

PROPOSAL FOR DECISION

OIL AND GAS DOCKET NO. 04-0227352; ENFORCEMENT ACTION AGAINST EL RIO OIL & GAS COMPANY (OPERATOR NO. 250577) FOR VIOLATIONS OF STATEWIDE RULES ON THE LUTZ (08281) LEASE, HIDALGO COUNTY, TEXAS

OIL AND GAS DOCKET NO. 04-0228511; COMPLAINT OF EL RIO OIL & GAS CO. REGARDING THE LUTZ (08281) LEASE, HIDALGO COUNTY, TEXAS ALLEGING THAT J. PAUL JONES OFS & SUP INC. AND/OR SOUTHWEST OIL & LAND, INC. EXERCISED PHYSICAL OPERATION AND CONTROL OF THE WELL IN SUCH A WAY THAT THEY ACQUIRED RESPONSIBILITY FOR PLUGGING THE WELL.

APPEARANCES

FOR MOVANT:

Scott Holter, Staff Attorney

FOR RESPONDENT:

Rex H. White, Jr.
A. E. Martens

Joe Pritchett

MOVANT:

Railroad Commission of Texas -
Enforcement Section

RESPONDENT:

El Rio Oil & Gas Company
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Southwest Oil & Land, Inc.

PROCEDURAL HISTORY

First Amended Complaint Served:

April 26, 2001

Hearing Held:

June 28, 2001

Heard By:

Mark H. Tittel, Hearings Examiner

Record Closed:

February 3, 2003

PFD Circulation Date:

February 27, 2003

Current Status:

Protested

STATEMENT OF THE CASE

This was a Commission-called hearing on the recommendation of the District Office to

determine the following:

1. Whether the respondent(s) should be required to plug or otherwise place in compliance with Statewide Rule 14(b)(2) the Lutz, Max (08281) Lease, Well No. 1, Hidalgo County, Texas (hereafter “the subject well” or “the subject lease”);
2. Whether the respondent(s) has violated provisions of Title 3, Oil and Gas, Subtitles A, B, and C, Texas Natural Resources Code, Chapter 27 of the Texas Water Code, and Commission rules and laws pertaining to safety or prevention or control of pollution by failing to comply with said statutes and Statewide Rules 14(b)(2) and 3(a);
3. Whether the respondent(s) should be assessed administrative penalties of not more than \$10,000.00 per day for each offense committed regarding such lease and wells; and
4. Whether any violations of Rule 14(b)(2) and 3(a) by the respondent(s) should be referred to the Office of the Attorney General for further civil action pursuant to TEX. NAT. RES. CODE ANN. § 81.0534.

Attorney Rex H. White, Jr. appeared at the hearing on behalf of El Rio Oil & Gas Company (hereafter “El Rio”). A.E. Martens, President of El Rio, also appeared at the hearing but did not testify. Joe Pritchett appeared on behalf of Southwest Oil & Land, Inc. (hereafter “Southwest”) and offered evidence. J. Paul Jones Oilfield Service & Supply, Inc. did not appear at the hearing. Scott Holter, Staff Attorney, appeared at the hearing representing the Railroad Commission of Texas, Enforcement Section. Enforcement requests that the El Rio be ordered to plug or place the subject wells in compliance with Commission Rules and be ordered to pay an administrative penalty in the amount of \$2,750. After Enforcement refused El Rio’s request to join Southwest and Jones as parties, El Rio filed a complaint alleging that those operators exercised physical operation and control of the subject well in such a way that they acquired responsibility for plugging the well. El Rio’s complaint was heard at the same time as the Enforcement docket. The examiner recommends that the enforcement action against El Rio be dismissed and that Southwest be ordered to plug the subject well.

BACKGROUND

The operator of a well must plug the well when required and in accordance with Statewide Rule 14(b)(2) and all other applicable Commission rules and regulations concerning plugging of wells. For wells transferred before September 1, 1997, the operator designated on the most recent Commission-approved Form P-4 is presumed to be the person responsible for the physical operation and control of the well at the time the well was abandoned or ceased operation, although this presumption may be rebutted at a hearing called for the purpose of determining plugging responsibility.

Each property that produces oil, gas, or geothermal resources and each oil, gas, or

geothermal resource well and tank shall at all times be clearly identified by posting signs in accordance with Statewide Rule 3.

