

November 7, 2002

**RULE 37 CASE NO. 0223786**  
**District 6**

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**APPLICATION OF ANDREW ALAN EXPLORATION, INC., FOR AN EXCEPTION TO STATEWIDE RULE 37 TO DRILL WELL NO. 1, C. M. E. DUNAWAY LEASE, CARTHAGE (PETTIT, UPPER), CARTHAGE (PETTIT, LOWER), CARTHAGE (PETTIT, LOWER GAS), CARTHAGE (TRAVIS PEAK) AND WILDCAT FIELDS, PANOLA COUNTY, TEXAS.**

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**APPEARANCES:**

**FOR APPLICANT:**

Phil Patman  
Dale Miller

**APPLICANT:**

Andrew Alan Exploration, Inc.  
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**FOR PROTESTANTS:**

Flip Whitworth

**PROTESTANTS:**

EOG Resources and Alfred C. Glassell, Jr.

**PROPOSAL FOR DECISION**

**PROCEDURAL HISTORY**

**APPLICATION FILED:**

June 24, 2002

**NOTICE OF HEARING:**

July 23, 2002

**HEARING DATE:**

October 9, 2002

**HEARD BY:**

Mark Helmueller - Hearings Examiner  
Margaret Allen - Technical Examiner

**TRANSCRIPT DATE:**

October 24, 2002

**PFD PREPARED BY:**

Mark Helmueller - Hearings Examiner  
Margaret Allen - Technical Examiner

**PFD CIRCULATION DATE:**

November 7, 2002

### Statement of the Case

Andrew Alan Exporation, Inc. (“Applicant” or “Andrew Alan”) has filed an application for an exception to Statewide Rule 37 to drill Well No. 1 on the C.M.E. Dunaway Lease (“subject tract”) in the Carthage (Pettit, Upper), Carthage (Pettit, Lower), Carthage (Pettit, Lower Gas), Carthage (Travis Peak) and Wildcat Fields. The subject tract is an irregular 5 acre parcel with no regular lease line locations. The proposed well location is in the geometric center of the lease, situated 124 feet from the east and west lease lines and 446 feet from the southern lease line. A copy of the plat filed with Applicant’s W-1 Application for Permit to Drill, Deepen, Plug Back or Re-Enter is attached.

Field rules for the Carthage (Pettit, Lower) and Wildcat Fields are subject to the Statewide Rule 37 spacing requirements of 467 feet minimum spacing to the nearest lease line and 1200 feet minimum spacing between wells. Field rules for the Carthage (Travis Peak) Field require 660 feet minimum spacing to the nearest lease line and 1000 feet minimum spacing between wells. Field rules for the Carthage (Pettit, Upper) and Carthage (Pettit, Lower Gas) Fields require 1320 feet minimum spacing to the nearest lease line and 3960 feet minimum spacing between wells. The proposed well on the subject tract is the first well in the applied-for fields.<sup>1</sup>

Andrew Alan’s application is protested by offset operators EOG Resources, and Alfred Glassell, Jr. (“Protestants”).

Andrew Alan previously applied for a Rule 37 exception permit for the same tract and location in the Carthage (Cotton Valley), Carthage, N. (Cotton Valley), Carthage (Travis Peak 6450), and Wildcat Fields. An exception permit in the applied-for fields was granted in a Final Order entered by the Commission on August 8, 2000. Pursuant to Statewide Rules 5(g) and 37(i), the exception permit expired on August 8, 2002. The parties stipulated to the admissibility of the hearing file and exhibits related to the Proposal for Decision and Final Order previously entered by the Commission.

### Applicant’s Position and Evidence

Andrew Alan’s application is based on the legal subdivision exception to the Rule 37 minimum spacing requirements. Applicant contends that the subject tract took its current size and shape prior to the discovery of oil in the area. Applicant further contends that discovery of oil in the commission designated fields which are the subject of its application also occurred after the subject tract took its current size and shape. Applicant provided estimates of the potential recoverable reserves underlying the subject tract in the applied-for fields. Applicant claims that it will suffer confiscation absent the requested exception application.

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<sup>1</sup>Applicant’s W-1 also sought exception permits in the Carthage (Hill, North), Carthage (Glen Rose), Carthage (Blossom), Carthage (Rodessa), Carthage (Transitional), Carthage (Cotton Valley) and Carthage, N. (Cotton Valley) Fields. Applicant withdrew its request for a permit in these fields at the outset of the hearing.

Applicant further argues that the Commission previously determined in its entry of a Final Order approving exception permits in the Carthage (Cotton Valley), Carthage, N. (Cotton Valley), Carthage (Travis Peak 6450), and Wildcat Fields that the subject lease was a legal subdivision because the tract took its current size and shape in 1918, prior to the adoption of any minimum well spacing requirements in Statewide Rule 37. Andrew Alan argues that the doctrine of collateral estoppel is therefore applicable to the current application, citing the decisions in *Bonniwell v. Beech Aircraft Corporation*, 663 S.W.2d 816 (Tex. 1984) and *Muckelroy v. Richardson Independent School District*, 884 S.W.2d 825 (Tex.App. – Dallas, 1994, *writ denied*).

