

COMPLAINT OF DAVID PUESCHEL REGARDING PROPER NOTICE OF MEXCO ENERGY CORPORATION'S TO INJECT FLUID INTO A RESERVOIR PRODUCTIVE OF OIL & GAS PURSUANT TO STATEWIDE RULE 46 FOR THE TURNBOW, ALFRED LEASE, WELL NO. 3, TURNBOW (BURSON) FIELD, HASKELL COUNTY, TEXAS

APPEARANCES:

FOR COMPLAINANT:

David Pueschel
Bob Shea, Consultant (7-2-01 only)

REPRESENTING:

David Pueschel
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FOR PROTESTANT:

Roy Longacre, Attorney (7-2-01 only)
Wayne Barton, Engineer (11-12-01 only)

Mexco Energy Corporation
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PROCEDURAL HISTORY

Date Complaint Filed:

March 15, 2001

Notice of Hearing:

June 7, 2001

Hearing Held:

July 2, 2001 & November 12, 2001

Heard By:

Mark H. Tittel, Hearings Examiner
Donna Chandler, Technical Examiner (7-2-01)
Thomas H. Richter, Technical Examiner (11-12-01)

PFD Circulated:

December 12, 2001

Amended PFD Circulated:

January 11, 2002

STATEMENT OF THE CASE

This hearing arose from a complaint filed by David Pueschel alleging that Mexco Energy Corporation (hereinafter “Mexco”) failed to give proper notice when it applied for a permit pursuant to Statewide Rule 46 to inject fluid into the Turnbow, Alfred Lease, Well No. 3, Turnbow (Burson) Field, Haskell County, Texas (hereinafter “the subject lease” or the “subject well”). Mr. Pueschel owns an interest in both the surface and mineral estate. Mexco argues that Mr. Pueschel’s complaint should be dismissed because it was not brought in a timely manner.

A Proposal for Decision was issued on December 12, 2001. This amended Proposal for Decision is being issued in order to address concerns regarding past mechanical problems with the subject well which were raised in the exceptions filed by the Complainant.

DISCUSSION OF THE EVIDENCE

On or around February 20, 1989, Mexco completed a Form H-1 (Application to Inject Fluid into a Reservoir Productive of Oil or Gas) to convert the subject well into an injection well for waterflooding. Notice of Mexco’s application was published in the Haskell Free Press, a newspaper having general circulation in Haskell County on April 20, 1989. Mexco’s Form H-1 was received by the Commission on May 8, 1989. The service list did not include the name and address of the surface owner.

On July 17, 1989, Mexco filed an amended Form H-1. The service list indicates that a copy of the application was served upon Mrs. Alfred Turnbow (Mr. Pueschel’s grandmother, Mabel Turnbow). Mexco believed that she was the surface owner at that time. In fact, however, Mabel Turnbow had conveyed the surface to Joyce Pueschel by a deed executed on March 20, 1989 and recorded in the Deed Records of Haskell County on May 4, 1989. Joyce Pueschel lived approximately 50 miles from the address to which the notice of application addressed to Mabel Turnbow was sent and never received a copy of the notice. As no objection was filed, Mexco’s application was approved by the Commission and a Permit to Inject Fluid into a Reservoir Productive of Oil or Gas was issued on September 6, 1989.

Mexco began injection into the subject well in 1990. In 1993, Mr. Pueschel, who was handling his mother’s affairs, observed a line carrying water from an adjoining lease to the subject well. Mr. Pueschel felt that Mexco did not have authority to inject off-lease water and demanded that Mexco stop doing so. Shortly thereafter, Mexco disconnected the line and sent Joyce Pueschel a proposed contract which would expressly authorize it to inject off-lease water. The parties never agreed upon the terms and no contract was ever executed.

Mr. Pueschel subsequently discovered that Mexco had resumed injection of off-lease water into the subject well. On August 19, 1998, Joyce Pueschel conveyed the property to her son David

Pueschel. In November 1998, Mr. Pueschel filed suit in the 39th District Court of Haskell County¹. During discovery, Mr. Pueschel obtained copies of Mexco's application for an injection permit. Observing that his mother was not included on the certificate of service list on either the original or amended Form H-1, he filed the complaint which is the subject of this docket.

