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JASON KELLAHIN (RETIRED 1991)

October 20, 1997

**HAND DELIVERED**

Mr. William J. LeMay, Chairman  
Oil Conservation Commission  
2040 South Pacheco  
Santa Fe, New Mexico 87502

Re: **FASKEN'S MOTION IN LIMINE**

*NMOCD Case No. 11755*

*Application of Fasken for unorthodox gas well  
locations, Eddy County, New Mexico*

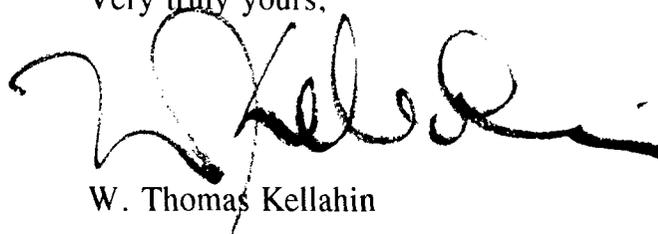
*NMOCD Case 11723*

*Application of Mewbourne for unorthodox gas well  
location, Eddy County, New Mexico*

Dear Mr. LeMay:

On behalf of Fasken, please find enclosed our motion requesting that the Commission enter an order in limine in this matter which is set for a Commission hearing on October 30, 1997.

Very truly yours,



W. Thomas Kellahin

cc: *Lyn Hebert, Esq.*  
*Attorney for the Commission*  
*Rand Carroll, Esq.*  
*Attorney for the Division*  
*William F. Carr, Esq.*  
*Attorney for Texaco*  
*James Bruce, Esq.*  
*Attorney for Mewbourne*

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

**APPLICATION OF FASKEN OIL AND RANCH, LTD.                   CASE NO. 11755  
FOR TWO ALTERNATIVE UNORTHODOX WELL  
LOCATIONS AND A NON-STANDARD PRORATION UNIT,  
EDDY COUNTY, NEW MEXICO.**

**APPLICATION OF MEWBOURNE OIL COMPANY                   CASE NO. 11723  
CORPORATION FOR AN UNORTHODOX WELL LOCATION  
AND A NON-STANDARD PRORATION UNIT  
EDDY COUNTY, NEW MEXICO.**

**FASKEN LAND AND MINERALS, LTD.  
AND  
FASKEN OIL AND RANCH, LTD.  
MOTION IN LIMINE  
TO EXCLUDE  
ARGUMENT AND EVIDENCE  
CONCERNING  
THE FASKEN-MEWBOURNE CONTRACTUAL DISPUTE**

Comes now Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd, (collectively "Fasken") by and through its attorneys, Kellahin & Kellahin, and moves the Commission for an order in **limine** limiting evidence and argument to the geologic and engineering issues and excluding from the DeNovo hearing any evidence or argument concerning the "Fasken-Mewbourne contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas,

and in support states:

## RELEVANT FACTS

1. Irregular Section 1 consists of 853.62 acres is divided into thirds with the central portion of this section being "unleased" federal oil and gas minerals the surface of which is subject to a federal environmental study. As a result, both Fasken and Mewbourne requested approval of a non-standard 297.88 acre unit ("NSP") comprising the southern portion of Irregular Section 1, T21S, R25E, Eddy County, N.M. and described as Lots 29, 30, 31, 32 and the SW/4 (S/2 equivalent).

2. Fasken is the operator of the S/2 equivalent of Irregular Section 1 as a result of a Joint Operating Agreement, AAPL-1956 Model Form, dated April 1, 1970 which includes Mewbourne Oil Company ("Mewbourne") Matador Petroleum Corporation, Devon Energy Corporation, and others, as non-operators.

3. South of Section 1 is Section 12 which Texaco Exploration and Production Inc. ("Texaco") operates as a 632.36 acre gas spacing and proration unit within the Catclaw Draw-Morrow Gas Pool which is currently dedicated to the:

(a) E. J. Levers Federal "NCT-1" Well No. 1 (the Levers Well No 1 located 660 feet from the South line and 1980 feet from the West line of Section 12; and

(a) E. J. Levers Federal "NCT-1" Well No. 2 (the Levers Well No 1 located 2448 feet from the North line and 1980 feet from the West line of Section 12

4. Both well locations are within the current boundary of the Catclaw Draw-Morrow Gas Pool which is subject to the Division's Special Rules and Regulations (Order R-4157-D) which include:

"Rule: 2...shall be located no closer than 1650 feet to the outer boundary of the section nor closer than 330 feet to any governmental quarter-quarter section line."

