

**FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY**

**FASKEN OIL AND RANCH, LTD. AND
FASKEN LAND AND MINERALS, LTD.,
Petitioners/Appellants**

vs.

No. CIV 98-54-JS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE, OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.,
Respondents/Appellees**

COUNTY, N.M.
FIFTH JUDICIAL DISTRICT
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ELEANOR JARNAGIN
DISTRICT COURT CLERK

COPY

**ORDER OF DISMISSAL
OF APPEAL**

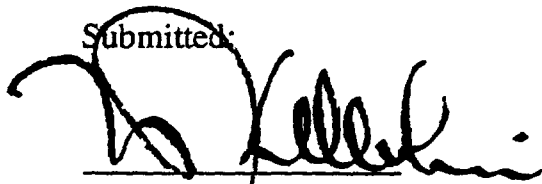
This matter having come before the Court upon the joint stipulation and motion for dismissal of appeal submitted by all parties involved in this matter and the Court being fully advised thereof;

IT IS THEREFORE ORDERED THAT motion for dismissal is hereby granted and this appeal is dismissed with prejudice.

s/JAMES L. SHULER

James L. Shuler
District Court Judge

Submitted:


W. Thomas Kellahin, Esq.
Attorney for Appellants

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

**FASKEN OIL AND RANCH, LTD. and
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Respondents/Appellees.

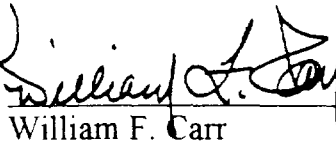
**MOTION TO EXCLUDE RESPONDENT/APPELLEE
TEXACO EXPLORATION AND PRODUCTION INC.
FROM FURTHER PROCEEDINGS IN THIS MATTER**

Respondent/Appellee Texaco Exploration and Production Inc. ("Texaco") requests the Court to enter an Order excusing Respondent from this appeal on the basis that Respondent has no interest in this appeal since all issues in which Respondent had an interest were resolved below and no issue affecting Respondent has been raised in this appeal.

Respectfully submitted,

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.

By:



William F. Carr
Post Office Box 2208
Santa Fe, NM 87504-2208
(505) 988-4421

Attorneys for Respondent/Appellee
Texaco Exploration and Production Inc.

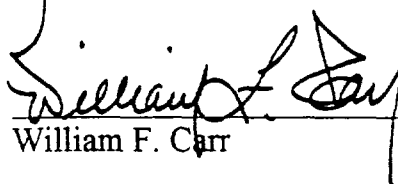
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to the following counsel of record at the following addresses on this 6th day of July, 1998:

W. Thomas Kellahin, Esq.
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Marilyn Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco Street
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Post Office Box 1056
Santa Fe, New Mexico 87504-1056


William F. Carr

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

vs.

No. CV 98-54-JS

**OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY, and
TEXACO EXPLORATION AND PRODUCTION INC.,**

Respondents/Appellees.

REQUEST FOR HEARING

1. Jury: _____ Non-Jury: X
2. Judge to whom assigned: Judge James L. Shuler
3. Disqualified Judge: None
4. Specific matter to be heard: Motion to Exclude Respondent/Appellee Texaco Exploration and Production Inc. from Further Proceedings in this Matter
5. Estimated time required: 10 minutes
6. Date Pre-Trial Order was filed or date of pre-trial conference: n/a
7. Hearings presently set: None

8. Names, addresses and telephone numbers of all counsel and pro se parties entitled to notice:

William F. Carr, Esq.
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Santa Fe, New Mexico 87504-2208

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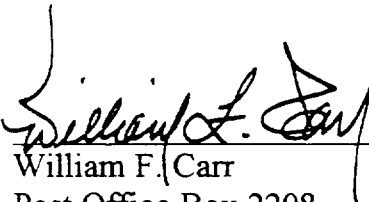
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Submitted by:

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.

By:



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Attorneys for Respondent/Appellee
Texaco Exploration and Production Inc.

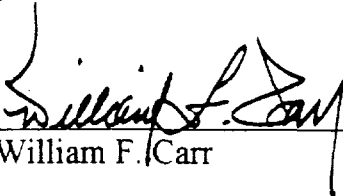
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Request for Hearing was mailed to the following counsel of record at the following addresses on this 6th day of July, 1998:

W. Thomas Kellahin, Esq.
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William F. Carr

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

vs.

No. CV 98-54-JS

**OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY. and
TEXACO EXPLORATION AND PRODUCTION INC.,**

Respondents/Appellees.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that this matter has been called for hearing before the
Court, for the time, place, date and purpose indicated:

DATE: _____

TIME: _____

PLACE: Fifth Judicial District Courthouse, 100 North Canal, Carlsbad, NM 88220

PURPOSE OF HEARING: Motion to Exclude Respondent/Appellee Texaco Exploration and
Production Inc. from Further Proceedings in this Matter

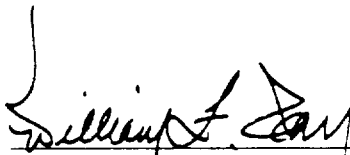
TIME ALLOCATED: 10 minutes

JUDGE ASSIGNED: Honorable James L. Shuler

Respectfully submitted,

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.

By:

A handwritten signature in black ink, appearing to read "William F. Carr", is written over a horizontal line.

William F. Carr
Post Office Box 2208
Santa Fe, NM 87504-2208
(505) 988-4421

Attorneys for Respondent/Appellee
Texaco Exploration and Production Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice was mailed to the following counsel of record at the following addresses on this ____ day of July, 1998:

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Secretary

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

vs.

No. CV 98-54-JS

**OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY, and
TEXACO EXPLORATION AND PRODUCTION INC.,**

Respondents/Appellees.

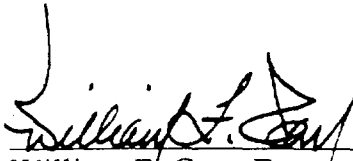
ORDER

Pursuant to Motion filed by Respondent/Appellee Texaco Exploration and Production,
Inc.,

IT IS HEREBY ORDERED that Respondent/Appellee Texaco Exploration and
Production, Inc. is hereby dismissed from this action without prejudice.

James L. Shuler
District Court Judge

Respectfully submitted.



William F. Carr, Esq.
Campbell, Carr, Berge & Sheridan, P.A.
Post Office Box 2208
Santa Fe, New Mexico 87504-2208

APPROVED AS TO FORM:

Telephonically approved 7/6/98

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Kellahin & Kellahin
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Post Office Box 1056
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**FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY**

EDDY COUNTY, N.M.
5TH JUDICIAL DISTRICT
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98 MAY -4 AM 10:15

ELEANOR J. MAGIN
DISTRICT COURT CLERK

**FASKEN OIL AND RANCH, LTD. AND
FASKEN LAND AND MINERALS, LTD.,
Plaintiff,**

vs

CV-98-54-JLS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO, ET AL,
Defendant.**

NOTICE OF HEARING

Type of Hearing: STATUS CONFERENCE

Starting At: 9:00 a.m.

Date: July 8, 1998

**TO: W. Thomas Kellahin, Esq.
P.O. Box 2265
Santa Fe, NM 87504**

**James Bruce Esq.
612 Old Santa Fe Trail
Santa Fe, NM 87501**

**William F. Carr, Esq.
510 Guadalupe
Santa Fe, NM 87501**

**Lyn Hebert, Esq.
2040 South Pacheco
Santa Fe, NM 87505**

You are hereby notified that the above matter is set for hearing before the Hon. James L. Shuler, Division V, at the Eddy County Courthouse, Carlsbad, NM, on the date and the time stated.

The District Court complies with the Americans with Disabilities Act. It is the Counsel's or a Pro Se Party's obligation to notify the Clerk of the Court at least five (5) days before any hearing of the anticipated attendance of a disabled person, so that appropriate accommodations can be made.

HON. JAMES L. SHULER

By:


DEPUTY CLERK

**FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.
Petitioners/Appellants,**

vs.

No. CIV 98-54-JS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.,
Respondents/Appellees**

**PETITIONERS-APPELLANTS'
BRIEF IN CHIEF**

**APPEAL FROM COMMISSION
TO THE FIFTH JUDICIAL DISTRICT
EDDY COUNTY
HONORABLE JAMES L. SHULER**

**W. THOMAS KELLAHIN
KELLAHIN & KELLAHIN
Post Office Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285**

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I.
SUMMARY OF PROCEEDINGS

Nature of the Case:

Pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA 1978, this case is before the Court on Appellants' Notice of Appeal and Petition for Review of Order R-10872-A entered in Case 11755 (DeNovo) on December 11, 1997 by the New Mexico Oil Conservation Commission ("Commission"). This appeal is limited to those issues raised by the Appellants in their "Application for Rehearing" filed with the Commission on December 31, 1997, which was denied by the Commission when it failed to act on said application within the prescribed ten (10) day period.

Parties:

Appellant Fasken Oil and Ranch, Ltd., a Texas limited partnership authorized to and doing business in the State of New Mexico, is the operator of Irregular Section 1, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico and proposes to drill the "Fasken well" to a location 750 feet from the West line and 2080 feet for the South line of said Irregular Section 1.

Appellant Fasken Land and Minerals, Ltd. is a Texas limited partnership who is the owner of leasehold interests in said Section 1.

Appellants were the applicants before the Commission in Case 11755 (DeNovo) which sought approval to drill the subject Fasken well at an unorthodox gas well location in Section 1 which was approved, but subjected to a requirement that a well location proposed by Mewbourne Oil Company ("Mewbourne") be drilled first as set forth in Commission Order R-10872-A. Appellants, therefore are parties of record in all of the proceedings before the Commission in this matter and are adversely affected by the Commission Order R-10872-A entered in Case No. 11755 (DeNovo).

Appellee Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

Appellee Mewbourne, a Texas corporation authorized to and doing business in the State of New Mexico, is a working interest owner in said Section 1 and is a party of record who opposed Fasken in all of the proceedings before the Commission in this matter and who was authorized by the Commission to drill its proposed well location first.

Appellee Texaco Exploration and Production, Inc. ("Texaco"), a party of record in all of the proceedings before the Commission in Cases No. 11755, 11723 and 11868 (DeNovo), is the operator (the "offsetting

operator") of gas wells in Section 12 which adjoins the southern boundary of Irregular Section 1. Texaco appeared in opposition to Mewbourne's requested gas well location.

