

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

HUGHSON FLYING "A" RANCH, INC.,)
A Nebraska Corporation, and JANE A.)
GROVE)

Petitioners,)

vs.)

MEMORANDUM ORDER

Case No. CI15-69

THE NEBRASKA OIL AND GAS)
CONSERVATION COMMISSION:)
TEREX ENERGY CORPORATION and)
STEVAN V. JOHNSON)

Respondents)

This matter comes in consideration of the Petitioners' Petition for Judicial Review. Evidence was offered and received. Comments from counsel were made. Briefs were submitted. The matter was taken under advisement. The Court, having reviewed the pleadings and the law, makes the following findings and enters the following orders.

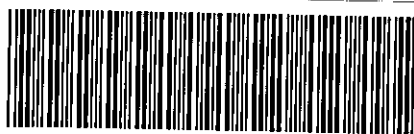
General Overview

This is a civil action brought by the Petitioners to challenge actions of the Nebraska Oil and Gas Conservation Commission (hereinafter "the Commission"). The Respondent, Terex Energy, applied with the Commission for approval to convert an existing oil well into a salt water disposal well. The Commission took the application up and after public hearing approved the same. Objections had been raised at the public hearing. Subsequent to the public hearing and the approval of the application, the Petitioners filed this action to challenge the Commission's decision.

Factual Findings

The record in this matter is extensive and voluminous. The Court has considered the entirety of the record in reaching its decision herein. The parties, in their briefs, identified certain relevant facts.

Terex Energy submitted an application to the Commission for approval to convert an oil well into a salt water disposal well. The well sought to be converted is the Laucomer 13-1 well and is located in the Spotted Tail Creek Field in Sioux County, Nebraska. This application was



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dated November 7, 2014. The Commission acknowledged receipt of the application on November 25, 2014 and assigned Case No. UIC14-14 to the application. It sought to convert the well into a Class II-D disposal well for the purpose of disposing of water produced with oil and gas from the Spotted Tail Creek Field and such other nearby wells as may be needed in the future. This well would be considered a commercial disposal well. Terex indicated that the well was necessary to dispose of produced waters brought to the surface during oil and gas production operations.

Terex was not a Nebraska corporation at the time of the filing of the application. Its business address is in Broomfield Colorado.

Terex asserted that it estimated a maximum initial rate of injection of 10,000 barrels per day. It expected to take water produced from Nebraska, Wyoming and Colorado to inject the same into the disposal well. It could accept water from the Silo Field¹, the Wattenberg Fields and many other operations in the area with such water of which to dispose. The application asserted that the produced water is to be filtered and run through separators to remove solids and any oil cut prior to injection into the Sundance Sands and/or Spearfish Sands.

Persons owning real estate within one-half mile of the proposed well site were notified of the application and given an opportunity to protest or object to the application. Five protests were filed with the Commission to oppose the application. Among the concerns raised in the protests related to the proposed volume of the use of the well site, the number of trucks necessary to accommodate the same and the prospect of contamination of the ground water through the injection of such waters sought to be disposed therein. It was noted that Terex expected to be operating the well “24-hours a day, seven days a week”. It was expected that an average of 80 trucks per day would be travelling on Hwy 29 to the well site from other locations.

A hearing was held on March 24, 2015. This hearing took place in Sidney, Cheyenne County, Nebraska. The Commission limited the permitted testimony at the hearing to those persons it identified as “interested parties” meaning those persons with a legal interest in real estate located within one-half mile of the proposed disposal well. All other protests or objections and some letters of support were kept in a separate file. That file is not a part of the record in this review. At the hearing, testimony was taken from several persons.

¹ This field is located north of Cheyenne, Wyoming.

Dave Haack testified that he operated a commercial saltwater disposal well in the Kimball County for approximately 20 years. He operates one currently and receives water primarily from Wyoming and Nebraska with a little coming from Colorado. His operations have always accepted such water from out-of-state and in-state entities. He noted that his facilities have accepted wastewater produced from Sioux County.

David Laucomer, one of the owners of the surface and minerals where the proposed well is located also testified. He spoke to his personal and familial experience with oil and gas operations and that he was not concerned about the development of this disposal well. He further testified that he and his family corporation would not have entered into the agreement with Terex if they felt that such a well would posed a threat to the water sources or environment in general.

Jenny Hughson, a member of the Petitioner Hughson Flying "A" Ranch, testified in opposition to the well. She asserted that her opposition was not to the production of oil and gas in Nebraska, nor in the disposal of wastewater produced by Nebraska production. She noted that there are a number of other such wells in operation in the State. Her opposition was to the acceptance of waste product from other states that should have their own disposal facilities.

Martin Gottlob, a vice-president with Terex, testified at the hearing. He testified, in part, that one well near the proposed disposal well site had produced 15,000 barrels of water and that its "twin", identified as Bird-Corman 11-16-2X, has produced 9,000 barrels of water. He further testified that other wells in the area were "dry holes" meaning that they did not produce oil and gas. He testified that Terex envisioned using this disposal well for at least ten years. He testified that, in the area of this proposed well, there have only been three producing oil/gas wells. He estimated the total amount of water produced from those wells in the area of Laucomer 13-1 was approximately 30,000 barrels in the entire history of their production. These three wells are the only currently producing wells in the Spotted Tail Creek Field.

