STATE OF NEW MEXICO
COUNTY OF RIO ARRIBA
FIRST JUDICIAL DISTRICT

THE ESTATE OF JOSEPH A. SOMMER, Deceased, THE JOSEPH A. SOMMER REVOCABLE TRUST, and JAS OIL & GAS CO., LLC a New Mexico limited liability company,

Plaintiffs,

v.

ENERGEN RESOURCES CORPORATION, an Alabama corporation,

Defendant.

Case No. D-117-CV-2007-00128

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THESE PROCEEDINGS DUE TO THE PRIMARY JURISDICTION OF AN ADMINISTRATIVE AGENCY

Plaintiffs, the Estate of Joseph A. Sommer, deceased, the Joseph A. Sommer Revocable Trust, and JAS Oil and Gas Co., LLC ("Plaintiffs"), respond to the Motion to Dismiss, or in the Alternative, to Stay These Proceedings due to the Primary Jurisdiction of an Administrative Agency, submitted by Defendant Energen Resources Corporation ("Energen").

Introduction

As explained more fully below, Energen's Motion, while certainly lengthy, does not set forth any facts or legal theories supporting its position, but instead incorrectly characterizes Plaintiffs' Complaint as implicating the "statutory authority and regulations of the Oil Conservation Division under the New Mexico Oil and Gas Act...and the prior order of the Commission." (*See*, Memorandum in Support of Motion, p. 2). In fact, Plaintiffs' Complaint, and request for relief of

damages, sounds clearly in common law legal principles, and therefore, the Motion to Dismiss should be denied. Further, Energen has offered no reasons why these proceedings should be stayed pending action before an administrative agency to modify the 1961 Order.

Background

Plaintiffs own, or have owned, an undivided mineral interest in the SW 1/4 of Section 2, Township 25 North, Range 3 West, N.M.P.M., in Rio Arriba County, New Mexico (the "Interest"). By Order No. R-1960, dated May 5, 1961 (the "1961 Order"), the Interest was force pooled by the New Mexico Oil Conservation Commission (the "Commission") for the development of Martinez Well # No.1 for production of hydrocarbons from the Pictured Cliffs formation (the "Well"). Energen has operated the Well since 1997.

The 1961 Order is the only operative document setting forth the relationship between the parties. Plaintiffs and Energen have no operating agreement between them specifying the management of the Well, or the manner in which the production from the Well would be marketed and sold. Notwithstanding the foregoing, Energen has continuously and wrongfully sold all the production from the Well, and it has been charging Plaintiffs for (i) "joint interest billings" for monthly Well operating costs; and (ii) "management fees" in the amount of $73.00 per month. The Well has been producing since the time when Energen took over Well operations. However, Energen has not paid Plantiffs any royalties, as required by the 1961 Order and the New Mexico Oil and Gas Act (the "Act"). Energen has been marketing and selling 100% of the Well's production and retaining the full amount of the proceeds to the detriment of Plaintiffs and other similarly situated. As alleged in the Complaint, Energen's actions are in violation of numerous New Mexico statutes and the specific terms of the 1961 Order. The statutes which Energen continuously violates

are not under the jurisdiction of the Commission or of the Oil Conservation Division (the "Division"). The continuous acts of Energen have caused damages to Plaintiffs and neither the Commission nor the Division is able to award damages to Plaintiffs, thus negating the imposition of the doctrine of primary jurisdiction. Finally, Energen cites Rule 414, NMAC 19.15.414, Gas Sales by Less Than One Hundred Percent of the Owners in a Well stating that this provision provides further authority for its Motion, when in fact the rule provides that owners, such as Plaintiffs, ***may petition the Division for a hearing seeking appropriate relief.*** This provision does not require that Plaintiffs' sole remedy and recourse is to the Division. Furthermore, the Division has now declined to hear Energen's Amended Application pending resolution of this case by this Court. All the relief for Energen's past acts and malfeasance against the Plaintiffs and other similarly situated cannot be addressed by the Commission or the Division, for both lack the authority and the jurisdiction to determine ownership of the gas, and to award damages against Energen in favor of Plaintiffs and others similarly situated.

Argument

Energen's brief spends an inordinate amount of space addressing the doctrine of "primary jurisdiction" in arguing that this court should defer to the jurisdiction of the Commission to resolve the dispute between the parties. (*See*, Memorandum in Support of Motion, pp. 6 - 11). Plaintiffs do not dispute Energen's description of the primary jurisdiction doctrine, nor the ruling in the numerous cases cited Energen. Plaintiffs, do, however, assert that Energen's reliance on the doctrine of "primary jurisdiction" is wholly misplaced and inapposite in this situation. The Complaint does not request interpretation of the plain language of the 1961 Order, or of the Act, as Energen would have this court believe. The Complaint seeks monetary damages for Energen's failure to make royalty

payments on the Interest, for unapproved billing of overhead costs, for conversion of 100% of the proceeds of the Well's production, and for misrepresentation of the ownership of the minerals being sold. Energen's assertion regarding the Commission's specialized knowledge respecting this case is simply incorrect. The Commission is not in a position to determine Plaintiffs' damages, as opposed to the Court and the Commission lacks the authority and jurisdiction necessary to resolve the claims in this dispute.