Jurisdiction:

The Fifth Judicial District, Eddy County, New Mexico, has jurisdiction of this appeal pursuant to the provisions of Section 70-2-25.B 1978 because Commission Order R-10872-A applies to oil and gas interest in lands located within Eddy County, New Mexico.

The Commission held a public hearing in Cases 11755, 11723 and 11868 (DeNovo) on October 30, 1997 and apparently as of December 11, 1997 the Commission entered a single order (Order R-10872-A) deciding all three cases.

On December 31, 1997, Petitioners timely filed their Application for Rehearing with the Commission which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

Appellants have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25(B) NMSA 1978 and pursuant to Rule 1-074 NMRA 1997.

Relevant factual summary:

(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). (TR-p. 32-33)

(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. (TR-p. 34)

(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: (TR-p. 297)

(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) (TR-p. 298-299)

(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. (TR-p. 299)

(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) Fasken analysis, based upon geophysical testimony which has never been controverted by Mewbourne, 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. (TR-p. 241-261) 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. (TR-p.

) 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. (TR-p. 234)

(8) Texaco appeared at the Commission hearing in opposition to the Mewbourne location which would encroach upon the Texaco gas spacing unit and proposed an 81.4% production penalty. (TR-p. 314)

(9) 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. (TR-p.)

(10) 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. (TR-p. 36, Fasken's Motion in Limine)

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

(12) On October 30, 1997, the Commission held an evidentiary hearing at which Fasken, Mewbourne and Texaco each presented geological evidence in an effort to support their respective positions. (TR-p. 1-432)

(13) At the Commission hearing and over Fasken's objection, Mewbourne introduce testimony and evidence concerning this contractual dispute, the priority of well proposals and the division of interests and asked the Commission to take this evidence into consideration when it decided the well location cases. (TR-p. 35-39)

(14) On December 12, 1997, the Commission released Order R-10872-A which was dated December 11, 1997 but contained only the signatures of Commissioners LeMay and Bailey. By December 31, 1997, the Commission Order R-10872-A contained the signatures of all three Commissioners but still showed a date of December 11, 1997.

II.

ARGUMENTS AND AUTHORITIES

The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the law creating it. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights. (NMSA 1978, Section 70-2-11)

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. **Fasken v. Oil Conservation Commission**, 87 N.M. 292, 532 P.2d 588 (1975); **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). Likewise, in **Viking Petroleum Corporation v. Oil Conservation Commission**, 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in **Continental** and **Fasken**, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

Although a reviewing court generally may not substitute its judgment for that of the administrative decision maker, it may correct the decision maker's misapplication of law. **Wolfly v. Real Estate Commission**, 100 N.M. 187, 668 P.2d 303 (1981). Such is the case with the Commission's decision in Order R-10872-A.

**POINT I: THE COMMISSION EXCEEDED ITS
JURISDICTION BY DECIDING THE
PRIORITY OF MULTIPLE WELL
PROPOSALS**

Unless this order is amended, the Commission has now established a new precedent for deciding unorthodox well location cases. For the first time in the history of the agency, the Commission has applied its compulsory pooling criteria to an unorthodox location case and made its decision based upon facts which are irrelevant and inadmissible as to any of the issues properly before the Commission.

The Commission has jurisdiction to decide the priority in which competing well proposals will be drilled only within the context of compulsory pooling applications (Section 70-2-17.C). In a compulsory pooling case, the Commission often decides such matters based upon which party has the largest individual interest and which party proposed the well first. The Commission does so because under the explicit language of the pooling statute, the Commission should adjudicate such interests because there is no contract to guide the actions of the parties.

However, the Commission's decision in the subject cases has nothing to do with compulsory pooling. The subject cases are not analogous to the compulsory pooling situation because here there is a contract to guide the actions of the parties. The Commission approved the Fasken location and, subject to a production penalty also approved the Mewbourne location. At that point it should have simply stopped. Unfortunately, the Commission went beyond anything it was required to do by gratuitously deciding that Mewbourne's location should be drilled first. In doing so, the Commission impermissably interposed its opinion as to which location should be drilled first, a matter which is clearly beyond the jurisdiction of the Commission. While the Commission can limit the number of wells¹ to be drilled in a gas spacing unit, it was not its obligation or responsibility to dictate to the parties which of the two approved wells would be drilled first. There are no waste or correlative rights issues involved in a decision made by the Commission based upon a finding that Mewbourne location gets drilled first because "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1." What business is it of the Commission to decide which well gets drilled first? There is nothing that limits the Commission to approving only one well.

¹ Despite the Commission's inaccurate assertion to the contrary contained on page 2 of its Statement of Appellate Issues 2, Commission Orders R-4157 allows for multiple wells to be drilled in a gas spacing unit in this pool.

In fact the Commission's rules for this pool allows not less than two wells in a spacing unit. If the Commission mistakenly thought it must approve only one well, that still does not justify the Commission choosing which well gets drilled. The Commission fulfilled its statutory duties when it approved both wells and imposed a production penalty on the Mewbourne well location. It should have left it up to the parties and the Texas District Court to decide which of these wells should be drilled first.

Historically and until now, the Commission has decided unorthodox well locations based upon the geology and reservoir engineering to determine if that location adversely affected the correlative rights of the party being encroached upon. With this case, and in spite of Fasken's uncontroverted geophysical evidence, the Commission awards the drilling of the first well to Mewbourne who filed its application first without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the spacing unit. The Commission approved Mewbourne's location because Mewbourne had the largest single working interest (42.7%) despite the fact that Fasken and Matador with 48.2% of the working interest ownership wanted Fasken's well location drilled first. With this case, the Commission made its decision on ownership interests which has nothing to do with either waste or correlative rights. It advances no interest of the State of New Mexico to decide which location gets drilled first.

**POINT II: THE COMMISSION HAS ADJUDICATED
A CONTRACTUAL DISPUTE**

A conservation commission, 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).² Notably absent from the Commission's enumerated 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.**

This spacing unit is subject to a joint operating agreement and does not require the Commission to use its authority to pool those interests. The parties are involved in litigation commenced by Mewbourne in a Texas district court in which one of the issues is whether Fasken's or Mewbourne's well proposal gets drilled first. The appropriate forum for resolving those contractual disputes exists but resides with the court and not with the Oil Conservation Commission. 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

² 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.

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 wanted and what the Commission did was to decide that Mewbourne has the right to drill the first well. That portion of Order R-10872-A amounts to the Commission adjudicating a contract issue.

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 to prevent waste of 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). The Commission must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872-A by declaring that both Fasken and Mewbourne have the right to develop the Morrow formations in this spacing unit and approving both wells. **See Ordering Paragraph (1) of Order R-1087-A**. The only correlative rights which are impacted by the Commission order are those of Texaco, which opposed the Mewbourne location.

However, the Commission went further and by its actions, decided that Mewbourne gets to drill its location first. The Commission has exceeded its authority and preempted the adjudication of that issue before the court. The Commission was not asked to chose the "better" of two locations. But that is exactly what the Commission did and in doing so moved beyond its regulatory functions and dictated to the parties where they would locate their well which usurps the district court's exclusive jurisdiction over this contractual dispute.

**POINT III: THE COMMISSION'S DECISION IS
BASED UPON IRRELEVANT AND
INADMISSIBLE EVIDENCE**

Anticipating that Mewbourne would attempt to influence the Commission's decision by introducing inadmissible evidence at the Commission hearing, Fasken filed a Motion in Limine asking the Commission for an order to limit evidence and argument to the geologic and engineering issues. Specifically, Fasken sought to exclude from the DeNovo hearing any evidence or argument concerning the well proposals between Fasken and Mewbourne, what percentage of the interest owners supported either or both proposals, the respective ownership interests in the spacing unit and all other issues involved in the "Fasken-Mewbourne

contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas.

Included in Fasken's Motion in Limine was a request to exclude any consideration of the priority of multiple well proposals made which is one of the contractual issues being litigated.

The Commission took that motion under advisement but then, over the objection of Fasken, allowed Mewbourne's landman, Steve Cobb, to testify about the priority of well proposals and the percentage of interest for each of the working interest owners in that unit and the status of commitment to either well proposal. Thereafter, the Commission relied upon this very evidence in its ultimate decision to authorize Mewbourne to drill its well first.

The Commission admits it based its decision to allow Mewbourne's location to be drilled because Mewbourne is the largest single working interest owner in this spacing unit. How does that fact have any possible relevance to the Commission's obligation to prevent waste and protect correlative rights? Does the Commission interpret its statutory duty based upon which owner has the largest interest? Why did the Commission vote for Mewbourne who has 42.7% of the working interest but rejected Fasken/Matador's location when they held a total of 48.2% of the working interest? Why is not the Commission's decision arbitrary and capricious?

The Commission's admission and reliance upon inadmissible and irrelevant evidence introduced by Mewbourne over Fasken's objection amounts to an improper denial of the motion in limine, constitutes reversible error and requires that the Court to set aside this order.

III CONCLUSION

Appellants request that the Court review New Mexico Oil Conservation Commission Cases 11755, 11723 and 11868 (DeNovo) and Commission Order R-10868-A and enter its decision that:

- (1) Commission Order R-10868-A is unlawful, invalid and void;
- (2) Petitioner's property rights have been violated by the Commission exceeding its jurisdiction and authority; and
- (3) for such other and further relief as may be proper in the premises.

Respectfully submitted,



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PROOF OF SERVICE

Pursuant to Rule 1-074 NMRA 1997, I, W. Thomas Kellahin, hereby certify that on the 25th day of April, 1998, I mailed, by regular mail-postage prepaid, a copy of this Appellants' Brief in Chief to all of the counsel of record in these proceedings as follows:

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A handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', written over a horizontal line.

W. Thomas Kellahin

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

FIFTH JUDICIAL DISTRICT
EDDY COUNTY NM
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ELEONOR CARNAGIN
DISTRICT COURT CLERK

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

vs.

No. CV 98-54-JS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.**

Respondents/Appellees.