Mr. Gottlob testified that Terex would not be conducting the actual hauling operations of the wastewater to the disposal site. Terex's responsibility would be to build and operate the site itself. Terex would not control the trucks hauling the wastewater or the route they would chose to utilize to reach the disposal site.

Two witnesses testified as "experts". Andy Peterson testified that Terex was asking for approval to dispose of 10,000 barrels of wastewater daily. Allen Heim testified that the

Laucomer 13-1 conversion would/could not be intended for the use of disposal of wastewater produced in the Spotted Tail Creek Field as that field had produced approximately 30,000 barrels of such water in its entire history. He estimated that 80 trucks would be necessary to transport 10,000 barrels a day. Finally, he testified that he did not know where the solid waste that would be created through the “filtration” process would be disposed of.

A series of letters were submitted in opposition to the application. They came from the Scotts Bluff County Commissioners, the Sioux County Commissioners, the Village of Harrison, Nebraska, Board of Trustees, the City of Mitchell, Nebraska, the Mitchell Public Schools Superintendent, the North Platte Natural Resources District, the Panhandle Public Health District and the Rosebud Sioux and Oglala Sioux Tribes.

After the hearing, the Commission entered an Order reflecting its findings and rulings on the application. This Order is identified as Order No. R-890. This Order was issued on April 22, 2015. In this Order, the Commission specifically found that it had jurisdiction to rule on the application and protests. It found that the subject matter of the application was the operation of one salt water disposal well located in Sioux County, Nebraska. It held that the disposal well could be operated as a commercial disposal well and that the injected water would be produced from various oil and gas wells. It further indicated that such waters would be delivered by truck to the disposal site. The trucks would not be owned or operated by Terex. The sources of the water to be disposed of at the site included waters from the Silo Field.

The Order noted that the lack of such disposal sites in the northern panhandle inhibits production of oil and gas in that area. It specified that “[w]aste will occur if exploration and production cannot occur because there is no local site to dispose of produced water in the northern panhandle of Nebraska.” “Waste” was defined by the Commission pursuant to *Neb. Rev. Stat. §57-903*. It found that those governmental or quasi-governmental entities which submitted letters in opposition to the application were not interested parties and therefore lacked standing to protest the application. The Commission further noted that there is no prohibition in the applicable statutes to permit produced water from oil and gas wells outside of the State of Nebraska to be transported into the State of Nebraska for disposal here.

The Commission ultimately granted the application and made some modifications to the same. First it set the maximum authorized injection pressure at 1,500 pounds at the surface. It

further reduced the rate of injection to 5,000 barrels per day. Subsequent to the entry of the Order, the Petitioners filed this appeal for judicial review of the Commission's action.

Legal Conclusions

The first responsibility of a court is to consider whether it has the authority to act as requested by any party to a dispute. In other words, a court must first consider the issue of jurisdiction. Can it act as requested? Whether it should act is secondary to that first question. This action was brought to this Court pursuant to two statutes. *Neb. Rev. Stat.* §57-913 permits an interested party to appeal proposed orders in accordance with The Administrative Procedure Act. That act, *Neb. Rev. Stat.* §84-917(2)(a) requires filing of petitions for judicial review in the district court of the county where the action is taken. While the well site is in Sioux County, the Commission sits in Cheyenne County, the hearing on this matter was held in Cheyenne County and the Order originated from the Commission in Cheyenne County. Therefore the matter is properly before this Court.

The principle of first considering jurisdiction is particularly notable in this matter as one of the principal arguments of the Petitioners is that the Commission overstepped its authority. The Court firsts considers this position.

The Commission's Authority

The Commission is an administrative agency and a legislative creation. It therefore has limited powers. It may only act in accordance with the authority given to it by the legislature. Such authority is found in the statutes creating the Commission itself. As such, the Court is called on to interpret such statutes. The Nebraska Supreme Court has recently reminded trial courts of certain well-settled principles of statutory interpretation.

“We give statutory language its plain and ordinary meaning, and we will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous. *State v. Hansen*, 289 Neb. 478, 855 N.W.2d 777 (2014). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to

read anything plain, direct, or unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004).”

State v. Goynes, 293 Neb. 288, 295-6, 876 N.W.2d 912, 918 (2016).

*Neb. Rev. Stat. §57-901*² references production of oil and gas and prevention of “waste” “in Nebraska” or “in the state”. This statute is commonly referred to as a provision of “legislative intent”. It sets out the “purpose” of those statutes that follow. *Neb. Rev. Stat. §57-905* creates the Commission and empowers it to act. This statute sets out, among other things, the following relevant provisions:

“(1) The commission shall have jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of sections 57-901 to 57-921.

