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OIL AND GAS DOCKET NO. 5-95,279

APPLICATION OF LASMO ENERGY CORPORATION FOR AN EXCEPTION TO CONVERT THE FOLLOWING PRODUCING WELLS TO INJECTION WELLS: J.D. HANSBOROUGH UNIT NO. A-1, W.W. WINGFIELD UNIT NO. 2, AND THE J.R. LUSK UNIT NO. 1, IN THE ALABAMA FERRY (GLENROSE "D") FIELD, LEON AND HOUSTON COUNTIES, TEXAS.

APPEARANCES:

FOR APPLICANT:	**APPLICANT:**
Brian R. Sullivan, Attorney Jim Enlow David Basden	LASMO Energy Corp.
FOR PROTESTANTS:	**PROTESTANTS:**
David Nelson, Attorney	Murphy H. Baxter and John L. Cox
Susan G. Zachos, Attorney	Fortson Oil Company

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

FILING DATE:	November 5, 1990
HEARING DATE:	December 7, 1990
HEARD BY:	Meredith Kawaguchi, Legal Examiner Thomas Richter, Technical Examiner
TRANSCRIPT DATE:	January 3, 1991
BRIEFS FILED:	April 26 and May 16, 1991
PFD CIRCULATION DATE:	August 6, 1991
CURRENT STATUS:	Protested

STATEMENT OF THE CASE

LASMO Energy Corporation (LASMO) has applied to convert three producing wells to injection wells. Each of these wells produces from a tract in the Alabama Ferry North Unit. Certain royalty owners in each tract have not joined the unit. LASMO alleges that conversion of the three wells to injectors is necessary to prevent waste of 237,000 barrels of oil (BO). Some of the affected royalty owners oppose the conversion of their wells and contend that the Commission does not have authority under the unitization statute, TEX. NAT. RES. CODE ANN. §§ 101.001 et seq. (Vernon 1982), to grant LASMO's application.

PROCEDURAL HISTORY AND FACTS

LASMO's application is a request for an exception. In March 1990 the Commission approved LASMO's plan to unitize a portion of the Alabama Ferry (Glenrose "D") Field by a Final Order that contained this provision: "In order to protect unsigned ownership, when 100% of the royalty and working interest owners in a tract have not joined the unit, the operator is not authorized to convert the last producing well on that tract to an injector unless an exception is granted after notice and hearing." Paragraph 5, Final Order in Oil and Gas Docket No. 5-93,524.

In April 1990 LASMO applied for approval to inject water into 17 wells on the unit. Five of those wells constitute the last producing well on a tract where an unsigned royalty interest exists. All 17 wells, including the wells that are the subject of this proceeding, were approved ultimately for injection.

In November 1990 LASMO filed the current application. LASMO seeks an exception

to convert to injection these wells:

1. The W.W. Wingfield Unit No. 2 (Tract 2)
2. The J.D. Hansborough Unit No. A-1 (Tract 22)
3. The J.R. Lusk Unit No. 1 (Tract 26).

An unprotested hearing was convened on December 7, 1990. The evidence showed the monthly production from the three wells as of September 1990 and the percent of unsigned royalty:

Well	Oil	Gas	Percent Unsigned
1. Wingfield No. 2	1800 BO	16 MMCF	.49792%
2. Hansborough No. A1	400 BO	4 MMCF	2.27253%
3. Lusk No. 1	1200 BO	6 MMCF	1.15448%

The testimony concerning waste of 237,000 BO if the wells are not converted was not supported by any engineering or geological data entered into evidence. Exhibit 10, a plat of the unit showing producing wells and injectors, suggests that waste will not occur, because the alleged 237,000 BO will be swept to producing wells on tracts offsetting the unit or to unit producers.

LASMO argues that unsigned royalty owners within the unit will be protected under LASMO's proposed plan. If the Commission grants the exception, LASMO will allow the royalty owners to choose between payment of royalties on a unit basis and payment as working interest owners in the unit. In one instance LASMO offered a royalty owner $7,000 to buy her executive right, so that LASMO could enter her interest into the unit.