**APPELLEE OIL CONSERVATION COMMISSION'S
STATEMENT OF APPELLATE ISSUES**

COMES NOW THE NEW MEXICO OIL CONSERVATION COMMISSION
("COMMISSION") and responds to the Appellants Fasken Oil and Ranch, Ltd. And Fasken
Land and Minerals, Ltd. ("Fasken") Statement of Appellate Issues as follows:

I. Statement of the Issues

The Commission disputes Fasken's characterization of the issues.

Fasken's Point I: "The Commission exceeded its jurisdiction by deciding the priority of multiple

well proposals.” Fasken and Mewbourne Oil Co. (“Mewbourne”) both applied to the Commission for approval to drill wells at different locations in the same one-half section. In accord with the Commission’s spacing orders, only one well could be drilled in that one-half section. Consequently, the Commission had to choose the better location basing its decision on its duty to prevent waste and protect correlative rights. In its Order R-10872-B (“Order”) the Commission approved the Mewbourne location and denied the Fasken location. *See* Order pp 7 & 8. However, in the interest of administrative efficiency, the Commission’s Order does provide that in the event Mewbourne does not drill its well, Fasken is authorized to drill a well at its proposed location.

Fasken’s Point II: “The Commission has adjudicated a contractual dispute.” The Commission did no such thing. The Commission is authorized “...to set the spacing of wells[.]” *See* NMSA 1978, § 70-2-12B(10) (1978, as amended through 1996). The Order approved an unorthodox well location, a subject clearly within the Commission’s jurisdiction. Both Mewbourne and Fasken filed applications with the Commission for approval of different well locations. Only one well could be located in the one-half section. The Order clearly states that the Commission approved Mewbourne’s proposed well location and denied Fasken’s proposed location well. The Order made no determination as to whether either Mewbourne or Fasken had a contractual right to drill the well. The only reference in the Order to any contract is Finding 10 that is based on uncontroverted evidence that Mewbourne is the largest working interest owner in the one-half section as recited in a certain operating agreement.

Fasken’s Point III: “The Commission’s decision is based upon irrelevant and inadmissible evidence.” Finding 14 of the Order states:

The Mewbourne location has a higher probability of success in the Middle Morrow because of its close proximity to the Texaco Levers Well No. 2 and the north-south interpretation of the Middle Morrow Sand trend has a higher geologic probability than the alternative interpretations. Also, the proposed Fasken location has less of an opportunity to produce from the Middle Morrow than the proposed Mewbourne location and only a 10% chance of producing from Cisco formation.

This above finding is based on the geologic and engineering evidence presented by Fasken and Mewbourne as well as the geologic evidence presented by Texaco. All such evidence is relevant to the Commission determination in approving an unorthodox well location. Strict rules of evidence do not apply to the Commission adjudicatory hearings, and the evidence allowed during the Commission hearing was admissible and relevant.

II. Summary of the Proceedings

On October 30, 1997, on unopposed motions to consolidate three cases pending before the Commission, the Commission consolidated the following cases: No. 11,723, No. 11,755 and No. 11,868. (Oct. Tr. 8). At its public meeting on December 11, 1997, the Commission took final action to approve Order No. R-10872-B in the consolidated case. (Dec. Tr. 4, 5) Fasken refers to Order No. R-10872-A in its pleadings to the Court, but the Commission believes that Fasken intends to refer to Order No. R-10872-B; Order R-10872-A is a preliminary order by the Commission staying the earlier Oil Conservation Division order until the Commission heard the cases on a *de novo* appeal from the Oil Conservation Division pursuant to NMSA 1978, § 70-2-13 (1955, as amended through 1981)

III. Argument and Authorities

A. The Commission has jurisdiction to approve the well location.

In early 1997 both Mewbourne and Fasken filed separate applications with the Oil Conservation Division for approval to drill at unorthodox locations in the same section, Section 1. Section 1 is an irregular section that contains 863.62 acres, the middle third of which is subject to a federal environmental wildlife study and is not available for development. Both Mewbourne and Fasken claim to be interest owners in 297.88 acres that comprise the south one-half of Section I, and therefore both Mewbourne and Fasken are entitled to initiate an action seeking approval of an unorthodox location before the Oil Conservation Division pursuant to 19 NMAC 15.N.1203 that states, in part: "The Division upon its own motion, the Attorney General on behalf of the State, and any operator or producer, or **any other person having a property interest** may institute proceedings for a hearing." (emphasis added.)

As Fasken stated in its Statement of Appellate Issues, Section 1 is part of a prorated pool that was established on 640-acre spacing units, but pursuant to an order issued in 1981 the pool has been developed on 320-acre spacing units. Consequently, only one well could be approved in the south half of Section 1; both proposed locations could not be approved by the Commission since there was not enough acreage in the south one-half of the section to dedicate to two wells. Presented with two competing applications, it was left to the Commission to determine the location that would be more likely to prevent waste and protect correlative rights. *See* NMSA 1978, § 70-2-11 (1935, as amended through 1977) and NMSA 1978, § 70-2-12B(10) (1978, as amended through 1996) Ordinarily, interest owners reach agreement as to well site locations, but for one reason or another, that did not occur in this case. Instead, Mewbourne and Fasken are in

litigation in a Texas court on the issue of which one has the right to be the operator. The Commission believes the companies each applied to the Commission for approval of well locations to help their respective cases in the Texas court. In any event, the Commission was asked to make the decision for the interest owners, and it could not approve both locations as only one well was allowed in the one-half section.

Contrary to Fasken's argument, the Commission did not determine the priority of drilling between Mewbourne and Fasken. Rather, the Commission selected Mewbourne's location and denied Fasken's. *See* Order pp 7 & 8. However, the Order does provide that if Mewbourne's well is not drilled, then Fasken is allowed to drill its well without having to return to the Commission with another application for an unorthodox location. Fasken had presented its evidence for its location, and it was unnecessary to make Fasken reapply for approval to drill in the event Mewbourne did not drill its location.

Simply put, the Commission was asked to choose the better of two locations. The Commission made its decision based on which location was more likely to prevent waste and protect correlative rights. The Commission acted within its statutory jurisdiction. *See Grace v. Oil Conservation Comm'n*, 87 N.M. 205, 531 P.2d 939 (1975) (Commission had jurisdiction of the subject matter, *i.e.*, the conservation of oil and gas) As the Supreme Court stated in *Santa Fe Exploration Co. v. Oil Conservation Commission*, 114 N.M. 103, 112, 835 P.2d 819, 828 (1992):

The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission 'to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties.' NMSA 1978, § 70-2-12(B)(7).

B. The Commission did not adjudicate a contractual dispute.

It is not within the Commission's power or authority to determine contractual matters between competing interest owners. Early in the hearing the chairman of the Commission stated: "What I think is clear is, we will not render any kind of judgment concerning who has the right to drill." (Oct. Tr. 36) An order of the Commission cannot empower an interest owner with the legal right to drill and operate a gas well in the context of fixing the spacing of wells. If there is a contract determining which party has the right to drill, the Commission cannot alter or change such a contract. But the Commission can and must make determinations on proposed well locations, and that is all the Order does: the Order approved an unorthodox well location, a determination clearly within the Commission's jurisdiction.

C. The Commission's Order is based on sufficient evidence.

Rules governing the admissibility of evidence before administrative bodies are frequently relaxed. *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 63 N.M. 137, 314 P.2d 894 (1957). In administrative proceedings wide latitude is to be used in the admission of evidence. *Matter of Miller*, 88 N.M. 492, 542 P.2d 1182 (Ct.App. 1975) *cert. denied*. Fasken complains that the Commission allowed a joint operating agreement to be introduced into evidence. Prior to the hearing Fasken had filed a motion *in limine* to exclude the agreement. The motion was denied. The Commission has frequently had such agreements entered into evidence in other cases. Certainly there was nothing inflammatory or prejudicial about the operating agreement.

The Commission's decision to grant Mewbourne's requested location and deny Fasken's requested location was based on the Commission's mandate to prevent waste. As stated above, the geological and engineering evidence supports the Commission's Finding 14 that the


Mewbourne location has the higher probability of producing in the Middle Morrow thus reducing the risk of waste by failing to have the available gas produced.

“Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion.” *Rutter & Wilbanks Corp. v. Oil Conservation Comm’n*, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). The chairman of the Commission made it very clear that in deciding which location to approve, the Commission would be “...looking at geologic reasons for the different locations.” (Oct. Tr. 29) The geologic introduced by Mewbourne (Oct. Tr. 43-96) supports the Commission’s approval of the Mewbourne location.

IV. Relief Sought

The Commission requests that this Court affirm its decision in the consolidated case, Order No. R-10872-B.

Respectfully submitted,



Marilyn S. Hebert
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CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Record on Appeal Contents was mailed to all counsel of record on the 27th day of March, 1998.

A handwritten signature in black ink, appearing to read 'Marilyn S. Hebert', is written over a horizontal line.

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FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO

FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,

Petitioners/Appellants,

v.

No. CIV 98-54-JS

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO, MEWBOURNE
OIL COMPANY, and TEXACO EXPLORATION
AND PRODUCTION INC.,

Respondents/Appellees.

**APPELLEE MEWBOURNE OIL COMPANY'S
STATEMENT OF APPELLATE ISSUES**

Pursuant to SCRA 1-074 (1986), appellee Mewbourne Oil Company ("Mewbourne") submits this statement of appellate issues in response to the statement submitted by appellants Fasken Oil and Ranch, Ltd. and Fasken Land and Minerals, Ltd. (collectively, "Fasken").

I. STATEMENT OF ISSUES.

The following issue is before the Court:

Can the Oil Conservation Commission determine the priority of wells to be drilled based upon its statutory duty to prevent waste?

II. SUMMARY OF PROCEEDINGS.

Mewbourne will not restate the facts and proceedings in this case, except to point out the following errors and omissions in

Appellants' Summary of Proceedings ("Summary"):

1. Appellant Fasken Oil and Ranch, Ltd. is not the operator of the S½ of irregular Section 1, Township 25 East, NMPM. Cf. Summary at pp. 3, 6, 7.
2. Mewbourne was under no obligation to obtain the concurrence of Fasken before proposing its well location. Cf. Summary at p. 7.
3. Mewbourne's analysis of the geology was different than Appellants' analysis of the geology.

Other differences are discussed in Part III below.