Mexco Energy has not injected any off-lease water into the subject well since 1997. Mexco has used the subject well to dispose of saltwater from the Turnbow, Alfred Lease, Well No. 4, which is the only producing well on the subject lease. Well No. 4 currently produces approximately 180 barrels of oil and approximately 2,500 barrels of salt water per month.

The Turnbow lease has produced since 1967 and cumulative production through 1989 was 175,877 BO. A total of four wells have produced from the lease. By January 1990, production from the lease averaged less than 20 BOPD.

In 1988, a study was made to determine whether secondary recovery on the subject lease would be appropriate. An engineering study indicated that a waterflood on the lease would enhance recovery and the Turnbow No. 3 was recommended as the pilot injection well. Injection into the well was commenced in early 1990 after administrative approval of the injection well permit by the Commission.

Initially, water produced from the Turnbow No. 4 and from two other Mexco leases was injected into the No. 3. This produced water was insufficient for the waterflood and Mexco drilled a water supply well to provide make-up water for the waterflood. As a result of the increased injection, production from the lease increased to 38 BOPD by May 1992. Soon after this increase, production began to decline again and in 1997 injection of make-up water was ceased and the waterflood was effectively ended. Mexco has continued to inject produced water from the lease since 1997. Currently, 70-80 barrels of water per day are injected.

Between 1990 and 1997, more than 722,000 barrels of water were injected into the subject well. As a result of this injection, an additional 23,000 BO was recovered from the lease which would not have otherwise been recovered.

As a result of a complaint by Mr. Pueschel to the Railroad Commission's District Office in Abilene, an inspection of the subject well was conducted by Commission personnel on November 17, 2000. The inspector found that the subject well had pressure measuring 550 psi on the tubing and casing. Mexco was ordered to shut in the well and conduct a Commission-witnessed H-5 test before putting the well back into operation. The inspector also found that the wellhead packing was leaking. Mexco was ordered to repair the well and restore wellhead control. The inspector also found that the subject well had leaked saltwater into the soil covering an area 5' by 6" by 3". Mexco was ordered to repair the leak and remediate the spill. By February 2001, all of the aforementioned

¹ Cause No. 10, 867, styled David M. Pueschel vs. Mexco Energy Corporation, went to trial prior to the second hearing in this docket. The court entered a directed verdict dismissing Mr. Pueschel's claims on the grounds that they were barred by statute of limitations.

problems had been fixed.

The Commission approved a Form P-4 (Producer's Transportation Authority and Certificate of Compliance) transferring the subject lease to Texoma Oil Tools, Inc. effective October 1, 2001.

EXAMINERS' OPINION

Statewide Rule 46(c)(1) requires that notice of an application to inject fluid into a productive reservoir be mailed or delivered to the owner of record of the surface tract on which the well is located. The rule defines the term "of record" as meaning recorded in the real property or probate records of the county in which the property is located. Pursuant to Rule 46(d)(1)(C) an injection permit may be modified, suspended or terminated for just cause after notice and opportunity for hearing if there are substantial violations of the terms and conditions of the permit or of Commission rules.

Mr. Pueschel presented undisputed evidence that at the time that Mexco's original and amended applications were filed, his mother Joyce Pueschel was the surface owner of the tract. Because the deed conveying the property to Joyce Pueschel was recorded in the real property records of Haskell County before the original application was filed, she was clearly entitled to receive notice of the application. Mexco did not offer any explanation as to why Joyce Pueschel was not included on its list of persons given notice of the application. Instead, Mexco argued that its failure to send notice to the correct surface owner constituted a mere technical violation. The Fourteenth Amendment of the United States Constitution and the Article I, Section 19 of the Texas Constitution provide that a person cannot be deprived of life, liberty or property without due process of law. *Railroad Commission v. Graford Oil Corp.*, 557 S.W.2d 946, 953 (Tex. 1977). The state may not constitutionally authorize the deprivation of property rights without appropriate procedural safeguards, including notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990). The examiners believe that the notice requirements pursuant to Rule 46(c)(1) are necessary to protect fundamental, constitutionally protected rights and that Mexco's failure to properly notify the surface owner of its application for an injection permit constituted a substantial violation of Commission Rules within the meaning of Rule 46(d)(1)(C).