When a violation of Title 3 of the Texas Natural Resources Code relating to safety and/or the prevention or control of pollution is established, the Commission may assess a penalty of up to \$10,000 per day for each violation. In determining the amount of the penalty, the Commission is required to consider the respondent's previous history of violations, the seriousness of the violation, any hazard to the health or safety of the public, and the demonstrated good faith of the respondent. TEX. NAT. RES. CODE ANN. § 81.0531.

DISCUSSION OF THE EVIDENCE

Enforcement's Position

Enforcement's hearing file for this docket was admitted into evidence. El Rio filed its most recent Form P-5 (Organization Report) on June 3, 1991. El Rio filed a P-4 Form (Producer's Transportation Authority and Certificate of Compliance) effective April 1, 1985, designating itself as the operator of the subject well.

Commission District inspection reports on the subject lease made on November 16, 2000 and December 7, 2000 indicate that the well is inactive. Commission records reflect zero reported production from the subject well since at least February 1986, when El Rio filed the last Form P-1 (Production Report) for the subject well. The subject well has not been plugged, nor is there any Form W-1X (Application for Future Re-entry of Inactive Well Bore and 14(b)(2) Extension Permit) in effect. The last Form W-1X was filed by El Rio on September 4, 1990 and expired after one year. The estimated cost to plug the subject well is \$14,400.

A Commission District inspection report on the subject lease made on November 16, 2000 indicated that there were no signs or identification as required by Statewide Rule 3(a) at the well site, lease entrance, and the tank battery.

El Rio's Position

El Rio contends that it is not responsible for plugging the subject well because it was not responsible for the physical operation and control of the well at the time the well was abandoned or ceased operation. El Rio contends that it intended to re-enter the subject well up until the time it lost the subject lease by virtue of a judicial foreclosure. El Rio submitted into evidence a copy of a sheriff's deed dated August 7, 1990, pursuant to a judgment and order of sale rendered by the 92nd District Court of Hidalgo County, conveying "all the estate, right, title and interest" of El Rio to J. Paul Jones. J. Paul Jones had an active Form P-5 at the time of the judicial sale. Its last Form P-5 was filed on July 28, 1993.

On August 20, 1990, J. Paul Jones executed a Deed and Bill of Sale to Southwest. The deed

purported to convey “[a]ll the interest of El Rio Oil and Gas Company in and to the Max Lutz Well No, 1, ... including the land to which such well is affixed, leasehold, buildings, and appurtenances thereto.” Subsequently, persons working for Southwest entered the lease and removed the pumping units, two tanks, and rods. Southwest had an active Form P-5 at the time of the sale. Its last Form P-5 was filed on December 10, 1999. Neither J. Paul Jones nor Southwest ever submitted a Form P-4 for the subject lease.

Southwest’s Position

Southwest admitted that it purchased the property from J. Paul Jones, but contends that it believed that it was only purchasing the equipment on the lease. Southwest also admitted to removing the pumping units, two tanks, and rods from the lease. While these items were being removed from the lease, someone came to the lease and stated that he owned the well. At the hearing, Southwest was unable to identify this person who allegedly claimed ownership. Southwest never returned to the lease again.

EXAMINER’S OPINION

The evidence in the record proves that the subject lease and well are in violation of Statewide Rules 14(b)(2) and 3(a). The remaining issue is who is the operator responsible for the violations and for placing the lease and wells into compliance.

Prior to the effective date of the amendments effective September 1, 1997, TEX. NAT. RES. CODE ANN §89.002(a)(2) provided that:

“‘Operator’ means a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation . . .”.

Statewide Rule 14(c)(2) provides that as to any well for which the most recent Commission-approved operator designation form was filed prior to September 1, 1997, the entity designated as operator on that form is presumed to be the entity responsible for the physical operation and control of the well and the entity responsible for properly plugging the well. The presumption of responsibility may be rebutted only at a hearing called for the purpose of determining plugging responsibility. This rule applies here because the Form P-4 transferring the subject lease to El Rio was filed well before 1997.

El Rio contends that its responsibility ended when it lost title to the subject lease by virtue of the foreclosure. However, nothing in the Natural Resources Code indicates that the plugging responsibility of a well is dependent upon ownership. In fact, TEX. NAT. RES. CODE § 89.044 of the Natural Resources Code, specifically provides that the Commission “...or its employees or agents, the operator or the nonoperator, on proper identification, may enter the land of another for the purpose of plugging or replugging a well that has not been properly plugged.”