III. ARGUMENT.

A. The Commission's Decision Was Based On Geology, And Prevents Waste.

Both the Mewbourne and Fasken locations are unorthodox, and it is unquestionable that the Oil Conservation Division ("Division") and the Oil Conservation Commission ("Commission") have the authority to consider, and approve or deny, the locations. NMSA 1978 §70-2-12.B.(7), (10) (1995 Repl. Pamp.) (the Division has the authority to fix well spacing and locations, and prevent harm to neighboring properties); Division Rule 104.F.(2)¹ (the Division has the authority to grant an exception to the well location requirements of Rules 104.B and 104.C). In accordance

¹19 NMAC 15.C Rule 104.F.(2).

with this authority, the Commission examined the technical evidence, and determined that the Mewbourne location is the better location. **Order No. R-10872-B ("the Order"), Finding ¶(14).** Once the Commission made that finding, it was compelled to allow Mewbourne's location to be drilled first. Allowing Fasken's geologically inferior location be drilled first would cause waste.

The decision of the Commission is unrelated to any contractual dispute between the parties, but rather is based on the Commission's statutory duty to prevent waste and protect correlative rights. **NMSA 1978 §70-2-11 (1995 Repl. Pamp.).** Thus, the Order is proper.

B. The Operating Agreement Was Not The Basis For The Commission's Decision.

Fasken asserts that the Joint Operating Agreement was the basis of the Commission's decision granting priority to Mewbourne's location. See Summary at pp. 13-15. However, Fasken cannot cite to any provision of the Order which states that Mewbourne should be allowed to drill its well first because of the Joint Operating Agreement.² Fasken's argument is without merit.

C. The Commission Can Consider Land Evidence.

Fasken states that the Commission, in reaching its decision,

²The only reference in the Order to Joint Operating Agreement is Finding ¶(10), which merely states that the agreement covers the S½ of Section 1. Nowhere in the Order is it used as a basis for the Commission's decision.

cannot consider non-technical evidence. However, there is no limitation in the statutes or Division regulations restricting the factors which can be considered by the Commission in competing unorthodox location cases. Moreover, in response to Fasken's Motion in *Limine*, the Commission, at the hearing, held that it would consider the usual factors used in competing compulsory pooling cases.³ Fasken did not object to the Commission's ruling at that time.

As pointed out at the hearing, Fasken has owned its acreage in Section 1 for 25 years, and did nothing while Texaco produced its offsetting Levers Fed. "NCT-1" Well No. 2 at a rate of 4 MMCF/day. **Hearing Transcript at p. ____.** The impetus to drill a well in the S½ of Section 1, and to protect the correlative rights of the Section 1 interest owners, was due to Mewbourne's actions. This land testimony is relevant to the protection of correlative rights, is admissible, and Finding ¶(15) of the Order is proper.

D. The Interest Owners Favor The Mewbourne Location.

Evidence in the record shows that 98.53% of the working

³Contrary to Fasken's assertion, the compulsory pooling statute (NMSA 1978 §70-2-17.C) does not address competing pooling applications, or well priority in such cases. In addition, the statute does not specify the evidence to be considered by the Commission in pooling cases.

Competing pooling cases often involve different proposed well locations, and the Commission decides which well location gets drilled in those cases. The Division and the Commission have also, in such cases, held that if the location preferred by the Commission is not drilled in a timely manner, the second location may be drilled.

interest owners in the S½ of Section 1 have voluntarily joined in Mewbourne's well, while Fasken admits that only 57% of the working interest owners have voluntarily joined in the Fasken well. **Summary at p. 13.** Thus, the interest owners in the S½ of Section 1 favor the Mewbourne location.

In competing compulsory pooling cases, the Commission gives some weight to the well proposal with the largest interest committed thereto, since those interest owners have the most at risk in drilling the well. The same principle applies to this case, and again Finding ¶(15) of the Order is proper.

E. The Litigation Between Fasken And Mewbourne Does Not Address Well Drilling Priority.

Fasken asserts that the issue of which well should be drilled first is being litigated in District Court in Midland County, Texas. **Summary at p. 2, 12.** That is incorrect. The issues in that litigation involve alleged breach of contract and breach of fiduciary duty. Nowhere in the complaint or counterclaim does any party ask the court to decide which well should be drilled first. If the Court desires copies of those pleadings, Mewbourne will provide them.

F. The Appeal Is Moot.

The well proposed by Mewbourne has now been drilled, with Fasken as a consenting, or participating, interest owner, and with Mewbourne as operator. Therefore, the issues raised by Fasken in

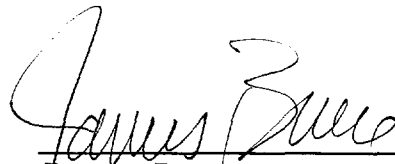
this case are now moot.

IV. CONCLUSION.

Based on its power to protect the correlative rights of the interest owners in the S½ of Section 1, and to prevent waste by preventing the drilling of unnecessary wells, the Commission can consider any relevant data. It did so in this case, and the Order is proper.

WHEREFORE, Mewbourne requests the Court to affirm the Commission's order.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James Bruce", is written over a horizontal line.

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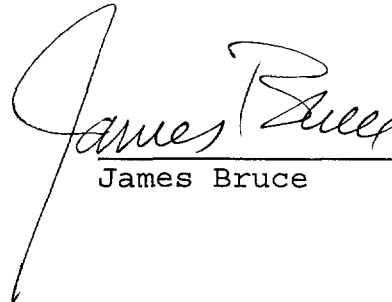
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was mailed to each of the following counsel of record this 28th day of March, 1998:

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James Bruce

**STATE OF NEW MEXICO
COUNTY OF EDDY
FIFTH JUDICIAL DISTRICT**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.
Petitioners/Appellants**

vs.

No. CIV 98-54-JS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.
Respondents/Appellees**

**APPELLANTS-FASKEN OIL AND RANCH, LTD
and
FASKEN LAND AND MINERALS, LTD.'S
STATEMENT OF APPELLATE ISSUES**

Appellants, Fasken Oil and Ranch, Ltd. and Fasken Land and Minerals, Ltd. ("Fasken") pursuant to Rule 1-074 NMRA 1997 submits its Statement of Appellate Issues:

I.

STATEMENT OF APPELLATE ISSUES

Fasken requests the Court review the actions of the Oil Conservation Commission of New Mexico in Cases 11755 (DeNovo) 11723 (DeNovo) and 11868 (DeNovo) on the Commission's docket and vacate Order R-10872-A entered therein because:

(1) in Ordering Paragraph (3) Order R-10872-A, the Commission exceeded its jurisdiction by declaring that Mewbourne had the right to drill its location first which is one of the contractual issues currently being adjudicated by the parties in a Texas State District Court proceeding; and

(2) in Finding (15) of Order R-10872-A, the Commission exceeded its jurisdiction by deciding that Mewbourne's location would be drilled first based upon its contention that "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

(3) Commission committed reversible error when it failed to grant Appellants' Application for Rehearing and Motion to Stay said order because:

POINT I.

THE COMMISSION EXCEEDED ITS JURISDICTION BY
DECIDING THE PRIORITY OF MULTIPLE WELL
PROPOSALS

POINT II:

THE COMMISSION EXCEEDED ITS JURISDICTION BY
ADJUDICATING A CONTRACTUAL DISPUTE BETWEEN
FASKEN AND MEWBOURNE

POINT III:

THE COMMISSION'S DECISION IS BASED UPON
IRRELEVANT AND INADMISSIBLE EVIDENCE AND THE
COMMISSION COMMITTED REVERSIBLE ERROR WHEN
IT FAILED TO GRANT FASKEN'S MOTION IN LIMINE

II. SUMMARY OF THE PROCEEDINGS

Nature of the Case:

Pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA 1978, this case is before the Court on Appellants' Notice of Appeal and Petition for Review of Order R-10872-A entered in Case 11755 (DeNovo) on December 11, 1997 by the New Mexico Oil Conservation Commission ("Commission"). This appeal is limited to those issues raised by the Appellants in their "Application for Rehearing" filed with the Commission on December 31, 1997, which was denied by the Commission when it failed to act on said application within the prescribed ten (10) day period.

Parties:

Appellant Fasken Oil and Ranch, Ltd., a Texas limited partnership authorized to and doing business in the State of New Mexico, is the operator of Irregular Section 1, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico and proposes to drill the "Fasken well" to a location 750 feet from the West line and 2080 feet for the South line of said Irregular Section 1.

Appellant Fasken Land and Minerals, Ltd. is a Texas limited partnership who is the owner of leasehold interests in said Section 1.

Appellants were the applicants before the Commission in Case 11755 (DeNovo) which sought approval to drill the subject Fasken well at an unorthodox gas well location in Section 1 which was approved, but subjected to a requirement that a well location proposed by Mewbourne Oil Company ("Mewbourne") be drilled first as set forth in Commission Order R-10872-A.

Appellants, therefore are parties of record in all of the proceedings before the Commission in this matter and are adversely affected by the Commission Order R-10872-A entered in Case No. 11755 (DeNovo).

Appellee Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

Appellee Mewbourne, a Texas corporation authorized to and doing business in the State of New Mexico, is a working interest owner in said Section 1 and is a party of record who opposed Fasken in all of the proceedings before the Commission in this matter and who was authorized by the Commission to drill its proposed well location first.

Appellee Texaco Exploration and Production, Inc. ("Texaco"), a party of record in all of the proceedings before the Commission in Cases No. 11755, 11723 and 11868 (DeNovo), is the operator (the "offsetting operator") of gas wells in Section 12 which adjoins the southern boundary of Irregular

Section 1. Texaco appeared in opposition to Mewbourne's requested gas well location.

Jurisdiction:

The Fifth Judicial District, Eddy County, New Mexico, has jurisdiction of this appeal pursuant to the provisions of Section 70-2-25.B 1978 because Commission Order R-10872-A applies to oil and gas interest in lands located within Eddy County, New Mexico.

The Commission held a public hearing in Cases 11755, 11723 and 11868 (DeNovo) on October 30, 1997 and apparently as of December 11, 1997 the Commission entered a single order (Order R-10872-A) deciding all three cases.

On December 31, 1997, Petitioners timely filed their Application for Rehearing with the Commission which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

Appellants have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25(B) NMSA 1978 and pursuant to Rule 1-074 NMRA 1997.

Relevant factual summary:

(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) 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.

(8) Texaco appeared at the Commission hearing in opposition to the Mewbourne location and proposed an 81.4% production penalty.