The doctrine of primary jurisdiction seeks to promote the proper relationships between courts and administrative agencies charged with particular regulatory duties. The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and then comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory claim scheme, have been placed within the special competence of an administrative body. In those limited circumstances, judicial process is suspended. See generally Mountain States Natural Gas Corporation v. Petroleum Corporation of Texas, 693 F.2d 1015 (10th Cir. 1982). The Commission lacks the legal capacity to deal with the issues in this lawsuit. In the Mountain States case like this lawsuit, the plaintiff sought an accounting and damages for conversion. The defendant argued that the Commission should have primary jurisdiction over this matter and the court flatly disagreed, as should this court with respect to Energen's Motion.

Energen relies heavily on the case of Schwartzman Inc. v. Atchison, Topeka & Santa Fe Railway Co., 857 F. Supp. 838 (D.N.M. 1994) for its argument that the Commission should have primary jurisdiction over this dispute. The Schwartzman court discussed five factors on which a court should rely in determining whether a court or an agency should retain primary jurisdiction over a matter. Energen mischaracterizes each of them. First, the Schwartzman court stated that it should

consider whether it is "being called upon to decide factual issues which are not within the conventional experience of judges, or are instead the issues of the sort that an [agency] [sic] routinely considers." Schwartzman at 842. Here, Plaintiffs are seeking damages for breach of the 1961 Order and certain statutes. Surely, an award of damages is within the "conventional experience of judges". Although Energen argues that the Commission is better suited to hear this matter because of the Commission's role in protecting the correlative rights, preventing waste and inefficiency, and determining drilling and development costs[1], none of these topics are at issue in this case. While the 1961 Order does allow Energen to recover supervision charges, those can be determined by the Court. The 1961 Order does not grant Energen the right to bill for unspecified "management fees." Neither the 1961 Order, nor the Act, permit Energen to unilaterally charge Plaintiffs for such expenses. Moreover, the cases Energen cites in support of its argument under the first factor are simply not applicable. All of the cases address either a review of a Commission Order, the role of the Commission as set forth above, the formula for allocating production, or contain fact patterns not on point.[2] Interestingly, Energen cites McDowell v. Napolitano, 119 N.M. 696 (1995) in arguing that an agency "is in a better position to fully develop the grievance." (*See*, Memorandum in Support of Motion, p. 7). However, McDowell also stands for the proposition that the court will retain jurisdiction where "there is an applicable common-law or legal remedy." McDowell at 700. In this

---

[1] Energen references the following sections of the Act: §§ 70-2-6(A), 70-2-22, 70-2-33H, 70-2-11A.

[2] *See*, Grace v. Oil Conservation Commission, 87 N.M. 203 (1975) (requesting review of a Commission order); *see*, Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310 (1962) (reviewing the sufficiency of the Commission's order); *see*, El Paso Natural Gas Co. v. Oil Conservation Commission, 76 N.M. 310 (1966) (challenging the formula for allocating production); *see*, McDowell v. Napolitano, 119 N.M. 696 (1995) (wrongful termination).

lawsuit, as repeatedly alleged, Plaintiffs' claim is for damages, which is certainly both a common law and a legal remedy.

The second factor considered under Schwartzman, is "whether defendant could be subjected to conflicting orders of both the court and the administrative agency." Schwartzman at 842. Energen has made no showing that it would be subject to conflicting orders. The third factor is described as "whether the relevant agency proceedings have actually been initiated." Id. Fourth, courts will consider "whether the agency has demonstrated diligence in resolving the issue or has instead allowed the issue to languish." Id. Energen applied for an administrative hearing before the Commission, to amend the 1961 Order, on April 30, 2007. Plaintiffs' Complaint was filed on March 26, 2007, and Energen answered on April 26, 2007. Legal proceedings were well under way before Energen applied for a hearing, yet Energen claims that its "administrative application to the [Commission] pre-dates the filing of Plaintiffs' Complaint". (*See*, Memorandum in Support of Motion, p. 10). This assertion is patently false, and the Motion is simply another one of Energen's delay tactics to avoid accounting to Plaintiffs, and others similarly situated, for Energen's wrongdoing. Further, the Commission denied Energen's application, pending the outcome of this litigation. Even the Commission deferred jurisdiction to the courts to resolve the matters at issue. Energen's reliance on the Commission's hoped-for actions is nothing short of petty game-playing in an attempt to thwart the rights of Plaintiffs and others similarly situated.