Applicant presented evidence that the discovery dates for the fields in the current application range from 1942 through 1986. Applicant's uncontested volumetric calculations show that approximately 265,186 mcf of gas underlay the subject tract at original conditions in the applied-for fields. Finally, applicant's expert testified that there are currently reserves remaining in each of the applied-for fields underlying the subject lease.

Andrew Alan also argued that it is seeking the first well on this tract. Andrew Alan contends that Texas law recognizes that a refusal to permit the first well on a legal subdivision is confiscation as a matter of law citing *Benz-Stoddard v. Aluminum Company of America*, 368 S.W.2d 94 (Tex. 1963)

### **Protestants' Position and Evidence**

Protestants EOG and Glassell contended that the doctrine of collateral estoppel is inapplicable because the original permit was limited in duration, and the instant application involves different applied-for fields and depths. Protestants also argued that applicant failed to sustain its burden of proof in support of the requested exceptions because it did not provide any volumetric evidence concerning the remaining recoverable reserves in the applied-for fields underlying the subject lease.

Additionally, protestants urged that the Commission include a directional survey requirement as a condition of any permit in order to preclude the possibility that applicant will commit a mineral trespass if its wellbore deviates beyond the boundaries of the lease. Protestants claimed that an inclination report from one of its nearby wells showed a maximum cumulative displacement greater than the minimum distance of the proposed well to the nearest lease lines. Protestants contended that this supports the request that a directional survey be required as a condition of any exception permit granted to Andrew Alan.<sup>2</sup>

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<sup>2</sup>Andrew Alan objected to the admission of the inclination report and cross-examination of its engineering expert on this issue, claiming that the issue was not relevant to the requested Rule 37 exception. The examiners requested additional authority from protestants to support the additional requirement and advised that the objection would be ruled on in the Proposal for Decision. As noted below, the Commission has previously included as a condition of a Rule 37 lease line exception permit, that a directional survey be performed. Accordingly, applicant's objection is overruled and the exhibit and cross-examination testimony proffered by protestants is included in this record.

### Examiners' Opinion

Andrew Alan seeks a permit to drill its well on a 5 acre tract which has no locations regular to the surrounding lease lines. Andrew Alan's proposed location is at the geographic center of the subject lease. If the tract is a legal subdivision, an exception to Rule 37 may be granted to prevent either confiscation or waste. As noted above, applicant limited its case to confiscation.

#### A. Legal Subdivision

As noted in *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 80 (Tex. 1939):

It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th.

In this case, the subject tract is only 5 acres, far less than the minimum amount required under any of the applicable field rules. Accordingly, the question of whether or not applicant is entitled to an exception to drill a well on its substandard acreage tract is determined by whether or not the tract is a legal subdivision, i.e., a tract that took its current size and shape "prior to the discovery of oil and gas in the territory where the lands are located." *Railroad Commission v. Delhi-Taylor Oil Corp.*, 320 S.W.2d 273, 274 (Tex.App.–Austin, 1957).

In the Final Order entered by the Commission on August 8, 2000, the Commission adopted Findings of Fact and Conclusions of Law which determined that the subject tract was a legal subdivision because the tract took its current size and shape in 1918, prior to the adoption of any minimum well spacing requirements in Statewide Rule 37. Andrew Alan urges that the doctrine of collateral estoppel should therefore be applied to the Commission's prior adoption of Findings of Fact and Conclusions of Law on this issue.

Collateral estoppel or issue preclusion, is applicable to the administrative agency orders "when the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Muckelroy v. Richardson Independent School District*, 884 S.W.2d 825, 830 (Tex.App. – Dallas, 1994, *writ denied*). Collateral estoppel precludes relitigation of specific issues of fact or law that were actually litigated in a prior action. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985). In order to invoke the doctrine, a party must establish: 1) The issue to be litigated in the second action was fully and fairly litigated in the prior action; 2) The issue was essential to the judgment in the first action; and, 3) The parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corporation*, 663 S.W.2d 816 (Tex. 1984).

Applying this three prong test, it is clear that collateral estoppel is appropriate to the determination of the legal subdivision issue. This issue was fully and fairly litigated in the prior action, as seen by the stipulation that it was not necessary to resubmit the same evidence in the second hearing. As to the second element, the issue of whether the subject tract is a legal subdivision was essential to the prior action, because Andrew Alan would not have been entitled to drill a well to protect its correlative rights if the subject tract was not a legal subdivision. Finally, under the third prong of the test, the record shows that the same adversaries in the first action are again opposed to each other in the instant proceeding.