(9) 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 even despite its belief that only the Fasken location would drain the reservoir from which the Texaco well is producing.

(10) 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.

(11) 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.

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

(13) On October 30, 1997, the Commission held an evidentiary hearing at which Fasken, Mewbourne and Texaco each presented geological evidence in an effort to support their respective positions.

(14) At the Commission hearing and over Fasken's objection, Mewbourne introduce testimony and evidence concerning this contractual dispute, the priority of well proposals and the division of interests and asked the Commission to take this evidence into consideration when it decided the well location cases.

(15) On December 12, 1997, the Commission released Order R-10872-A which was dated December 11, 1997 but contained only the signatures of Commissioners LeMay and Bailey. By December 31, 1997, the Commission Order R-10872-A contained the signatures of all three Commissioners and still showed a date of December 11, 1997.

III.

ARGUMENTS AND AUTHORITIES

The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the law creating it. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights. [Section 70-2-11 NMSA 1978]

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. **Fasken v. Oil Conservation Commission**, 87 N.M. 292, 532 P.2d 588 (1975); **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). Likewise, in **Viking Petroleum Corporation v. Oil Conservation Commission**, 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in **Continental** and **Fasken**, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

Although a reviewing court generally may not substitute its judgment for that of the administrative decision maker, it may correct the decision maker's misapplication of law. **Wolfly v. Real Estate Commission**, 100 N.M. 187, 668 P.2d 303 (1981). Such is the case with the Commission's decision in Order R-10872-A.

**POINT I: THE COMMISSION EXCEEDED ITS
JURISDICTION BY DECIDING THE
PRIORITY OF MULTIPLE WELL
PROPOSALS**

Unless this order is amended, the Commission has now established a new precedent for deciding unorthodox well location cases. For the first time in the history of the agency, the Commission has applied its compulsory pooling criteria to an unorthodox location case and made its decision based upon facts which are irrelevant and inadmissible as to any of the issues properly before the Commission.

The Commission has jurisdiction to decide the priority in which competing well proposals will be drilled only within the context of compulsory pooling applications (Section 70-2-17.C). In a compulsory pooling case, the Commission often decides such matters based upon which party has the largest individual interest and which party proposed the well first. The Commission does so because under the explicit language of the pooling statute, the Commission should adjudicate such interests because there is no contract to guide the actions of the parties.

However, the Commission's decision in the subject cases has nothing to do with compulsory pooling. The subject cases are not analogous to the compulsory pooling situation because here there is a contract to guide the actions of the parties. The Commission approved the Fasken location and, subject to a production penalty also approved the Mewbourne location. At that point it should have simply stopped. Unfortunately, the Commission went beyond anything it was required to do by gratuitously deciding that Mewbourne's location should be drilled first. In doing so, the Commission impermissably interposed its opinion as to which location should be drilled first, a matter which is clearly beyond the jurisdiction of the Commission. While the Commission can limit the number of wells to be drilled in a gas spacing unit, it was not its obligation or responsibility to dictate to the parties which of the two approved wells would be drilled first. There are no waste or correlative rights issues involved in a decision made by the Commission based upon a finding that Mewbourne location gets drilled first because "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1." What business is it of the Commission to decide which well gets drilled first? The Commission fulfilled its statutory duties when it approved both wells and imposed a production penalty of the Mewbourne well location. It should have left it up to the parties and the Texas District Court to decide which of these wells should be drilled first.

Historically and until now, the Commission has decided unorthodox well locations based upon the geology and reservoir engineering to determine if that location adversely affected the correlative rights of the party being encroached upon. With this case, the Commission awards the drilling of the first well to Mewbourne who filed its application first without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the spacing unit. The Commission awards the drilling of the first well to Mewbourne who has the largest single interest despite the fact that a majority (57%) of the working interest owners have agreed to join in the Fasken well. With this case, the Commission has made its decision on facts having nothing to do with either waste or correlative rights. A decision that Mewbourne's location shall be drilled first does nothing to either prevent waste or protect correlative rights. It advances no interest of the State of New Mexico.

**POINT II: THE COMMISSION HAS ADJUDICATED
A CONTRACTUAL DISPUTE**

A conservation commission, 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).¹ Notably absent from the

¹ 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.

Commission's enumerated 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.**

This spacing unit is subject to a joint operating agreement and does not require the Commission to use its authority to pool those interests. The parties are involved in litigation commenced by Mewbourne in a Texas district court in which one of the issues is whether Fasken's or Mewbourne's well proposal gets drilled first. The appropriate forum and remedies for resolving those contractual disputes exist but resides with the court and not with the Oil Conservation Commission. **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 wanted and what the Commission did was to decide that Mewbourne has the right to drill the first well. That portion of Order R-10872-A amounts to the Commission adjudicating a contract issue.

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). The Commission must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872-A by declaring that both Fasken and Mewbourne have the right to develop the Morrow formations in this spacing unit and approving both wells. See **Ordering Paragraph (1) of Order R-1087-A**.

However, the Commission went further and decided that Mewbourne gets to drill the first well by its actions, the Commission has exceeded its authority and preempted the adjudication of that issue before the court.

**POINT III: THE COMMISSION'S DECISION IS BASED
UPON IRRELEVANT AND INADMISSIBLE
EVIDENCE**

Anticipating that Mewbourne would attempt to influence the Commission's decision by introducing inadmissible evidence at the Commission hearing, Fasken filed a Motion in Limine asking the Commission

for an order to limit evidence and argument to the geologic and engineering issues. Specifically, Fasken sought to exclude from the DeNovo hearing any evidence or argument concerning the well proposals between Fasken and Mewbourne, what percentage of the interest owners supported either or both proposals, the respective ownership interests in the spacing unit and all other issues involved in the "Fasken-Mewbourne contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas.

Included in Fasken's Motion in Limine was a request to exclude any consideration of the priority of multiple well proposals made which is one of the contractual issues being litigated.

The Commission took that motion under advisement but then, over the objection of Fasken, allowed Mewbourne's landman, Steve Cobb, to testify about the priority of well proposals and the percentage of interest for each of the working interest owners in that unit and the status of commitment to either well proposal. Thereafter, the Commission relied upon this very evidence in its ultimate decision to authorize Mewbourne to drill its well first.

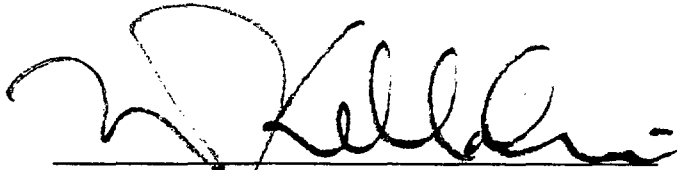
The Commission's admission and reliance upon inadmissible and irrelevant evidence introduced by Mewbourne over Fasken's objection amounts to an improper denial of the motion in limine, constitutes reversible error and requires that the Court to set aside this order.

CONCLUSION

Appellants request that the Court review New Mexico Oil Conservation Commission Cases 11755, 11723 and 11868 (DeNovo) and Commission Order R-10868-A and enter its decision that:

- (1) Commission Order R-10868-A is unlawful, invalid and void;
- (2) Petitioner's property rights have been violated by the Commission exceeding its jurisdiction and authority; and
- (3) for such other and further relief as may be proper in the premises.

Respectfully submitted,



W. THOMAS KELLAHIN, Esq.

KELLAHIN & KELLAHIN

P. O. Box 2265

Santa Fe, New Mexico 87504

(505) 982-4285

ATTORNEYS FOR PETITIONERS/APPELLANTS

PROOF OF SERVICE

Pursuant to Rule 1-074 NMRA 1997, I, W. Thomas Kellahin, hereby certify that on the 26th day of February, 1998, I hand delivered a copy of this Notice of Appeal and Petition for Review to all of the counsel of record in these proceedings as follows:

Lyn Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364
Attorney for the Commission

James Bruce, Esq.
612 Old Santa Fe Trail
Santa Fe, New Mexico 87501
(505) 982-2043
Attorney for Mewbourne Oil Company

William F. Carr, Esq.
510 Guadalupe
Santa Fe, New Mexico 87501
(505) 988-4421
Attorney for Texaco Exploration and Production, Inc.


W. Thomas Kellahin

0 3/11/98

FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,
Petitioners/Appellants

vs.

No. CIV 98-54-JS

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.
Respondents/Appellees

RECEIVED

MAR 11 1998

**SUMMONS
STATE OF NEW MEXICO**

Oil Conservation Division

TO: Oil Conservation Commission of the State of New Mexico
c/o Attorney General for State of New Mexico
Santa Fe, New Mexico 87501

TO: Oil Conservation Commission of State of New Mexico
c/o Lori Wortenberg, Chairman
2040 South Pacheco
Santa Fe, New Mexico 87505

GREETINGS:

You are hereby directed to serve a pleading or motion in response to the attached Notice of Appeal and Petition for Review as provided in Rule 1-074 NMRA 1997 after service of this summons, and to file the same, all as provided by law.

You are notified that, unless you serve and file a responsive pleading or motion, the Petitioner will apply to the Court for the relief demanded in the Petitioners/Appellants.

Attorney for Petitioners/Appellants:
W. Thomas Kellahin
Kellahin & Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285

WITNESS the Honorable James L. Shuler, District Judge of the Fifth Judicial District Court of the State of New Mexico, and the seal of the District Court of Eddy County, this 2 day of March, 1998.

By Eleanor Jarnagin Deputy
Eleanor Jarnagin, District Court Clerk

(Seal)

RETURN

STATE OF NEW MEXICO)
) SS.
COUNTY OF SANTA FE)

I, the undersigned, being duly sworn, upon oath, say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served the within Summon in said County on the ____ day of March, 1998, by delivering a copy thereof, with a copy of the Notice and Petition attached, in the following manner:

[] In accordance with Section 38-1-17 NMSA 1978, to Office of the Attorney General, State of New Mexico, as agent authorized to receive service of process for Respondent/Appellee The Oil Conservation Commission of the State of New Mexico.

[] In accordance with Section 38-1-17 NMSA 1978, to Lori Wrotenbery, Chairman of the Oil Conservation Commission as head authorized to receive service of process for Respondent/Appellee The Oil Conservation Commission of the State of New Mexico.