Mexco also argued that the complaint should be dismissed because it was not brought in a timely manner. Mexco contended that since Mr. Pueschel and his mother were aware of the existence of the injection well as early as 1993 when Mr. Pueschel first discovered that off-lease water was being injected into the well, they should have been on notice of any procedural defects in the application and should not be allowed to complain of improper notice approximately eight years later.

Mexco did not cite any specific statute or rule which would bar Mr. Pueschel's complaint due to the passage of time. Neither the Texas Natural Resources Code nor the Commission's Statewide Rules contain any generally applicable statutes of limitations comparable to those

contained in Chapter 16 of the Texas Civil Practice & Remedies Code. The only legal grounds cited by Mexco in support of its argument is the doctrine of waiver. However, to prove waiver one must show that there was an intentional relinquishment of a known, existing right or intentional conduct inconsistent with claiming it. *Giddings v. Giddings*, 701 S.W. 2d 284, 289 (Tex. App. Austin - 1985). There is no evidence in the record that, prior to filing the complaint, Mr. Pueschel or his mother knew of the surface owner's right to receive notice under Statewide Rule 46 and therefore they could not have formed the intent to waive any such right. The examiners are unable to find any other established legal or equitable doctrine which would bar the present complaint. The defense of estoppel arises "where by fault of one, another has been induced to change his position for the worse." *Id.* quoting *Wirtz v. Sovereign Camp, W.O.W.*, 268 S.W. 438 (Tex. 1925). Similarly to establish the defense of laches, one must prove an unreasonable delay by one having legal or equitable rights in asserting them and a good faith change of position by another to his detriment because of the delay. *Caldwell v. Barnes*, 975 S.W. 2d 535 (Tex. 1998). While there has arguably been an unreasonable delay in bringing the present complaint, Mexco presented no evidence that the passage of time caused it to change its position or suffer any harm.

Mexco sent notice of its application to a party whom it believed to be the surface owner of and who, in fact, had been the record owner until shortly before the application was filed. Accordingly, the evidence in the record suggests that Mexco's failure to provide notice of its application to the proper party was due to lack of due diligence on its part, rather than to a bad faith intent to circumvent Commission Rules.

Although the notice of Mexco's application should not have been granted administratively due to the defective notice, as a result of this complaint proceeding Mexco's application has now been subjected to a full-blown hearing on its merits. Mr. Pueschel did not propose any viable relief which the Commission might provide to remedy any perceived harm from the defective notice of application. Mr. Pueschel did not present any technical evidence which would support his request that the subject well be shut in. Mexco has met its burden of proof and its application satisfies the requirements of Chapter 27 of the Texas Water Code and the Railroad Commission's Statewide Rule 46. The well has operated smoothly for many years with the exception of the relatively minor problems reported by the Commission's District Office in November 2000. Those problems were promptly fixed by Mexco and do not constitute sufficient grounds for the Commission to order the well shut-in as Mr. Pueschel requests. There is no evidence in the record to indicate that operation of the well has resulted in pollution of surface water or useable quality ground water or that it has resulted in any harm to mineral bearing formations. In fact, the evidence in the record shows that Mexco's use of the subject well for waterflooding has prolonged the economic life of the lease and has prevented the waste of a substantial amount of oil. Approximately 23,000 barrels of secondary oil have been produced from the subject lease which would not otherwise have been produced without waterflooding. Accordingly, the examiners recommend that Mexco be allowed to continue to inject fluids into the subject well in accordance with its previously granted permit pursuant to Statewide Rule 46.