The examiners also reject Protestants' argument that the doctrine is not applicable due to changes in the applied-for fields. The changes in the applied-for fields and well depth and the expiration of the prior permit are not related to the previously litigated issue, which was that the tract took its present size and shape prior to the adoption of any spacing rules. Protestants' contention would apply to a case where field specific information was essential to the Commission's prior determination. However, the legal subdivision determination is not based on any technical evidence and was fully and fairly litigated by the very same parties. Finally, the examiners do not believe that the two year expiration period for an exception permit is relevant to the issue of whether a prior Commission hearing arrived at a determination which is binding on the parties in subsequent proceedings. Accordingly, the examiners conclude that the doctrine of collateral estoppel applies to the Commission's prior determination that the subject tract is a legal subdivision.

## **B. Confiscation**

Establishment of a legal subdivision is only the first step in justifying a permit based on confiscation for a tract with no regular well locations. Andrew Alan must also show confiscation; that it will be denied its fair chance to recover the oil and gas in or under the land, or their equivalents in kind.

Andrew Alan is seeking the first well on this tract. Andrew Alan established through uncontested engineering evidence that reserves of up to 265,186 mcf of gas may underlie the tract in the applied-for fields. Generally, a first well on a legal subdivision is necessary to prevent confiscation. *Benz-Stoddard v. Aluminum Company of America*, 368 S.W.2d 94 (Tex. 1963)

Andrew Alan must also show that the proposed exception location is reasonable. There are no regular locations on the subject tract. Further, the applied-for location is at the geographic center of the CME Dunaway Lease, which is presumably the most reasonable well location. Finally, no evidence was presented contesting the reasonableness of the proposed location as opposed to any other location on the lease.

Andrew Alan has established entitlement to an exception to Rule 37, to prevent confiscation

of hydrocarbons underlying its lease on a legal subdivision. Andrew Alan also showed that the proposed irregular location was reasonable due to its presence at the geographic center of the lease. Accordingly, the application for an exception to Rule 37 to prevent confiscation should be granted.

### **C. Directional Survey**

Protestants have also requested that Andrew Alan be required to perform a directional survey for the well to prevent a mineral trespass from occurring. Two prior cases considered by the Commission discussed the issue of whether an operator should be required to conduct a directional survey as a condition of a Rule 37 permit granted to prevent confiscation, but both of those cases are distinguishable from this matter.

In the most recent case, *Rule 37 Case No. 0229978: Application of Zachry Exploration, Inc. to consider an Exception to Statewide Rule 37 for the Thomas Heirs Lease, Well No. 1, Chesterville (Yegua 6600) Field, Colorado County, Texas*, the applicant sought to drill a well at a lease line exception distance because the applied-for field was not present at any other regular location on its lease. Applicant agreed to perform a directional survey in order to ensure that the bottomhole location of its well had not drifted closer to the lease line. Based on the agreement of the applicant, the directional survey requirement was included as a condition of the permit.

The other Rule 37 case addressing this issue involved similar facts. In *Rule 37 Case No. 0201881: Application of Sierra Oil Company for an exception to Statewide Rule 37 for its No. 4 Well on the A. D. Crawford Lease, (156.34 acres) Sierra (Ranger Lime), Sovereign Genesis (Miss), and Wildcat Fields*, Sierra sought to drill a well at an exception distance only 50' from the lease line because regular locations were watered out and a location updip on structure was necessary to recover the remaining reserves in a strong water drive reservoir. However, the examiners conditioned the permit to a specified bottomhole location 50' from the lease line. There was no specific requirement in the Final Order adopted by the Commission that a directional survey be performed, and the proposal for decision contained no Findings of Fact or Conclusions of Law addressing the need for a directional survey. The Proposal for Decision does note that three inclination surveys for wells completed in the same formation showed maximum horizontal displacement in excess of 50 feet.

The examiners believe that while a prudent operator would seek to minimize the possibility of a mineral trespass when drilling a well in close proximity to the lease line, that no directional survey requirement should be added to any permit issued to Andrew Alan for a well at the exception location. Statewide Rule 11 requires that an operator perform a directional survey only when the maximum cumulative displacement in the required inclination report for the well indicates that the well could have potentially drifted beyond the confines of the subject lease. Accordingly, in light of: the provisions of Rule 11 which already address the issue of when a directional survey is required; the absence of any specific requirement under any other Commission rule; the refusal by the applicant to voluntarily accept such a condition to its permit; and the lack of any other facts which mandate that a directional survey be performed, the examiners decline to recommend that a directional survey requirement be made a condition of any exception permit issued to Andrew Alan

at the applied-for location.