Signature of Person Making Service

Title (if any)

SUBSCRIBED AND SWORN TO before me this ____ day of March, 1998.

Notary Public

(Seal)

My Commission Expires: _____

**FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY**

**FASKEN OIL AND RANCH, LTD. AND
FASKEN LAND AND MINERALS, LTD.,
Petitioners/Appellants**

vs.

No. CIV 98-_____()

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE, OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.,
Respondents/Appellees**

**NOTICE OF APPEAL
AND
PETITION FOR REVIEW
OF A DECISION OF
THE OIL CONSERVATION COMMISSION OF NEW MEXICO**

COMES NOW, FASKEN OIL AND RANCH, LTD. and FASKEN LAND AND MINERALS, LTD, (collectively "Fasken"), pursuant to the provisions of Section 70-2-25(B) NMSA 1978 and Rule 1-074 NMRA 1997, files this Notice of Appeal and respectfully petitions the Court for review of the actions of the Oil Conservation Commission of New Mexico in Cases 11755 (DeNovo) 11723 (DeNovo) and 11868(DeNovo) on the Commission's docket and its Order R-10872-A entered therein.

PARTIES

1. Petitioners/Appellants, Fasken Oil and Ranch, Ltd., a Texas limited partnership authorized to and doing business in the State of New Mexico, is the operator of Irregular Section 1, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico and proposes to drill the "Fasken well" to a location 750 feet from the West line and 2080 feet for the South line of said Irregular Section 1. Fasken Land and Minerals, Ltd. is a Texas limited partnership who is the owner of leasehold interests in said Irregular Section 1. Petitioners were the applicants before the Commission in Case 11755 (DeNovo) which sought approval to drill the subject Fasken well at an unorthodox gas well location in Section 1 which was approved, but subjected to a requirement that a well location proposed by Mewbourne Oil Company ("Mewbourne") be drilled first as set forth in Commission Order R-10872-A. Petitioners, therefore are parties of record in all of the proceedings before the Commission in this matter and are adversely affected by the Commission Order R-10872-A entered in Case No. 11755 (DeNovo).

2. Respondent/Appellee, the Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

3. Respondent/Appellee, Mewbourne, a Texas corporation authorized to and doing business in the State of New Mexico, is a working interest owner in said Section 1 and is a party of record who opposed Fasken in all of the proceedings before the Commission in this matter and who was authorized by the Commission to drill its proposed well location first.

4. Texaco Exploration and Production, Inc. ("Texaco"), a party of record in all of the proceedings before the Commission in Cases No. 11755, 11723 and 11868 (DeNovo), is the operator (the "offsetting operator") of gas wells in Section 12 which adjoins the southern boundary of Irregular Section 1. Texaco appeared in opposition to Mewbourne's requested gas well location.

JURISDICTION:

5. The Commission held a public hearing in Cases 11755, 11723 and 11868 (DeNovo) on October 30, 1997 and apparently as of December 11, 1997 the Commission entered a single order (Order R-10872-A) deciding all three cases.

6. On December 31, 1997, Petitioners timely filed their Application for Rehearing, a copy of which is attached as Exhibit "A" and incorporated herein, which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

7. Petitioners have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25(B) NMSA 1978 and pursuant to Rule 1-074 NMRA 1997.

8. The Fifth Judicial District, Eddy County, New Mexico, has jurisdiction of this case pursuant to the provisions of Section 70-2-25 N.M.S.A. (1978), because the property affected by Commission Order R-10872-A is located within Eddy County, New Mexico.

RELIEF SOUGHT:

9. Petitioners complain of Commission Order R-10876-A attached hereto as Exhibit "B" and assert that the Commission committed reversible error when it failed to grant Petitioners' Application for Rehearing and Motion to Stay said order, all as set forth in Exhibit "A", because:

POINT I.

THE COMMISSION EXCEEDED ITS JURISDICTION BY
DECIDING THE PRIORITY OF MULTIPLE WELL
PROPOSALS

POINT II:

THE COMMISSION EXCEEDED ITS JURISDICTION BY
ADJUDICATING A CONTRACTUAL DISPUTE
BETWEEN FASKEN AND MEWBOURNE

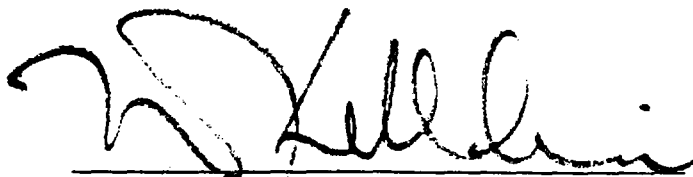
POINT III:

THE COMMISSION'S DECISION IS BASED UPON
IRRELEVANT AND INADMISSIBLE EVIDENCE AND
THE COMMISSION COMMITTED REVERSIBLE ERROR
WHEN IT FAILED TO GRANT FASKEN'S MOTION IN
LIMINE

WHEREFORE, Petitioners/Appellants pray that the Court review New Mexico Oil
Conservation Commission Cases 11755, 11723 and 11868 (DeNovo) and Commission
Order R-10868-A and enter its decision that:

- (1) Commission Order R-10868-A is unlawful, invalid and void;
- (2) Petitioner's property rights have been violated by the
Commission exceeding its jurisdiction and authority; and
- (3) for such other and further relief as may be proper in the
premises.

Respectfully submitted,



W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

ATTORNEYS FOR PETITIONERS/APPELLANTS

PROOF OF SERVICE

Pursuant to Rule 1-074 NMRA 1997, I, W. Thomas Kellahin, hereby certify that on the 27th day of January, 1998, I hand delivered a copy of this Notice of Appeal and Petition for Review to all of the counsel of record in these proceedings as follows:

Lyn Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
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Attorney for the Commission

James Bruce, Esq.
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Attorney for Mewbourne Oil Company

William F. Carr, Esq.
510 Guadalupe
Santa Fe, New Mexico 87501
(505) 988-4421
Attorney for Texaco Exploration and Production, Inc.



W. Thomas Kellahin

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

**APPLICATION OF FASKEN OIL AND RANCH, LTD.
FOR TWO ALTERNATIVE UNORTHODOX WELL
LOCATIONS AND A NON-STANDARD PRORATION UNIT,
EDDY COUNTY, NEW MEXICO.**

CASE NO. 11755

**APPLICATION OF MEWBOURNE OIL COMPANY
CORPORATION FOR AN UNORTHODOX WELL
LOCATION AND A NON-STANDARD PRORATION
UNIT, EDDY COUNTY, NEW MEXICO.**

CASE NO. 11723

**APPLICATION OF TEXACO EXPLORATION AND
PRODUCTION, INC. FOR CLARIFICATION OR IN
THE ALTERNATIVE, AN EXCEPTION TO THE
SPECIAL POOL RULES AND REGULATIONS FOR
THE CATCLAW DRAWN-MORROW GAS POOL,
EDDY COUNTY, NEW MEXICO.**

CASE NO. 11868

ORDER R-10872-A

**APPLICATION FOR REHEARING AND
MOTION TO STAY
COMMISSION ORDER R-10872
BY
FASKEN LAND AND MINERALS, LTD.
AND
FASKEN OIL AND RANCH, LTD.**

This application for Re-hearing is submitted by W. Thomas Kellahin, Esq. of Kellahin and Kellahin for and on behalf of Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd. (collectively "Fasken").



In accordance with the provisions of Section 70-2-25 NMSA (1978), Fasken requests the New Mexico Oil Conservation Commission enter an order staying Order R-10872-A and granting this Application for Re-Hearing in Cases 11755 (denovo) and Case 11723 (denovo).

INTRODUCTION

A stay of Order R-10872-A and a rehearing are essential so the Commission can enter an order which:

(1) deletes Ordering Paragraph (3) Order R-10872 in which the Commission exceeded its jurisdiction by declaring that Mewbourne had the right to drill its location first which is one of the contractual issues currently being adjudicated by the parties in a Texas State District Court proceeding; and

(2) deletes that portion of Finding (15) in which the Commission exceeded its jurisdiction by deciding that Mewbourne's location would be drilled first based upon its contention that "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

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. 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.

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

9. 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 even despite its belief that only the Fasken location would drain the reservoir from which the Texaco well is producing.

10. 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.

11. 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.

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

13. On October 30, 1997, the Commission held an evidentiary hearing at which Fasken, Mewbourne and Texaco each presented geological evidence in an effort to support their respective positions.

14. At the Commission hearing and over Fasken's objection, Mewbourne introduce testimony and evidence concerning this contractual dispute, the priority of well proposals and the division of interests and asked the Commission to take this evidence into consideration when it decided the well location cases.

15. On December 12, 1997, the Commission released Order R-10872-A which was dated December 11, 1997 but contained only the signatures of Commissioners LeMay and Bailey. On December 31, 1997, the Commission issued Order R-10872-A which now contained the signatures of all three Commissioners but instead of being dated December 31, 1997 still showed a date of December 11, 1997.

GROUNDS FOR REHEARING

POINT I:

THE COMMISSION EXCEEDED ITS JURISDICTION BY DECIDING THE PRIORITY OF MULTIPLE WELL PROPOSALS

Unless this order is amended, the Commission has now established a new precedent for deciding unorthodox well location cases. For the first time in the history of the agency, the Commission has applied its compulsory pooling criteria to an unorthodox location case and made its decision based upon facts which are irrelevant and inadmissible as to any of the issues properly before the Commission.

The Commission has jurisdiction to decide the priority in which competing well proposals will be drilled only within the context of compulsory pooling applications (Section 70-2-17.C). In a compulsory pooling case, the Commission often decides such matters based upon which party has the largest individual interest and which party proposed the well first. The Commission does so because under the explicit language of the pooling statute, the Commission should adjudicate such interests because there is no contract to guide the actions of the parties.

However, the Commission's decision in the subject cases has nothing to do with compulsory pooling. The subject cases are not analogous to the compulsory pooling situation because here there is a contract to guide the actions of the parties. The Commission approved the Fasken location and, subject to a production penalty also

approved the Mewbourne location. At that point it should have simply stopped.

Unfortunately, the Commission went beyond anything it was required to do by gratuitously deciding that Mewbourne's location should be drilled first. In doing so, the Commission impermissably interposed its opinion as to which location should be drilled first, a matter which is clearly beyond the jurisdiction of the Commission.

