

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

**CASE 12622
(De Novo)**

**APPLICATION OF NEARBURG EXPLORATION COMPANY, LLC
FOR TWO ALTERNATIVE UNORTHODOX WELL
LOCATIONS AND A NON-STANDARD PRORATION UNIT,
LEA COUNTY, NEW MEXICO.**

FILED
SEP 29 PM 3:15
CLERK OF DISTRICT COURT
LEA COUNTY, NEW MEXICO

**CASE 12908-A
(Severed and Reopened)**

**APPLICATION OF THE OIL CONSERVATION DIVISION
FOR AN ORDER CREATING, CONTRACTING CERTAIN
POOLS IN LEA COUNTY
LEA COUNTY, NEW MEXICO.**

**REDROCK OPERATING LTD., CC.'S
MOTION IN LIMINE
TO LIMIT
ARGUMENT AND EVIDENCE
TO
CERTAIN ISSUES**

Comes now Redrock Operating Ltd, Co. ("Redrock") by and through its attorneys, Kellahin & Kellahin, and moves the Commission for an order **in limine** limiting evidence and argument to the geologic, engineering issues including the permitting issues for Nearburg's its Grama Ridge "34" State Well No. 1 and its failure to dedicate the well to a standard 320-acres spacing unit consisting of the E/2 of Section 34, and Nearburg's admission that Redrock has a 5% ORR in that unit based upon its 10% ORR in the S/2 of Section 34 thereby **excluding** from the De Novo hearing any evidence or argument concerning any other issue including settlement, discovery, contracts, title, or the "Redrock Overriding Royalty" which is beyond the jurisdiction of the Commission, and in support states:

RELEVANT FACTS

(1) Nearburg has admitted that Redrock has a 10% ORR in the S/2 of Section 34 and that issue is not in dispute. **See Examiner Transcript page 25**

(2) There are three (3) critical issues in these cases:

(a) How did Nearburg get itself in this mess and what if anything should the Commission do;

(b) the Pool boundary:

- (i) to protect the Gas Storage Unit; and
- (ii) separate it from the Morrow production to the East.

(c) The proper 320-acre gas proration and spacing unit for the Nearburg Grama Ridge 34 Well No. 1 in the NE/4 of Section 34:

- (i) should it be only 160-acres consisting of the NE/4 of Section 34;
- (ii) or should it be the standard 320-acre spacing unit consisting of the E/2 of Section 34.

(3) Certain of Nearburg's proposed Exhibits, including parts of its Chronology, are replete with extraneous materials beyond the jurisdiction of the Commission raising matters outside the scope of the above issues.

I

ARGUMENT

In an effort to overcome the fact that the Division **denied** Nearburg's request for two 160-acre non-standard proration and spacing unit, and unless stopped, Nearburg may attempt any of the following;

(a) to unduly influence the Commission;

(b) attempt to prejudice the Commission against Redrock; Rule 403 NEW MEXICO RULES OF EVIDENCE

(c) misdirect the Commission's attention away from Nearburg's failure to abide by the Division's rules for the permitting of its well;

(d) ask this Commission to interpret or construe contracts and determine title; or

(e) render decisions concerning matters beyond the jurisdiction of the Commission.

All of these issues and associated legal opinions are irrelevant and inadmissible on any of the issues properly before the Commission concerning approval of 2 non-standard spacing units and a change in pool boundaries which may adversely affect correlative rights.

Commission's Jurisdiction:

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).

Contract and title relevancy:

Rule 401 and Rule 402 of the New Mexico Rules of Evidence addresses relevancy. Nearburg intends to rely upon irrelevant evidence.

However, a conservation commission cannot under the guise of meeting its statutory mandate to prevent waste and protect correlative rights, act as an adjudicator of contractual controversies. **See REO Industries v. Natural Gas Pipeline Co. 932 F.2d 447 (5th Cir. 1991).**¹ Redrock is prepared to litigate the fact that Nearburg has violated its fiduciary duties to Redrock and is positioning itself to wrongfully deny Redrock its overriding royalty. The appropriate forum and remedies for resolving those contractual disputes exist but reside with the courts. **See REO Industries, supra**. By the same token, that district court has no business adjudicating those correlative right issues raised in Nearburg's requests which must be resolved by the Commission. Nearburg wants it both

¹ This 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.

ways--it will want the Commission to adjudicate the breach of fiduciary obligation dispute between Redrock and Nearburg. What Nearburg wants the Commission to decide is that Nearburg has the legal right to damage Redrock interest. **See Cook v. El Paso Natural Gas Co. 560 F.2d 978 (10th Cir. 1977)**, where the ORR owner was entitled to damages from the operator who operated both the spacing unit with the draining well and the offset spacing unit containing Cook's ORR. The operator, as the common operator, was still liable to the ORR owner even though the New Mexico Commission had precluded a well on the ORR tract because it was in the Oil-Potash area.

Correctly, the Commission should refuse to adjudicate these issues because the Commission does not have jurisdiction to decide contractual disputes. Notably absent from the enumeration of its powers, is the power to interpret contracts and operating agreements and to require specific enforcement of those contracts 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 Commission 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 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..."

Settlement Privileged:

Settlement is protected and can not be used by one party against another and is not relevant to the decision of the Commission on the merits. The Commission actively encourages settlement and the fact that Redrock and Nearburg each accuse the other of dealing in bad faith or causing delay is not relevant to the Commission. All Nearburg is doing is attempting to cloud the fact it wants the Commission to allow Nearburg to coverup its mistakes. **SEE Rule 408 New Mexico Rules of Evidence**

Discovery Relevancy

Matter's involving discovery are always not matters which should be used to try and influence or distract the Commission from the technical issues in these cases. **See Rules 403 New Mexico Rules of Evidence**

Hearsay:

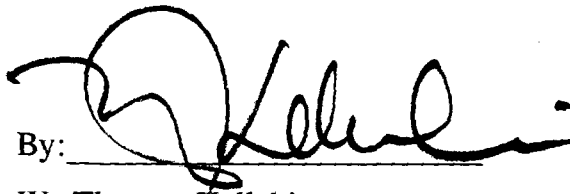
Rule 801 New Mexico Rules of Evidence precludes "hearsay" evidence. Nearburg proposes to rely upon hearsay for which there is no exception.

CONCLUSION

Wherefore, Redrock request that the Commission enter an order **in limine** limiting evidence and argument to the geologic and engineering issues and excluding from the De Novo hearing any evidence or argument concerning any other issue than Nearburg's admission that Redrock has a 5% ORR in the production for the date of first from the Nearburg's well is dedicated to a standard 320-acre spacing unit consisting of the E/2 of Section 34.


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
23th day of September, 2002.


W. Thomas Kellahin