Nevertheless, while the loss of title did not in itself relieve El Rio of its plugging obligation, El Rio can avoid plugging responsibility if the evidence establishes that another operator exercised physical operation and control of the subject well. There is no basis in this case to impose plugging

responsibility on J. Paul Jones Oilfield Service & Supply, Inc. The evidence in the record indicates that J. Paul Jones simply seized the subject well by judicial foreclosure and then promptly sold it to Southwest. There is no evidence that J. Paul Jones attempted to exercise physical operation and control of the well.

In determining whether Southwest is assumed plugging responsibility, the Commission must look at its conduct, not merely its subjective intent. While Southwest contended that it believed that it was only acquiring the right to the equipment¹, the evidence in the record establishes that Southwest's actions constituted physical operation and control so as to render it liable for plugging the subject well.

A review of the Commission archives of enforcement cases indicates that in cases in which an identified entity, not acting as agent for the operator of record, entered a well bore and pulled downhole equipment the Commission has found that the entity that entered the wellbore assumed responsibility for the physical operation and control of the well and was therefore responsible for plugging the well². The rationale behind this policy was articulated in Oil & Gas Docket No. 7B-0204370, *Enforcement Action Against Harmony Oil & Gas, Inc. and/or Santa Anna Partners, LP* (Final Order signed May 13, 1997):

If the Commission were to abandon its current policy, which is well known in the industry, and hold that an entity can enter inactive wellbores and remove rods, tubing, and other downhole equipment without incurring liability for plugging, it will be effectively declaring open season on the equipment in inactive wells. Once notices of intent to plug (Form W-3A), which are available to the public, are filed, those with marginal claims, and unscrupulous individuals without any claim, will move in and strip wells bare of all valuable equipment... [I]ncreased stripping of

¹ Southwest's contention that it believed that it was only acquiring the right to the equipment is not persuasive. Southwest's understanding of the nature of the rights it was acquiring is directly contradicted by the plain language of the deed which clearly was intended to convey an interest in both real and personal property. In construing a deed, "...it is not the intention that the parties may have had but failed to express in the instrument, but it is the intention that is expressed by said instrument. That is, the question is not what the parties meant to say, but the meaning of what they did say." *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984).

² *See e.g.* Oil & Gas Docket No. 03-0222092, *Enforcement Action Against J.A. Leonard and/or Aim Consultants, Inc.* (Final Order signed October 21, 2002); Oil & Gas Docket No. 7B-0204370, *Enforcement Action Against Harmony Oil & Gas, Inc. and/or Santa Anna Partners, LP* (Final Order signed May 13, 1997); Oil & Gas Docket No. 03-0201927, *Enforcement Action Against Brent Explorations, Inc. and/or Edward D. Lara d/b/a L&L Investments* (Order signed Dec. 12, 1995); Oil & Gas Docket No. 1-97,294, *Enforcement Action Against TAS, Inc. and/or Comet Operating Co., et al.* (Order signed April 25, 1995); Oil & Gas Docket No. 7B-0204788, *Enforcement Action Against Encino Exploration, Inc. and/or Shamrock Minerals Corp.* (Order signed Feb. 6, 1995); Oil & Gas Docket No. 7C-94,336, *Enforcement Action Against PK-Cat Operating Co. and/or M/G Equipment Co.* (Order signed Jan. 28, 1991); Oil & Gas Docket No. 7C-94,337, *Enforcement Action Against PK-Cat Operating Co. and/or M/G Equipment Co.* (Order signed Jan. 28, 1991).

wells will mean that more wells go unplugged by operators who do not have the assets to fund proper plugging once the equipment is stripped from the well.

At the time of the August 7, 1990 foreclosure, the well had a plugging extension and there was no evidence that El Rio had abandoned the well. Southwest was the last entity to enter the wellbore and effectively abandoned the well and rendered it incapable of production by removing the downhole equipment. In so doing, Southwest assumed responsibility for the operation and control of the subject well. Furthermore, by stripping the well of both surface and downhole equipment, Southwest rendered the well less likely to be plugged by any other operator, because it no longer has any salvage value.