"Rule 5: A standard gas proration unit...shall be 640-acres."

5. While the Catclaw Draw-Morrow Gas Pool is still officially "prorated", prorationing has been suspended and the wells in the pool are allowed to produce at capacity.

6. On January 28, 1997 and without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the S/2 of Irregular Section 1, Mewbourne filed with the Division an application for approval of an unorthodox gas well location 660 feet from the south line and 2310 feet from the East line of said Section 1. This is NMOCD Case 11723 and is referred to as the "Mewbourne location" which encroaches upon Texaco who appeared at the April 3, 1997 examiner's hearing in opposition to Mewbourne's location.

7. Mewbourne contends its location is necessary in order to compete with Texaco's Levers Well No. 2 which is producing gas from the Morrow formation.

8. Fasken analysis indicates that Mewbourne's location is on the downthrown side of a fault and is fault separated from Texaco's Levers Well No. 2 and would not be able to compete for Morrow gas now being produced by Texaco in that wellbore. Therefore, Fasken proposed to Mewbourne and the other owners in the S/2 of Irregular Section 1 that Morrow gas well be drilled at a location 750 feet from the West line and 2080 feet from the South line of Section 1. This is NMOCD Case 11755 and is referred to as the "Fasken location" which does not encroach upon Texaco. Fasken's proposed location will also test a Cisco structure which the parties do not believe exists at the Mewbourne location.

9. Texaco appeared at the Division hearing in opposition to the Mewbourne location and proposed an 81.4% production penalty.

10. Texaco acknowledged that it could not complain about the Fasken location because Fasken's location was more than 1650 feet away from Texaco's unit boundary event despite its belief that only the Fasken location would drain the reservoir from which the Texaco well is producing.

11. The Fasken location is standard as to Texaco's Section 12 but is unorthodox as to Section 2 which is operated by Penwell Energy Inc. who waived any objection to Fasken's location.

12. On April 3 and 4, 1997, the Division held an evidentiary hearing before Examiner Stogner at which Fasken, Mewbourne and Texaco each presented geological evidence in an effort to support their respective positions.

13. On September 12, 1997, the Division entered Order R-10872 approving the Fasken location and denying the Mewbourne location.

14. Although Fasken has a legitimate business disagreement with Mewbourne with respect to the optimum well location, on April 30, 1997, Mewbourne filed litigation in a District Court in Midland Texas contending that Fasken, among other things, owed Mewbourne a fiduciary duty and that Fasken had breached the Joint Operating Agreement by proposing an alternative location for approval by the Division. These contractual issues are still in litigation.

15. At the Examiner hearing, Mewbourne attempted to introduce testimony and evidence concerning this contractual dispute and asked the Division Examiner to adjudicate certain issues related to those contractual matters.

16. At the hearing held on April 3 and 4, 1997, for the first time, Mewbourne Oil Company raised a question about the standing of Fasken Oil and Ranch, Ltd. to be an applicant in Case 11755. In order that there be no question about the real party applicant in interest, Fasken Land and Minerals, Ltd. requested that it be added as a co-applicant in Case 11755. That procedural pleading issue was resolved by the Division when it granted over Mewbourne's objection, Fasken's application to have both Fasken Land and Fasken Oil interplead as parties.

17. In its motion for a stay of the Division order, Mewbourne continues to complain to the Division concerning its contractual dispute with Fasken. Among other things, Mewbourne complains that by awarding operations to Fasken the Division has ignored the Operating Agreement.

