

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

**IN THE MATTER OF THE APPLICATION OF
McELVAIN OIL & GAS PROPERTIES, INC.
FOR COMPULSORY POOLING,
RIO ARRIBA COUNTY, NEW MEXICO**

CASE NO. 12635, *de novo*

Consolidated with:

**IN THE MATTER OF THE APPLICATION OF
D.J. SIMMONS INC. FOR COMPULSORY POOLING,
RIO ARRIBA COUNTY, NEW MEXICO**

CASE NO. 12705

ORDER NO. R-11663-B

**ORDER OF THE DIVISION
DENYING MOTION TO DISMISS**

BY THE DIVISION DIRECTOR:

THIS MATTER has come before the Division Director of the New Mexico Oil Conservation Division (hereinafter referred to as "the Director") on Motion to Dismiss filed herein by McElvain Oil & Gas Properties Inc. (hereinafter referred to as "McElvain"), opposed by D.J. Simmons Inc. (hereinafter referred to as "Simmons"), and the Director, being fully advised in the premises,

FINDS:

1. On March 13, 2001 McElvain filed an application for compulsory pooling of all interests from the base of the Pictured Cliffs formation to the base of the Mesaverde formation under the under S/2 of Section 25, Township 25 North, Range 3 West, NMPM, Rio Arriba County, New Mexico to form standard spacing and proration units for formations and/or pools spaced on 320 acres. The application was assigned case number 12635 by the Oil Conservation Division (hereinafter referred to as "the Division").

2. On July 12, 2001, Simmons filed an application for compulsory pooling all interests from the surface to the base of the Mesaverde formation under the E/2 of Section 25, to form standard spacing and proration units for formations and/or pools spaced on 320 acres. The application was assigned case number 12705 by the Division.

3. On September 24, 2001, the Division entered Order No. R-11663 in Case No. 12635 which, in pertinent part, ordered compulsory pooling of all uncommitted mineral interests from the base of the Pictured Cliffs formation to the base of the Mesaverde formation underlying the S/2 of Section 25, Township 25 North, Range 3 West, NMPM, Rio Arriba County, New Mexico, to form a standard 320-acre spacing unit.

4. On October 3, 2001 Simmons filed an application to have Case No. 12635 heard *de novo* by the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), and on October 16, 2001, because the applications sought compulsory pooling in the same section, the Director issued an order consolidating Case No. 12635 with Case No. 12705.

5. Both matters are scheduled for hearing before the Oil Conservation Commission on November 6, 2001.

6. On October 1, 2001, before the cases were consolidated, McElvain filed a Motion to Dismiss the application of Simmons, now before the Director as a preliminary matter to be addressed before commencement of the hearing.

7. As grounds for its Motion, McElvain seems to argue that Simmons' failure to develop definitive plans to drill a well, to propose the drilling of a well to working interest owners, to file an Application to Drill with the Division, to file an application to pool or otherwise act with due diligence to drill a well, requires the application be dismissed.

8. Simmons filed a response opposing the motion. Simmons argued that McElvain's Motion fails to present proper grounds for dismissal and that McElvain's motion urges prejudgment of the outcome of the *de novo* hearing. Simmons characterizes McElvain's arguments as based on principles of "first-come, first-served" rather than on more appropriate factors.

9. The Motion to Dismiss of McElvain is not well taken and should not be granted.

10. As noted, the principal grounds cited for dismissal appear to be the delay of Simmons to develop plans to drill, the failure to propose the well to working interest owners, the failure to file an APD with the Division, the failure to file a pooling application, and the failure to proceed with due diligence to drill a well.

11. The Oil and Gas Act provides, in pertinent part, that the Division may pool interests in favor of an interest owner where "... such separate owner, or owners ... has the right to drill has drilled or proposes to drill a well ..." NMSA 1978, § 70-2-17(C) (Repl. 1995). Thus, the Division may pool in favor of an interest owner in two distinct circumstances: (a) where an owner who has the right to drill has already drilled a well; or (b) where an owner who has the right proposes to drill a well.

12. It seems to be undisputed that Simmons has the right to drill in Section 25. *See e.g.* McElvain Exhibits 2, 3 and Simmons Exhibits 1, 2, 5, 8, hearing of May 17, 2001 (Case No. 12,635). Certainly no party has to date raised this as an issue and it does not appear to be raised in the Motion and Response.

13. Although testimony from the examiner's hearing of May 17, 2001, cited by McElvain in support of the Motion, may establish that as of May 17, 2001 Simmons had no immediate plans to drill, had not filed an application to drill and had not proposed the drilling of a well, the application of Simmons in Case No. 12705 demonstrates that the situation may have changed and a well may now in fact be proposed by Simmons. As Simmons points out in the response to the motion, Simmons has apparently only recently acquired its property in Section 15 and it may be unreasonable to expect Simmons to have taken these steps during a brief period of ownership.

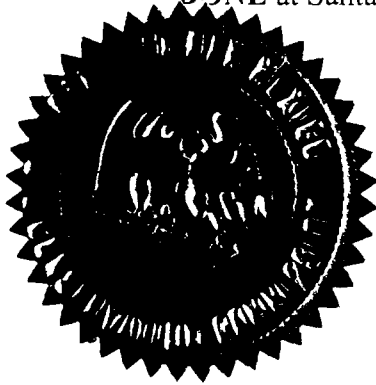
14. Thus, the issue of proposal of a well is, at the very least, a fact issue and inappropriate for summary disposition.

15. McElvain's apparent argument that its earlier application and the Division's pooling order establish McElvain's position as a matter of law is defective. By virtue of the timely *de novo* filing, the application in Case No. 12635 is before the Commission. Such an argument might have credence if an order were entered by the Division and the time to apply for *de novo* review had expired, making the order permanent. Moreover, a decision by the Division or the Commission on a pooling application must be governed by the factors set forth in the Oil and Gas Act, including the avoidance of the drilling of unnecessary wells, the protection of correlative rights and the prevention of waste. NMSA 1978, § 70-2-17(C). Normally, a pooling decision cannot be made strictly on the basis of which party filed the first application. Any suggestion by McElvain that the case be decided on this basis should be rejected.

16. As a result of the foregoing, the Motion to Dismiss of McElvain should be denied.

IT IS THEREFORE ORDERED that the Motion to Dismiss Case No. 12705 is denied.

DONE at Santa Fe, New Mexico, on the 2nd day of November 2001.



**STATE OF NEW MEXICO
OIL CONSERVATION DIVISION**

Lori Wrotenbery
LORI WROTENBERY
Director