### **Conclusion**

Andrew Alan is entitled to an exception to Rule 37, to prevent confiscation of hydrocarbons underlying its lease on a legal subdivision. Andrew Alan established that it would be drilling the first well on a legal subdivision and that the proposed irregular location was reasonable due to its presence at the geographic center of the lease. Accordingly, the application for an exception to Rule 37 to prevent confiscation on a legal subdivision should be granted.

Based on the record in this Docket, the examiners recommend adoption of the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Andrew Alan Exporation, Inc. (“Applicant” or “Andrew Alan”) has applied for an exception to Statewide Rule 37 to drill Well No. 1 on the C.M.E. Dunaway Lease (“subject lease” or “Dunaway Lease”) in the Carthage (Pettit ,Upper), Carthage (Pettit, Lower), Carthage (Pettit, Lower Gas), Carthage (Travis Peak) and Wildcat Fields.
2. The Dunaway Lease is a 5 acre parcel (“subject tract”) with no regular lease line locations. The proposed well location is in the geometric center of the subject tract, situated 124 feet from the east and west lease lines and 446 feet from the northern and southern lease lines.
3. Field rules for the Carthage (Pettit, Lower) and Wildcat Fields are subject to the Statewide Rule 37 spacing requirements of 467 feet minimum spacing to the nearest lease line and 1200 feet minimum spacing between wells.
4. Field rules for the Carthage (Travis Peak) Field require 660 feet minimum spacing to the nearest lease line and 1000 feet minimum spacing between wells.
5. Field rules for the Carthage (Pettit, Upper) and Carthage (Pettit, Lower Gas) Fields require 1320 feet minimum spacing to the nearest lease line and 3960 feet minimum spacing between wells.
6. The proposed well on the subject tract is the first well in the applied-for fields.
7. Andrew Alan previously applied for a Rule 37 exception permit for the same tract and location in the Carthage (Cotton Valley), Carthage, N. (Cotton Valley), Carthage (Travis Peak 6450), and Wildcat Fields.

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8. Andrew Alan's application is protested by offset operators EOG Resources, and Alfred Glassell, Jr. ("protestants"), who also protested Andrew Alan's prior application.
9. An exception permit in the applied-for fields was granted in a Final Order entered by the Commission on August 8, 2000. Pursuant to Statewide Rules 5(g) and 37(i), the exception permit expired on August 8, 2002.
10. The Final Order entered by the Commission on August 8, 2000, adopted the following Findings of Fact and Conclusions of Law concerning the status of the subject tract which were essential to the Commission's prior determination:
  - a. The first Statewide well spacing requirement was adopted by the Railroad Commission on November 26, 1919 as Rule 37.
  - b. The subject tract took its legal size and shape in 1918.
  - c. The 5 acre Dunaway Lease is a legal subdivision.
11. The parties stipulated to the admissibility of the hearing file and exhibits related to the Proposal for Decision and Final Order previously entered by the Commission.
12. Reserves exist beneath the subject tract that the mineral interest owners of the tract will not have an opportunity to recover without an exception to the spacing requirements of Rule 37.
  - a. Reserves of up to 265,186 mcf of natural gas could be recovered from the four target fields underlying the subject tract.
  - b. A wildcat field could be encountered by the well to a depth of 6800 feet.
  - c. The proposed well will be the first well on the subject tract.
  - d. There are no regular locations on the subject tract and the applied-for location is at the geographic center of the Dunaway Lease.

**CONCLUSIONS OF LAW**

1. Proper notice of hearing was timely given to all persons legally entitled to notice.
2. All things have occurred to give the Commission jurisdiction to decide this matter.

3. In the Final Order entered by the Commission on August 8, 2000, the Commission adopted Findings of Fact and Conclusions of Law which determined that the subject tract was a legal subdivision which took its current size and shape in 1918, prior to the adoption of any minimum well spacing requirements. The doctrine of collateral estoppel is applicable in this proceeding to the determination that the subject tract was a legal subdivision under the test set forth in *Bonniwell v. Beech Aircraft Corporation*, 663 S.W.2d 816 (Tex. 1984):
  - a. The issue was fully and fairly litigated in the prior proceeding;
  - b. The issue was essential to the judgment in the first proceeding; and,
  - c. The parties were cast as adversaries in the first proceeding.
4. A well spacing rules exception is required to give Andrew Alan a reasonable opportunity to recover its fair share of hydrocarbons from the applied-for fields.
5. An exception to Statewide Rule 37 for a well at the applied-for location is necessary to prevent confiscation.
6. Pursuant to Statewide Rule 38(d)(1) an exception to Statewide Rule 38 is not required because the application seeks to drill the first well on a legal subdivision.

### **RECOMMENDATION**

The examiners recommend that the subject application be granted in the applied-for fields in accordance with the attached final order.

Respectfully submitted,

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Mark J. Helmueller  
Hearings Examiner

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Margaret Allen  
Technical Examiner