FINDINGS OF FACT

1. Notice of the hearing was given at least 10 days prior to the hearing to all interested persons entitled to notice.
2. On or around February 20, 1989, Mexco completed a Form H-1 (Application to Inject Fluid into a Reservoir Productive of Oil or Gas) to convert the Turnbow, Alfred Lease, Well No. 3, Turnbow (Burson) Field, Haskell County, Texas (hereinafter “the subject lease” or the “subject well”) into an injection well for waterflooding. Notice of Mexco’s application was published in the Haskell Free Press, a newspaper having general circulation in Haskell County on April 20, 1989. Mexco’s Form H-1 was received by the Commission on May 8, 1989. The service list did not include the name and address of the surface owner.
3. On July 17, 1989, Mexco filed an amended Form H-1. The service list indicates that a copy of the application was served upon Mrs. Alfred Turnbow (David Pueschel’s grandmother, Mabel Turnbow).
4. At the time Mexco’s application was filed with the Commission, the surface owner of the tract was Joyce Pueschel by virtue of a deed from Mabel Turnbow executed on March 20, 1989 and recorded in the Deed Records of Haskell County on May 4, 1989. Joyce Pueschel lived approximately 50 miles from the address to which the notice of application addressed to Mabel Turnbow was sent and never received a copy of the notice.
5. Mexco’s failure to provide notice of its application to the proper party was due to lack of due diligence on its part, rather than a bad faith intent to circumvent Commission Rules.
6. As no objection was filed, Mexco’s application was approved by the Commission and a Permit to Inject Fluid into a Reservoir Productive of Oil or Gas was issued on September 6, 1989. Mexco began injection into the subject well in 1991.
7. In 1993, Mr. Pueschel, who was handling his mother’s affairs, observed a line carrying water from an adjoining lease to the subject well. Mr. Pueschel felt that Mexco did not have authority to inject off-lease water and demanded that Mexco stop doing so. Shortly thereafter, Mexco disconnected the line and sent Joyce Pueschel a proposed contract which would expressly authorize it to inject off-lease water. The parties never agreed upon the terms and no contract was ever executed. Mexco resumed injection of off-lease water into the subject well after contract negotiations had fell apart.
8. On August 19, 1998, Joyce Pueschel conveyed the property to her son David Pueschel.
9. Mexco Energy has not injected any off-lease water into the subject well since 1997. Mexco has used the subject well to dispose of saltwater from the Turnbow, Alfred Lease, Well No. 4, which is the only producing well on the subject lease. Well No. 4 currently produces approximately 180 barrels of oil and approximately 2,500 barrels of salt water per month.

10. Between 1990 and 1997, more than 722,000 barrels of water were injected into the subject well. As a result of this injection, an additional 23,000 BO was recovered from the lease which would not have otherwise been recovered.
11. Injection into the subject well is in the public interest because it has helped to maximize oil recovery from the Turnbow (Burson) Field without endangering useable quality water.
12. An inspection of the subject well was conducted by Commission personnel on November 17, 2000. The subject well had pressure measuring 550 psi on the tubing and casing, the wellhead packing was leaking, and saltwater had leaked into the soil covering an area 5' by 6" by 3". These problems were all remediated by Mexco by February 2001.
13. Operation of the subject well has not resulted in pollution of surface water or useable quality ground water nor has it has resulted in any harm to mineral bearing formations.
14. The Commission approved a Form P-4 (Producer's Transportation Authority and Certificate of Compliance) transferring the subject lease to Texoma Oil Tools, Inc. effective October 1, 2001.

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.
3. Joyce Pueschel was entitled to receive notice of Mexco's application for an injection permit pursuant to Statewide Rule 46(c)(1) [16 TEX. ADMIN. CODE § 3.46(c)(1)].
4. Mexco failed to properly notify the surface owner at the time that it filed its application for an injection permit pursuant to Statewide Rule 46(c)(1) [16 TEX. ADMIN. CODE § 3.46(c)(1)].
5. Mexco has met its burden of proof and its application satisfies the requirements of Chapter 27 of the Texas Water Code and the Railroad Commission's Statewide Rule 46.
6. Approval of the application for commercial disposal authority will not harm useable quality water resources and will not harm other mineral bearing formations.

RECOMMENDATION

The examiners recommend that the Commission enter an order adopting the foregoing findings of fact and conclusions of law and ordering that the operator of the

Turnbow, Alfred Lease, Well No. 3, Turnbow (Burson) Field, Haskell County, Texas be allowed to continue to inject fluids into the well in accordance with its previously granted permit pursuant to Statewide Rule 46.

Respectfully submitted,

Mark H. Tittel,
Hearings Examiner

Donna Chandler,
Technical Examiner