There are no waste or correlative rights issues involved in a decision based a finding that Mewbourne location gets drilled first because "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

Historically and until now, the Commission has decided unorthodox well locations based upon the geology and reservoir engineering to determine if that location adversely affected the correlative rights of the party being encroached upon. With this case, the Commission awards the drilling of the first well to Mewbourne who filed its application first without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the spacing unit. The Commission awards the drilling of the first well to Mewbourne who has the largest single interest despite the fact that a majority (57%) of the working interest owners have agreed to join in the Fasken well. With this case, the Commission has made its decision on facts having nothing to do with either waste or correlative rights. A decision that Mewbourne's location shall be drilled first does nothing to either prevent waste or protect correlative rights. It advances no interest of the State of New Mexico.

POINT II:

THE COMMISSION HAS ADJUDICATED A CONTRACTUAL DISPUTE

A conservation commission, 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).¹ Notably absent from the Commission's enumerated 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.**

This spacing unit is subject to a joint operating agreement and does not require the Commission to use its authority to pool those interests. The parties are involved in litigation commenced by Mewbourne in a Texas district court in which one of the issues is whether Fasken's or Mewbourne's well proposal gets drilled first. The appropriate forum and remedies for resolving those contractual disputes exist but reside with the court and not with the Oil Conservation Commission. 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

¹ 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.

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 wanted and what the Commission did was to decide that Mewbourne has the right to drill the first well. That portion of Order R-10872-A amounts to the Commission adjudicating a contract issue.

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). The Commission must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872-A by declaring that both Fasken and Mewbourne have the right to develop the Morrow formations in this spacing unit and approving both wells. **See Ordering Paragraph (1) of Order R-1087-A.**

However, the Commission went further and decided that Mewbourne gets to drill the first well by its actions, the Commission has exceeded its authority and preempted the adjudication of that issue before the court.

POINT III:

THE COMMISSION'S DECISION IS BASED UPON IRRELEVANT AND INADMISSIBLE EVIDENCE

Anticipating that Mewbourne would attempt to influence the Commission's decision by introducing inadmissible evidence at the Commission hearing, Fasken filed a Motion in Limine asking the Commission for an order to limit evidence and argument to the geologic and engineering issues. Specifically, Fasken sought to exclude from the DeNovo hearing any evidence or argument concerning the well proposals between Fasken and Mewbourne, what percentage of the interest owners supported either or both proposals, the respective ownership interests in the spacing unit and all other issues involved in the "Fasken-Mewbourne contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas.

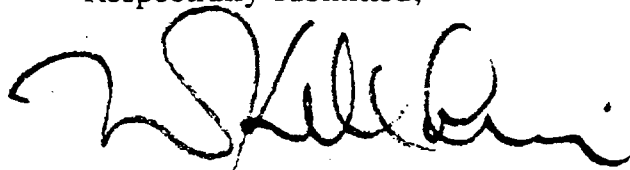
Included in Fasken's Motion in Limine was a request to exclude any consideration of the priority of multiple well proposals made which is one of the contractual issues being litigated.

The Commission took that motion under advisement but then, over the objection of Fasken, allowed Mewbourne's landman, Steve Cobb, to testify about the priority of well proposals and the percentage of interest for each of the working interest owners in that unit and the status of commitment to either well proposal. Thereafter, the Commission relied upon this very evidence in its ultimate decision to authorize Mewbourne to drill its well first.

The Commission's admission and reliance upon inadmissible and irrelevant evidence introduced by Mewbourne over Fasken's objection amounts to an improper denial of the motion in limine, constitutes reversible error and requires that the Commission grant a rehearing in order to correct its mistake.

WHEREFORE, Fasken Land and Minerals, Ltd and Fasken Oil and Ranch, Ltd. respectfully requests the New Mexico Oil Conservation Commission enter an order staying Order R-10872-A and granting this Application for Re-Hearing in Cases 11755 (denovo) and Case 11723 (denovo).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', written in a cursive style.

W. Thomas Kellahin
Kellahin & Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504

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

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:

APPLICATION OF MEWBOURNE OIL
COMPANY FOR AN UNORTHODOX
GAS WELL LOCATION AND A NON-
STANDARD GAS PRORATION UNIT,
EDDY COUNTY, NEW MEXICO.

DE NOVO
CASE NO. 11723

APPLICATION OF FASKEN OIL AND
RANCH, LTD. FOR A NON-STANDARD
GAS PRORATION AND SPACING
UNIT AND AN UNORTHODOX GAS
WELL LOCATION, EDDY COUNTY,
NEW MEXICO.

DE NOVO
CASE NO. 11755

APPLICATION OF TEXACO EXPLOR-
ATION AND PRODUCTION INC. FOR
CLARIFICATION, OR IN THE ALTER-
NATIVE, AN EXCEPTION TO THE
SPECIAL POOL RULES AND REGULA-
TIONS FOR THE CATCLAW DRAW-
MORROW GAS POOL, EDDY COUNTY,
NEW MEXICO.

CASE NO. 11868

ORDER NO. R-10872-B

ORDER OF THE COMMISSION

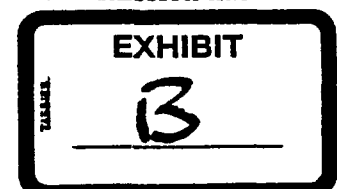
BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m. on October 30, 1997 at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 11th day of December, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

(1) Due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.



(2) In Case 11723, Mewbourne Oil Company ("Mewbourne") seeks approval of a non-standard 297.88 acre gas spacing and proration unit in the Catclaw Draw-Morrow Gas Pool comprised of Lots 29-32 and the SW/4 (S/2 equivalent) of Section 1, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico to be dedicated to a well to be drilled at an unorthodox gas well location 660 feet from the South line and 2310 feet from the East line (Unit W) of Section 1.

(3) In Case 11755, Fasken Oil and Ranch, Ltd. ("Fasken") seeks approval of the above-described non-standard gas spacing and proration unit, for a well to be drilled at an unorthodox gas well location 2080 feet from the South line and 750 feet from the West line (Unit T) of Section 1.

(4) In Case 11868, Texaco Exploration and Production Inc. ("Texaco") seeks clarification of the rules for the Catclaw Draw-Morrow Gas Pool regarding second wells on gas proration units in the Catclaw Draw-Morrow Gas Pool, or in the alternative, an exception to Division rules for its E. J. Levers "NCT-1" Well Nos. 1 and 2, located in Units N and F, respectively, of Section 12, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico to allow both wells to produce simultaneously.

(5) At the time of the hearing, Case Nos. 11723 (de novo); 11755 (de novo) and 11868 were consolidated for the purpose of presenting testimony. Since these cases involve the same acreage and subject matter, one order should be entered for all three.

(6) Sections 1 and 12 are within the Catclaw Draw-Morrow Gas Pool, a pool created in 1971 and prorated in 1974 by Order No. R-4707. The pool is governed by Special Pool Rules and Regulations adopted by Order No. R-4157 that requires 640 acre units, with wells to be no closer than 1650 feet to the unit's outer boundary and no closer than 330 feet to a quarter-quarter section line. Prorationing in the pool was suspended by Commission Order No. R-10328, dated March 27, 1995, and wells in the pool are allowed to produce at capacity.

(7) Order No. R-4157-D dated August 26, 1981, found that wells in the Catclaw Draw-Morrow Gas Pool were only capable of draining 320 acres, and the pool has been effectively developed on 320-acre spacing.

(8) In suspending prorationing in the Catclaw Draw-Morrow Gas Pool, the Commission only suspended the assignment of allowables to the wells. All other rules, regulations and policies governing this pool, including authorization for a second well on each 640-acre spacing unit in the Catclaw Draw-Morrow Gas Pool, remain in effect.

(9) Section 1 is comprised of 863.62 acres. The middle one-third of the section is federal land which is unleased due to a federal environmental wildlife study and cannot be included in the well unit. As a result, approval of the non-standard gas spacing and proration unit is proper and necessary to prevent waste, and should be approved.

(10) All working interest owners in the S/2 of Section 1 are subject to an A.A.P.L. Model Form Operating Agreement - 1956, dated April 1, 1970 ("Operating Agreement"). Mewbourne is the largest working interest owner in the S/2 of Section 1 containing 297.88 acres. Summary of unit ownership is as follows:

Mewbourne Oil Company	43.29470%
Fasken Land and Minerals, Ltd.	30.95951%
Matador Petroleum Corporation	17.93116%
Devon Energy Corporation	<u>7.81463%</u>
	100.00000%

(11) Mewbourne presented geologic and engineering evidence which showed that:

- (a) The primary objective of both the Fasken and Mewbourne proposed locations in Section 1 is the Morrow Zone.
- (b) The primary Morrow Zone is the Middle Morrow, the main producing zone in Texaco's Levers Well No. 2. A net isopach of the Middle Morrow pay sand trends in a north/northeast - south/southwest direction.
- (c) Mewbourne's proposed location is located within the same producing pod as the Texaco Levers Well No. 2.
- (d) Although there is evidence of faulting in the Morrow, it does not adversely affect Middle Morrow gas production.
- (e) Development of the pool occurred primarily in the early 1970's and early 1980's. The Texaco Levers Well No. 2, in Unit F of Section 12, was completed on January 13, 1996, and has produced 2.2 billion cubic feet of gas from the Middle Morrow at rates averaging 4 million cubic feet of gas per day.
- (f) There is no commercial Morrow production in the Catclaw Draw-Morrow Gas Pool north of Texaco's Levers Well No. 2.

- (g) Drilling as close to commercial production as possible reduces dry holes risk and is the main reason for Mewbourne's request for a well location 660 feet from the South line of Section 1.
- (h) The gas in place figures for Sections 1 and 12 are calculated as follows:

	<u>Section 1</u>	<u>Section 12</u>	<u>Total</u>
1/13/96	1.80 BCF	3.95 BCF	5.75 BCF
10/1/97	1.11 BCF	2.44 BCF	3.55 BCF

- (i) Drainage is non-radial, along the trend of the Morrow reservoir. The Texaco Levers Well No. 2 is not draining from the south or southwest because of competing wells located in those directions. The Levers Well No. 2 is not draining reserves northwest of Section 12 because dry holes control limits the Middle Morrow productive limits in that direction.
- (12) Fasken presented geologic and engineering evidence which showed that:
- (a) 3-D seismic data shows a major north/south Morrow cutting fault which separates the Fasken location and Texaco wells on the west side of this fault from the Mewbourne location on the east side of this fault. Mewbourne's location is on the down thrown side of this fault.
- (b) No Morrow sands will communicate or drain across this fault.
- (c) The Mewbourne location is at a structural disadvantage in the Morrow because both the Upper and Lower Morrow sands become wet in lower structural positions.
- (d) Lower Morrow channel sands trend north-northwest to south-southwest, have a very good permeability, drain long distances, and become wet down dip.
- (e) Middle Morrow marine influenced sands trend east-northeast to west-southwest, range from very good to very poor permeability, do not correlate in a north-south direction and did not drain effectively in a north-south direction one half mile distance between the Texaco's Levers #1 and #2 wells in Section 12.