Because El Rio rebutted the presumption that it is the entity responsible for the physical operation and control of the subject well at the time that it was abandoned, the examiner recommends that enforcement action against El Rio be dismissed and that Southwest be held liable for plugging the subject well. However, because Southwest was not made a party in Enforcement's Complaint, received no notice of violations from the District Office, and might have believed someone else was responsible for plugging the wells, the examiner recommends that no penalty be assessed.

Based on the record in this docket, the examiner recommends adoption of the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. All parties to this proceeding were given 10 days notice by certified, first-class mail, at the address reported to the Commission on the most recent Form P-5 (Organization Report). Attorney Rex H. White, Jr. appeared at the hearing on behalf of El Rio Oil & Gas Company (hereafter "El Rio"). A.E. Martens, President of El Rio, also appeared at the hearing but did not testify. Joe Pritchett appeared on behalf of Southwest Oil & Land, Inc. (hereafter "Southwest") and offered evidence. J. Paul Jones Oilfield Service & Supply, Inc. did not appear at the hearing. Scott Holter, Staff Attorney, appeared at the hearing representing the Railroad Commission of Texas, Enforcement Section.
2. El Rio filed its most recent Form P-5 (Organization Report) on June 3, 1991.
3. El Rio filed a P-4 Form (Producer's Transportation Authority and Certificate of Compliance) effective April 1, 1985, designating itself as the operator of the the Lutz, Max (08281) Lease, Well No. 1, Hidalgo County, Texas (hereafter "the subject well" or "the subject lease").
4. The subject well has been inactive for more than 12 months. Commission records reflect zero reported production from since at least February 1986, when El Rio filed the last Form P-1 (Production Report) for the subject well.
5. The subject well has not been plugged, nor is there any Form W-1X (Application for Future Re-entry of Inactive Well Bore and 14(b)(2) Extension Permit) in effect. The last Form W-1X was filed by El Rio on September 4, 1990 and expired after one year.

6. The estimated cost to plug the subject well is \$14,400.
7. The signs or identification as required by Statewide Rule 3(a) at the well site, lease entrance, and the tank battery are missing.
8. On August 7, 1990, pursuant to a judgment and order of sale rendered by the 92nd District Court of Hidalgo County, the subject lease and well were auctioned and a sheriff's deed was executed conveying "all the estate, right, title and interest" of El Rio to J. Paul Jones. J. Paul Jones had an active Form P-5 at the time of the judicial sale. Its last Form P-5 was filed on July 28, 1993.
9. On August 20, 1990, J. Paul Jones executed a Deed and Bill of Sale to Southwest. The deed conveyed "[a]ll the interest of El Rio Oil and Gas Company in and to the Max Lutz Well No. 1, ... including the land to which such well is affixed, leasehold, buildings, and appurtenances thereto." Subsequently, persons working for Southwest entered the lease and removed the pumping units, two tanks, and rods. Southwest had an active Form P-5 at the time of the sale. Its last Form P-5 was filed on December 10, 1999.
10. Usable quality groundwater in the area may be contaminated by migrations or discharges of saltwater and other oil and gas wastes from the subject wells. Unplugged wellbores constitute a cognizable threat to the public health and safety because of the probability of pollution.

CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued by the Railroad Commission to appropriate persons legally entitled to notice.
2. All things necessary to the Commission attaining jurisdiction over the subject matter and the parties in this hearing have been performed or have occurred.
3. Southwest is the operator of the subject wells, as defined by Commission Statewide Rule 14(b)(2) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.14(b)(2)] and Section 89.002 of the Texas Natural Resources Code, and is a person as defined by Commission Statewide Rule 79 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.69] and Chapters 85 and 89 of the Texas Natural Resources Code.
4. As operator, Southwest has the primary responsibility for complying with Rules 14(b)(2) and 3(a) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.14(b)(2) and § 3.3(a)] and with Chapter 89 of the Texas Natural Resources Code as well as other applicable statutes and Commission rules relating to the subject well.
5. The subject well is not in compliance with Statewide Rule 14(b)(2) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.14(b)(2)], or Chapters 85, 89 and 91 of the Texas Natural Resources Code.

6. The subject lease is not in compliance with Statewide Rule 3(a) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.3(a)].

RECOMMENDATION

The examiner recommends that the above findings and conclusions be adopted and that the attached be order approved, requiring Southwest Oil & Land, Inc., within 30 days from the day immediately following the date this order becomes final, to plug the subject well in compliance with Statewide Rule 14.

Respectfully submitted,

Mark H. Tittel
Hearings Examiner