The final factor set forth by Schwartzman is "the type of relief requested by Plaintiff...[C]ourts refuse to defer jurisdiction if the plaintiff is seeking damages for injury to property or person, as this is the type of relief courts routinely consider; however, if injunctive relief is called for, requiring scientific or technical expertise, the doctrine is more readily applicable." Id.

at 843. Plaintiffs are not requesting injunctive relief requiring scientific or technical expertise. Plaintiffs seek damages under theories and statutes not under the jurisdiction of the Commission. Energen disingenuously attempts to skirt this important factor by insultingly asserting that Plaintiffs' "limited understanding of the oil and gas industry" is the reason for Plaintiffs' damage claim, implying that Plaintiffs have incorrectly pled their request for relief. (*See*, Memorandum in Support of Motion, p. 11). By this reasoning, it seems Energen would have Plaintiffs add a count in the Complaint for injunctive relief!

When the Plaintiffs requested delivery of the gas Energen shows as a balance due to Plaintiffs, Energen refused to deliver the gas or to pay for the gas sold. Contrary to the assertion in the Energen's memorandum, the Plaintiffs have not refused to permit Energen to market the gas production. To rectify this situation, Plaintiffs have filed this lawsuit, and the ability to order the payment for past sales does not lie within the jurisdiction of the Commission, rather it rests in this Court. The Commission will not be in a better position or hold specialized knowledge with respect to determining the amount due to Plaintiffs and other similarly situated for defendant Energen's egregious conduct. Determining damages are the particular purview of courts. This Court is no exception, and it should retain jurisdiction even if the Commission rules on Energen's request to modify the 1961 Order. The Commission's decisions further will be prospective and not retrospective, and hence, this Court is in the best position to determine how much Energen owes Plaintiffs and other similarly situated. Energen fails to show that specialized scientific or technical knowledge is required to determine the damages due to Plaintiffs and other similarly situated.

One of the fundamental issues in this lawsuit is who owns the gas that is being sold by Energen. The Commission is not empowered or authorized to determine the amount of gas owed

to Plaintiffs, nor is it authorized under the statutes to determine ownership of the gas produced. Simply stated, Energen's Motion attempts to delay this case, and it attempts to further harm the Plaintiffs by selling gas with impunity. Energen has failed to show that even the basic requirements of the doctrine of primary jurisdiction apply to this lawsuit. By the clear language of the Act, the Commission and the Division only have authority and jurisdiction if the matter relates to the conservation of oil or gas, or the prevention of waste.[3] Both the Commission and the Division lack the authority to resolve the matters at issue in this case.

Finally, Energen argues that the Commission is "empowered to amend the cost recovery provisions of the [Order] to reflect the current custom and practice." Plaintiffs have not sought to have the Order amended. Energen's proposition is a nothing more than a veiled attempt to dismiss Plaintiffs' claims under false pretext, as it has been attempting to do for the last ten years. This court should not stand for such injustice and should deny Energen's Motion.

Conclusion

Energen's Motion to Dismiss is unfounded and distorts both the factual record and the legal principles at issues in this case. Energen has unsuccessfully attempted to complicate the otherwise simple issues, namely: (i) Energen has failed to make the required royalty and other payments to Plaintiffs as required by the Act and the 1961 Order; (ii) Energen has unlawfully charged Plaintiffs for costs to which Plaintiffs never consented; (iii) Energen has charged Plaintiffs improper costs; and

---

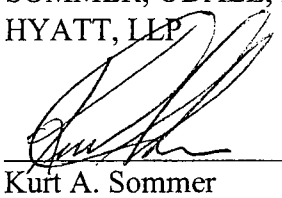
[3] See, NMSA 70-2-6A (1965) which states: "The division shall have, and is hereby given, **jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste** of potash as a result of oil or gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations." (Emphasis added).

(iv) Energen has converted Plaintiffs' Interest and failed to pay for the Interest sold. The primary remedy requested is damages for Energen's actions. The only proper forum to determine the amount of damages is this Court. Energen's Motion to Dismiss should be denied.

WHEREFORE, Plaintiffs request this court deny the Motion to Dismiss, or in the Alternative, to Stay These Proceedings Due to the Primary Jurisdiction of an Administrative Agency.

Respectfully submitted,

SOMMER, UDALL, HARDWICK, AHERN & HYATT, LLP

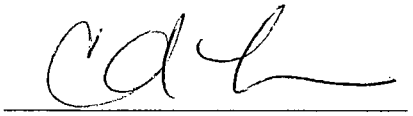


Kurt A. Sommer
Candice Lee
P.O. Box 1984
Santa Fe, New Mexico 87504
505-982-4676

Approved via electronic mail 8/13/07
James Bruce
Attorney at Law
P.O. Box 1056
Santa Fe, New Mexico 87504
(505) 982-2043

Certificate of Service

I certify that a copy of the foregoing was sent via first class mail to J. Scott Hall, Esq., at Miller Stravert, P.A., P.O. Box 1986, Santa Fe, New Mexico 87504-1986, attorneys for Defendant, on this 13th day of August, 2007.



Candice Lee