The hearing on December 7, 1990, was recessed to allow the examiners time to

evaluate the record and request more evidence if necessary. After reviewing the record and applicable case law, it was apparent that notice of the hearing had been deficient. Only those unsigned royalty owners whose sole interests in the field were in wells to be converted got notice; however, all unsigned royalty owners with an interest in wells to be converted are entitled to notice, even if they do participate in production from another well in the field. Also, the notice of hearing gave little actual notice of the portent of LASMO's proposal. After the Commission had found for this unit in two separate orders that the last producing well on a tract with an unsigned interest would not be converted to an injector and that the owners not desiring to enter the unit could refuse to join and continue to participate in production on an independent basis, a notice of hearing that merely states the Commission will consider LASMO's application to convert the AFNU 201, 2201, and 2601 wells to injection does not seem sufficient. After being further informed of the purpose of the hearing, and the wells involved, a number of affected persons registered their opposition to the conversion.

Rather than reopen the hearing, it appeared more expeditious to settle first the issue of the Commission's authority to take the action LASMO requests. All affected persons were given the opportunity to file a brief or a statement on the legal issue. LASMO filed a brief, as did Murphy H. Baxter and John L. Cox. Fortson Oil Company also filed a brief. John R. Lusk, Dolores C. Cox, and Dorothy O. Sirls filed a statement accompanied by an affidavit.

The Commission may choose to sign a final order dismissing the application for lack of authority to grant it, or may choose to issue an interim order finding authority, at which

time the hearing would be renoticed to allow all affected persons an opportunity to appear. The Commission may have other options not apparent at this time to the examiners.

LEGAL ARGUMENTS

LASMO---

There is no prohibition in the statutes or Commission rules of last well conversions. Commission unitization orders prohibit last well conversion, but that provision allows for an exception to the prohibition. The Commission has granted such exceptions in the past, so the issue of Commission authority has already been decided. The examiners should follow precedent.

The unsigned royalty owners will be protected as required by TNRC § 101.013(a)(3). LASMO has offered them a right to convert to unit participation, or in the alternative, a right to convert their royalty interests to working interests in the unit.

If the exception is granted the leases that have no well other than the converted well will expire and the royalty owners will become LASMO's cotenants. As cotenants, the nonjoiners will have no right to participate in production unless a unit producer is located on their tract. Nevertheless, LASMO is willing to offer them participation in unit production. As unleased mineral owners, the nonjoiners may lease their interests again or drill their own wells.

The Commission's responsibility to prevent waste is specifically retained in TNRC § 101.003. The waste of 237,000 BO will occur if the exception is not granted.

In a reply brief LASMO argued that the Commission's only concern should be whether the proposed injection operation is a proper conservation measure. The

Commission cannot adjudicate property rights between lessors and lessees and between cotenants. The opposition of the unsigned royalty owners to LASMO's request is a dispute over property rights, which is outside the Commission's jurisdiction.

A cotenant, such as LASMO, has the right to develop the land without the consent of the other cotenants. Because all cotenants have the right of access to the property, one cotenant cannot deny the other the right to drill or to inject water. The nonsigners are attempting to prevent LASMO from exercising its property rights. To force LASMO to continue to produce the subject wells would violate LASMO's property rights.

Conversion of the last producing well to injection does not compel the nonsigners to join the unit. They are free to dispose of their mineral rights as they see fit.

MURPHY BAXTER AND JOHN L. COX---

There appear to be no published Texas opinions that deal with the issue at hand--Commission authority to convert the last producing well on a tract where a nonconsenting interest exists.

The statute, TNRC §§ 101.001 to 101.052, provides that agreements for pooled units may bind only those parties who execute them; no person may be compelled or required to enter into such agreement. Despite numerous attempts made in past sessions of the Texas legislature to enact a compulsory unitization statute, none has been successful.

The Commission's historical prohibition of last well conversions is necessary to protect the correlative rights of nonsigners as required by TNRC § 101.013(a)(3). Other protections historically afforded nonsigners are restrictions on the location of injection wells and on the transfer of allowables.

LASMO's proposal is nothing more than an indirect form of compulsory unitization. The unitization statute prohibits either directly or indirectly the forced unitization of unsigned interests. Even though an unsigned owner possibly could lease his interest to another operator, if the interest is small, the chances of this occurring are remote at best, and his hydrocarbons will be produced by other unit tracts to his detriment.