- (f) The Fasken location will be higher and closer to the Conoco Levers #2 well in Section 2 which had a good gas show (I.P. 2.90 million cubic feet of gas per day) but watered out in the Upper Morrow "A" Sand.
- (g) The Cisco has productive potential at the Fasken location because the 3-D seismic shows a time structure with closure, an isochron thin from the 3rd Bone Springs sand to the top of the Cisco and an isochron thick from the top of the Cisco to the Middle Morrow Shale. However, the chances of success in the Cisco are 10% at best.
- (h) In order to minimize the risk involved, it is necessary to drill a well at a location in this spacing unit which can test for both Cisco and Morrow gas production.

(13) Texaco presented geological interpretations based exclusively on subsurface geology which demonstrated that:

- (a) using the same data used by Mewbourne, Texaco contended that the "green" (Middle Morrow) sand being produced in the Texaco Levers Well No. 2 was oriented such that the Fasken location was substantially better than the Mewbourne location.
- (b) if the Mewbourne location was approved, then a substantial penalty was necessary in order to keep the Mewbourne well from draining gas reserves to which it was not entitled.
- (c) Texaco recommended that the Mewbourne location be denied, but if approved, that it be subject to a 81.4% production penalty.

(14) The Mewbourne location has a higher probability of success in the Middle Morrow because of its close proximity to the Texaco Levers Well No. 2 and the north-south interpretation of the Middle Morrow Sand trend has a higher geologic probability than the alternative interpretations. Also, the proposed Fasken location has less of an opportunity to produce from the Middle Morrow than the proposed Mewbourne location and only a 10% chance of producing from Cisco formation.

(15) The Commission favors the Mewbourne proposal because in addition to the higher probability of commercial success in the Middle Morrow, Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1.

(16) The Mewbourne location should be penalized, however, so as not to gain an unfair competitive advantage in the reservoir. Said penalty should ignore acreage considerations because the Catclaw Draw-Morrow Gas Pool has effectively been developed on 320 acres. Said penalty should be based upon a variance from the standard pool rules set back being:

$$\frac{\text{North-South Variance}}{\text{North-South Standard}} = \text{Variance Factor}$$

$$\text{Variance Factor} = \frac{1650 - 660}{1650} = 0.60 = 60\%$$

The allowable should therefore be 40% of the productive capability of the well as measured by semiannual tests into the pipeline. Said allowable should not be less than 1 million cubic feet of gas per day, which is herein defined as the economic limit imposed on said well.

(17) In the event Mewbourne does not drill its location, Fasken should be given the opportunity to drill its location.

(18) The Commission finds that it is not necessary to grant Texaco's request for an exception to the Catclaw Draw-Morrow Gas Pool Rules, because Texaco is not in violation of those rules for the following reasons:

(a) The Commission has the authority to adopt rules and regulations and to issue orders and to interpret those orders and rules. In addition, the Commission has continuing jurisdiction over all of its orders and rules.

(b) On August 26, 1981, the Division issued Order No. R-4157-D which rescinded Orders R-4157, R-4157-A, R-4157-B and R-4157-C and adopted rules for this pool including:

Rule 5(A): 640-acre gas spacing units.

Rule 2(A): Initial well to be drilled not closer than 1650 feet to an outer boundary.

Rule 2(B): Authorizing the drilling of a second well in a 640-acre spacing unit provided that well also was not closer than 1650 feet to the outer boundary. (an "Infill well").

- (c) Although gas prorationing was suspended in the Catclaw Draw-Morrow Gas Pool by Division Order No. R-10328, issued by the Commission is Case No. 11211 on March 27, 1995, that order did not rescind Order No. R-4157-D.
- (d) Rule 2(B) of the special pool rules for Catclaw Draw-Morrow Gas Pool is still in full force and effect and has been since made effective on September 1, 1981.
- (e) Texaco's E. J. Levers Federal "NCT-1" Well No. 2 was drilled in compliance with Division rules, therefore it is not necessary to (a) grant simultaneous dedication for wells in this pool, or (b) grant an exception from these rules for its E. J. Levers Federal "NCT-1" Wells No. 1 and 2 located in Section 12, Township 21 South, Range 25 East, Eddy County, New Mexico.
- (f) It is not necessary to grant an exception from these rules for its E. J. Levers Federal "NCT-1" Wells No. 1 and 2 located in Section 12, Township 21 South, Range 25 East, Eddy County, New Mexico.

(19) Mewbourne's request for a declaration that all gas production from Texaco's E. J. Levers Federal "NCT-1" Well No. 2 be declared "illegal gas" should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The requests of both Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd. ("Fasken"), as the applicant in Case No. 11755 and Mewbourne Oil Company ("Mewbourne"), as the applicant in Case 11723, to establish a non-standard 297.88-acre gas spacing and proration unit for the Catclaw Draw-Morrow Gas Pool comprised of Lots 29, 30, 31 and 32 and the SW/4 (S/2 equivalent) of Irregular Section 1, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico, is hereby approved.

(2) Mewbourne's proposed unorthodox Morrow gas well location for said 297.88-acre unit being 660 feet from the South line and 2310 feet from East line (Lot 31/Unit W) of said Irregular Section 1 is hereby approved with a 60% penalty factor (40% allowable) assessed against the well's ability to produce into a pipeline and measured and adjusted semi annually and witnessed by OCD District personnel and representatives of Texaco. Said allowable shall have a lower limit of 1 million cubic feet of gas per day.

(3) In the event Mewbourne does not begin drilling the well approved in paragraph 2, by April 1, 1998, Mewbourne's application is denied and Fasken's application for an unorthodox Morrow and Cisco gas well location for said 297.88-acre unit being 2080 feet from the South line and 750 feet from the West line (Unit L) of Irregular Section 1 is hereby approved without penalty. In the event the Mewbourne well is drilled, the Fasken application is hereby denied.

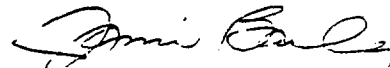
(4) In suspending prorationing in the Catclaw Draw-Morrow Gas Pool, the Commission only suspended the assignment of allowables to the wells. Therefore, all other rules, regulations and policies governing the pool, including authorization for a second well on each spacing or proration unit in the Catclaw Draw-Morrow Gas Pool, remain in effect. Accordingly, the application of Texaco Exploration and Production Inc. for an exception to the Special Pool Rules and Regulations for the Catclaw Draw-Morrow Gas Pool to permit it to continuously and concurrently produce its E. J. Levers Federal "NCT-1" Wells Nos. 1 and 2 on standard 632.36 acre gas spacing unit comprised on Section 12, Township 21 South, Range 25 East, NMPM, Eddy County, New Mexico is dismissed for no exception to the current rules is needed.

(5) Mewbourne's request for a declaration that all gas production from Texaco Exploration and Production, Inc. ("Texaco") E. J. Levers Federal "NCT-1" Well No. 2 be declared "illegal gas" is hereby denied.

(6) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinafter designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION



JAMI BAILEY, Member



WILLIAM W. WEISS, Member



WILLIAM J. LEMAY, Chairman

S E A L

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

FIFTH JUDICIAL DISTRICT
EDDY COUNTY NM
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ELEANOR JARNAGIN
DISTRICT COURT CLERK

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

vs.

No. CV 98-54-JS

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
MEWBOURNE OIL COMPANY and
TEXACO EXPLORATION AND PRODUCTION, INC.**

Respondents/Appellees.

**RECORD ON APPEAL
CONTENTS**

The New Mexico Oil Conservation Commission ("Commission"), by and through its undersigned attorney, pursuant to Rule 1-074(H) NMRA 1998 files the following as the Record on Appeal in this matter:

1. Title Page listing the attorneys of record.
2. Copies of all papers and pleadings filed in the proceeding with the Commission.

The Commission consolidated three cases: Case No. 11723; Case No. 11755; and Case No. 11868. The pagination begins with earliest filing in Case No. 11723, continues through the filings for Case No. 11755, and ends with the last filing in Case

No. 11868.

3. Copy of the Commission's Order No. R-10872-B issued on December 11, 1997.

4. All exhibits introduced at the Commission hearing on October 30, 1997.

The exhibits are contained in three folders: Fasken's Exhibits; Mewbourne's Exhibits; and Texaco's Exhibits.

5. Transcript of the proceedings, stenographically recorded. There are three volumes of transcripts: Volume I (hearing on October 30, 1997); Volume II (continuation of hearing on October 31, 1997); and transcript at public meeting on December 11, 1997.

Respectfully submitted,



Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Record on Appeal Contents was mailed to all counsel of record on the 11th day of February, 1998.



Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

**FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO**

**FASKEN OIL AND RANCH, LTD. and
FASKEN LAND AND MINERALS, LTD.,**

Petitioners/Appellants,

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**OIL CONSERVATION COMMISSION
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TITLE PAGE

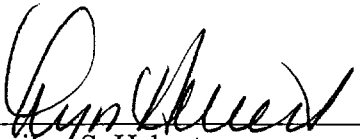
The New Mexico Oil Conservation Commission ("Commission"), by and through its undersigned attorney, states that the following are the attorneys who represented the parties in the proceedings before the Commission that have been appealed to this Court:

James Bruce
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Santa Fe, New Mexico 87501
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Post Office Box 2265
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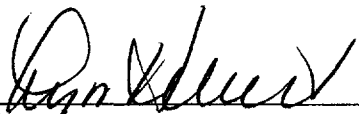
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Title Page was mailed to all counsel of record on the 11th day of February, 1998.



Marilyn S. Hebert