# I ARGUMENT

In an effort to overcome the fact that the Division approved the Fasken location and denied the Mewbourne location, Mewbourne may ask this Commission to interpret or construe contracts or render decisions concerning:<sup>1</sup>

(a) what type of activities constitutes "actually commence work on the proposed operations" pursuant to Article 12 of the joint operating agreement. **See Examiner Transcript p. 27.**

(b) interpretations and constructions of the "consent/non-consent" election pursuant to Article 12 of the Joint Operating Agreement-1956 AAPL form. **See Examiner Transcript p. 26.**

(c) interpretations and constructions of any limitations or prohibitions for multiple well proposals under Article 12 of the Joint Operating Agreement-1956 AAPL form. **See Examiner Transcript p. 26.**

(d) that only Fasken Land and Minerals, Ltd. and not Fasken Oil and Ranch, Ltd. can exercise the rights and obligations of Fasken under the Joint Operating Agreement. **See Examiner Transcript p. 22-23.**

(e) the priority of multiple well proposals made pursuant to the Joint Operating Agreement. **See Examiner Transcript p. 11, 26-27.**

(f) the standing or lack of standing of Mewbourne Oil Company, Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd. to appear before the Commission. **See Examiner Transcript p. 18.**

Mewbourne and Fasken are already litigating these contract issues and other issues in a Texas State District Court in Midland County, Texas.

All these contractually related issues and associated legal opinions are irrelevant and inadmissible on any of the issues properly before the Commission concerning approval of well locations which may adversely affect correlative rights.

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<sup>1</sup> All of these issues were raised at the Examiner hearing held on April 3, 1997 by Mewbourne over the objection of Fasken.

The New Mexico state courts have repeatedly recognized that the Commission is the administrative agency with the "experience, technical expertise and specialized knowledge" to deal with geologic and engineering data also as to prevent waste of a valuable resources and protect the correlative rights of all participants. **Viking Petroleum v. Oil Conservation Comm**, 100 N.M. 451, 672 P.2d 280, 282 (1983), **Rutter & Wilbanks Corporation v. Oil Conservation Commission**, 87 N.M. 286, 532 P.2d 582 (1975); **Grace v. Oil Conservation Commission**, 87 N.M. 205, 531 P.2d 939 (1975).

However, a conservation commission cannot under the guise of meeting its statutory mandate to prevent waste and protect correlative rights, **cannot** act as an adjudicator of contractual controversies. **See REO Industries v. Natural Gas Pipeline Co.** 932 F.2d 447 (5th Cir. 1991).<sup>2</sup> Mewbourne is already litigating these issues in a district court in Texas. The appropriate forum and remedies for resolving those contractual disputes exist but resides with the court. **See REO Industries, supra**. By the same token, that district court has no business adjudicating those correlative right issues raised in these well location requests which must be resolved by the Commission. Mewbourne wants it both ways--it will want the Commission to adjudicate the dispute between Fasken and Mewbourne over various items in this operating agreement, including who can operate and when and how wells can be proposed. What Mewbourne wants the Commission to decide is that only Mewbourne has the legal right under the operating agreement to propose a well.

Correctly, the Division has refused to adjudicate these issues because the Division does not have jurisdiction to decide contractual disputes. Notably absence from the enumeration of its powers, is the power to interpret contracts and operating agreements and to require specific enforcement of those contract or, in the alternative, to award money damages for any breach of those agreements. **Section 70-2-12.B NMSA 1979.**

Regardless of those litigation issues, the Division has and must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872 by disregarding all these contractual issues and declaring that both Fasken and Mewbourne have the right to develop the

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<sup>2</sup> Case deals with the doctrine of primary jurisdiction and the Texas Railroad Commission's jurisdiction, holding among other things, that the Commission could not decide contract interpretation and damages issues.

Morrow formations in this spacing unit **See Finding (14) of Order R-10872.** It did so in Order R-10872 by focusing on the geologic evidence and concluding that approval of the Fasken location and denial of the Mewbourne location was necessary "...in order to assure the adequate protection of correlative rights, the prevention of waste and in order to prevent the economic loss caused by the drilling of unnecessary wells..."

**CONCLUSION**

Wherefore, Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd, request that the Commission enter an order **in limine** limiting evidence and argument to the geologic and engineering issues and excluding from the DeNovo hearing any evidence or argument concerning the "Fasken-Mewbourne contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas.

Respectfully submitted,

KELLAHIN AND KELLAHIN

By:   
W. Thomas Kellahin

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this motion was mailed to all counsel of record this 20th day of October, 1997.

  
W. Thomas Kellahin