FORTSON OIL COMPANY---

Fortson is concerned about this application because two wells in which Fortson, as trustee, owns an 80% royalty interest are last producing wells on tracts in the unit. Fortson did not join the unit. Although these two wells (Bridges No. 1 and Ward No. 1) are not included in this proceeding, Fortson stands to be materially affected by its outcome. Since the Fortson wells have already been approved for injection, LASMO need only obtain an exception similar to the one sought in this docket to allow LASMO to terminate Fortson's royalty interests.

LASMO's request is unlawful for two reasons: 1) it fails to protect unsigned interests and 2) it requires compulsory pooling.

LASMO believes it does not need an exception to convert to injection the two Fortson wells. Each of the two wells is the last producing well on a tract but not the last producing well on a lease. If LASMO is allowed to automatically convert the last producing well on a tract where the unsigned interest participates in another well in the field within the unit boundaries, this will eliminate any protection for such unsigned interests.

There is no proof that the compensation offered by LASMO is adequate. The compensation will be based on the unit participation factor, and because the unit agreement

was voluntarily entered into, the Commission expressly abstained from addressing the equity of the unit participation factor.

LASMO's proposal gives unsigned owners no practical alternative but to join the unit. Unsigned owners may take a royalty interest or a working interest in the unit, or they may take nothing.

JOHN R. LUSK, DOLORES C. COX, AND DOROTHY O. SIRLS

The Commission's order approving the Alabama Ferry North Unit required that the rights of all interest owners in the field be protected. The measure employed most frequently by the Commission to protect the rights of nonsigners within the unit is the measure that LASMO seeks to negate by exception. Nonparticipants in the unit should be under no obligation to participate in the unit to protect their interests. The arrangement proposed by LASMO is contrary to the spirit of the voluntary unitization statute.

DISCUSSION

LASMO clearly wishes to use the property of the nonsigners to benefit the unit. To authorize LASMO to do so without the nonsigners' consent would, in the examiners' opinion, constitute compulsory unitization. Although the Commission will not issue a compulsory unitization order, the order granting the exception will have the same result as to the unsigned interests in the three wells in question. To say that the unsigned owners will retain dominion and control over their property rights may be technically true but practically false. The purpose of the proposed water injection is to cause the efficient and effective sweep of oil and gas away from the injection well and off the tract to nearby producers. Under these circumstances it is doubtful that another operator would take a lease, particularly where the

ownership interest is small. The unsigned owners may sue for breach of the lease covenants, but this is a course that many royalty owners cannot afford in time and money. After conversion of the wells, the unsigned owners would not be entitled to any accounting from their cotenant LASMO, unless a unit well produced from their lands. Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966). The Hobson's choice LASMO has asked the Commission to impose is coercive. The court in Halbouty v. Darsey would not impose such a choice. It would not condone denial of a Rule 37 permit because the applicant had refused an unconditional offer to pool. Pooling "is not a matter over which the Commission has been given jurisdiction to require but is a subject for voluntary agreement." Halbouty v Darsey, 326 S.W. 2d 528, (Tex. Civ. App.-Austin 1959, writ ref'd n.r.e.).

There is no basis to find that LASMO's offer to the unsigned owners protects their interests. The Commission generally does not pass upon the fairness of the terms of the unit agreement because it is a product of the private freedom to contract. LASMO argued this principle in Oil and Gas Docket 5-93,524, the application for approval of the unit. Letter of 1-31-90 from LASMO to Examiners, paragraph 4. According to LASMO the Commission did not have jurisdiction to hear royalty owners' complaints concerning the allocation of unit production to their tracts; the Commission had specific instructions from the legislature to determine only whether the offer to each owner was on the same yardstick basis. But if parties involuntarily may be made subject to the unit agreement, as in compulsory unitization, the regulatory agency does consider the equity of the terms of the agreement and its unit participation factor.

It may be argued that the Commission should consider its duty to protect the

correlative rights of the signed interests in unit production. However, to protect the rights of the signers, the Commission would have to compel the nonsigners to contribute their interests to the unit. There likely would be greater prevention of waste and more protection of the unit participants' correlative rights if unitization was compulsory, but as the protestants stated, the legislature has rejected compulsory unitization several times. Any argument that waste will be caused or correlative rights impaired unless a unit operator is allowed to appropriate the minerals of nonconsenting interest owners for the benefit of the unit should be addressed to the legislature rather than the Commission.

Finally, the examiners are of the opinion that the grant of LASMO's application would in effect license a trespass.

As LASMO's brief explains, a cotenant has the right to develop the jointly owned land without the consent of his cotenants. Because all cotenants have the right of access to the property, one cotenant cannot deny the other cotenant the right to drill. But does it therefore follow, as LASMO asserts, that a cotenant has the right to force oil and gas by injection from under the jointly owned property to adjacent lands in which the injecting cotenant owns an interest?

"The gist of an action for trespass to realty is the injury to the right of possession". 70 TEX. JUR. 3rd Trespass to Realty § 1 (1989). It would be most injurious to the nonsigners' right of possession if LASMO deliberately drove the oil and gas from beneath the jointly owned land. In Ramsey v. Carter Oil Co., 74 F. Supp. 481, 482 (E.D. Ill. 1947), aff'd, 172 F. 2d 622(7th Cir.) cert. denied, 337 U.S. 958, reh'g denied, 338 U.S. 842 (1949), the court held in the instance of a conflict between lessor and a nonconsenting lessee in a

secondary recovery operation:

> The defendant has only one right under its lease and that is to remove the oil according to approved methods for the benefit of itself and its lessor. It has no right to drive it from plaintiff's land by any method. To do so is clearly a trespass upon and a violation of plaintiff's right and title to the oil in place.

In a later case the Illinois court allowed the injection to take place, because the lessor would recover more royalties from the remaining three wells on the lease than he would have recovered from four wells on the lease absent the injection operation. Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E. 2d 519 (1950).

In Texas & Pacific Coal & Oil Co. v. Kirtley, 288 S.W. 619, 622 (Tex. Civ. App.--Eastland 1926, writ ref'd) the court stated that if a cotenant takes oil and gas from the jointly owned property contrary to the rights of his cotenant, he is to be regarded as a trespasser.

The court in the Manziel case, Railroad Comm'n v. Manziel, 361 S.W.2d 560 (Tex. 1962), did not believe the technical rules of trespass should defeat a valid secondary recovery project. In that case, however, the subsurface invasion came from an adjoining tract and was incidental to the conducting of secondary recovery by the adjoining operator on his own tract. The result may have been different had Whelan, assuming he had an interest in Manziel's minerals, come on the jointly owned property and drowned one of the producing wells in an attempt to remove the oil to property where he enjoyed sole ownership, to benefit his secondary recovery project. Unless the justification for the deliberate invasion of another's property rises to the level of something comparable to enormous waste and an

imminent peril to life and property, as in Corzelius v. Railroad Comm'n, 182 S.W.2d 412 (Tex. Civ. App.-Austin 1944, no writ), it does not seem that a court would approve of such an intrusion, even to prevent some level of waste. The court in Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W. 2d 411, 417 (1961), did not regard the Corzelius holding "as authority for the proposition that the type of deliberate action here involved for the purpose of increasing production even across property lines would not be a trespass, or as authorizing the Commission to license such action." The deliberate action the court referred to was fracing across lease lines from an adjacent tract.

It should be noted that the nonsigners have no power to prevent the secondary recovery project from going forward, even if it results in the premature watering out of wells in which they have an interest due to water injection on adjacent tracts. That is a risk they have chosen to take by declining to join the unit.

Since it appears that LASMO may not lawfully take the action it proposes, it would be useless for the Commission to grant LASMO's application.

LASMO has taken the position that it needs an exception only to convert the last producing well on a lease. Fortson argues that an exception is necessary for the last producing well on a tract, according to the plain language of paragraph 5, the exception provision. As has happened in this docket, a lease may be split between two distinct pooled units, each pooled unit constituting a tract within the larger unit. An unsigned royalty owner may lose a producing well to conversion on one tract but still have production from a pooled unit containing a portion of his lease in another tract.

The examiners believe Fortson's position is more sound. The language of paragraph

5 explicitly refers to the last producing well on a tract.

In addition, pooled units generally reflect the amount of acreage the field rules require, the amount of acreage that a well in the field will drain. If there is no producing well to drain that amount of acreage, the hydrocarbons thereunder will be lost to the unsigned owners. If their interests in remaining wells on other tracts are less than their interests in the well that was converted to injection, they stand little chance of recovering from those wells the royalties they would have received from the well lost to conversion.

In LASMO's opinion a last producing well on a tract with a nonconsenting interest that participates in production from another tract could be converted automatically, assuming LASMO had obtained injection approval, without notice or hearing. This would destroy the nonconsenter's royalty interest in the well. Such action appears contrary to substantive and procedural due process. Therefore, the examiners recommend that the Commission adhere to the plain language of paragraph 5 by requiring an exception to convert the last producing well on a tract, as well as the last producing well on a lease, regardless of the other interests owned by the nonsigners.

FINDINGS OF FACT

1. An unprotested hearing in this docket was convened on December 7, 1990, in which LASMO Energy Corporation, the applicant, appeared and presented evidence in support of its application.
2. All affected persons were given notice of and the opportunity to file a brief or statement, accompanied by an affidavit of pertinent facts, concerning the preliminary

issue of the Commission's jurisdiction to grant the applicant's request for an exception.

3. The applicant operates the Alabama Ferry North Unit (AFNU), which was approved by the Commission in Oil and Gas Docket No. 5-93,524.

4. The Final Order in Oil and Gas Docket No. 5-93,524 provides for an exception: "In order to protect unsigned ownership, when 100% of the royalty and working interest owners in a tract have not joined the unit the operator is not authorized to convert the last producing well on that tract to an injector unless an exception is granted after notice and hearing".

5. The application seeks to convert three producing wells in the AFNU to injection wells: The J.D. Hansborough Unit No. A-1, the W.W. Wingfield Unit No. 2, and the J.R. Lusk Unit No. 1, in the Alabama Ferry (Glenrose "D") Field.

6. Each well is the last producing well on a lease and tract where less than 100% of the royalty owners joined the unit.

7. The unit agreement for the AFNU is a private contract; the Commission has not ruled on the equity of the royalty owners' unit participation factor.

8. The purpose of water injection in a secondary recovery operation is to provide for the efficient and effective sweep of oil and gas away from the injection well to producing wells.

9. LASMO's proposal, to convert the last producing well on a lease to injection and to give the nonconsenting royalty owners a choice 1) to join the unit as working interest or royalty interest owners or 2) not to join the unit and take nothing, is

coercive.

10. The Texas legislature expressly has refused to pass a compulsory unitization statute.

11. The proposed conversion to injection of each of the subject wells is opposed by an affected royalty owner.

CONCLUSIONS OF LAW

1. Notice and opportunity to participate was given to all proper persons sufficient to allow the Commission to decide the preliminary issue of its jurisdiction to grant the applicant's request.

2. Under TEX. NAT. RES. CODE ANN. §101.001 et seq., the Commission does not have authority to grant the applicant's request, as the Commission may not compel any interest owner to unitize his interest.

3. If the subject wells were converted to injection wells without the consent of the affected royalty owners, upon lapse of the leases for nonproduction, LASMO Energy Corporation and the nonconsenting interest owners would become cotenants of the lands on which the leases lapsed.

4. The owner of land overlying oil and gas owns the minerals in place beneath his land.

5. If a cotenant removes oil and gas from the jointly owned property contrary to the rights of his cotenants, he is a trespasser.

6. The Commission should not do the useless thing of granting an exception that would, in effect, license a trespass.

7. An exception is required pursuant to the Final Order in Oil and Gas Docket No. 5-

93,524 to convert to injection the last producing well on a lease or on a pooled unit designated as a tract in the Alabama Ferry North Unit.

EXAMINERS' RECOMMENDATION

The examiners recommend that the Commission dismiss LASMO Energy Corporation's application pursuant to the terms of the proposed Final Order.

Respectfully submitted,

Meredith Kawaguchi

Meredith Kawaguchi
Legal Examiner

Thomas H. Richter

Thomas H. Richter, P.E.
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