(2) The commission shall have authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action by the commission.

...

(4) The commission shall have authority in order to prevent waste, to regulate: ...

(e) disposal of oilfield wastes, including salt water.

(5) The commission shall not have authority to limit the production of oil or gas, or both, from any pool or field except to prevent waste therein.

...

(7) The commission shall have authority to promulgate and to enforce rules, regulations, and orders to effectuate the purposes and the intent of sections 57-901 to 57-921.

...”

The Commission’s Order in this case is premised on its authority to act to prevent “waste”. Therefore, the Court must consider the applicable definition of waste. “Waste” is defined in *Neb. Rev. Stat. §57-903* as follows:

² The Court notes that in the interim of the Commission’s Order, the appeal herein and the rendering of this decision, the Legislature has modified the statutes. The Court considers the appeal based on the statutes existing at the time of the entry of the Order.

“Waste, as applied to oil, shall include underground waste, inefficient, excessive, or improper use, or dissipation of reservoir energy, including gas energy and water drive, surface waste, open pit storage, and waste incident to the production of oil in excess of the producer’s aboveground storage facilities and lease and contractual requirements, but excluding storage, other than open pit storage, reasonably necessary for building up or maintaining crude stocks and products thereof for consumption, use, and sale; (b) waste, as applied to gas shall include (i) the escape, blowing, or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas from wells producing oil or both oil and gas and (ii) the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced, but excluding gas that is reasonably necessary in the drilling, completing, testing, and producing of wells and gas unavoidably produced with oil if it is not economically feasible for the producer to save or use such gas; and (c) waste shall also mean the abuse of the correlative rights of any owner in a pool due to nonuniform, disproportionate, unratable, or excessive withdrawals of oil or gas therefrom causing reasonably avoidable drainage between tracts of land or resulting in one or more owners in such pool producing more than his or her just and equitable share of the oil or gas from such pool.”

As set out above, the Commission’s authority is expressly limited by the statutes which create and empower it. The statutes permit regulation of the oil industry in Nebraska and include regulation and avoidance of waste.

The Court finds that in this instance, the Commission overreached. The law permits it to regulate the disposal of oil wastes, including salt water. In this instance, the waste water to be disposed of is principally going to be transported into the State of Nebraska from outside the State. The Respondents point out that there exists a disposal site in Kimball which currently accepts such water. It asserts that to find in this case that the Commission erred in granting Terex’s application would detrimentally impact this already existing operation. The Court can only rule on that which is properly before it. Objections have been raised to this application. One of those objections is that this application will invariably permit the transport of waste water

from other states to be transported into this State for disposal. The Court finds that objection to have merit and support in the record.

The legislative intent of the statutes empowering the Commission clearly establishes that the Commission can only regulate the oil and gas production in the State of Nebraska. Perhaps the Legislature intends to grant to the Commission the authority to permit and regulate the transportation of waste water from other states into the State of Nebraska. The operative statutes do not specify that such authority was granted. The Court declines to read the statute that broadly.

The Court notes the following recent pronouncement from the Nebraska Supreme Court regarding consideration of such intent:

“If the Legislature believes that a power unit and hay grinder combination does not pose the type of risk it was intending to prevent and that excluding the combination from the CDL requirement would not violate the conditions for federal funding it desires to obtain, it could amend the Act's definition of "motor vehicle" in a fashion similar to the comparable definitions of the Motor Vehicle Certificate of Title Act and the Motor Vehicle Registration Act. It is not a proper function of this court to do so in the guise of statutory construction. (Citations omitted.)”

State v. Neisius, 293 Neb. 503, 513 (2016).

The *Neisius* holding is referenced in support of the contention that this Court ought not “read” matters into a statute that are best left to proper and legitimate debate in the Legislature where laws are to be created. In this instance, if the Legislature intended for the Commission to have the authority to permit the creation of a commercial disposal well intended to receive and dispose of wastewater from this and any other State, then it should so specify. Silence is not tacit approval. An administrative agency may only act within the authority mandated to it. To hold otherwise, permits an administrative agency more authority than is intended.

The Court, therefore, holds that the Order of the Commission identified as Order R-890 was in error and that the holding of the Commission should be and hereby is reversed and the Court orders that the application of Terex should be denied as submitted.

The Commission's Order

For completeness sake, the Court reviews the Order further. To the extent that it is found that the Commission has the authority to act as it did in this instance, the Court then reviews the decision for compliance with the applicable law. The Court considers this action on the premise that the action of the agency was presumptively valid. See *Dillard Dep't Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995). This presumption of validity is rebuttable. *Id.* The burden of proof is on the party challenging the agency action. *Id.*

The Commission stated that the purpose of permitting this well to be converted was to encourage oil production in the northern panhandle. It asserted that the presence of a closer disposal well would foster such production and, therefore, presumably, avoids waste of the available oil resources found there. There are at least three problems with this premise.

First, the Court notes that there exists an operational and permitted disposal site in Kimball which has accepted such wastewater in the past. There is no evidence in the record that this disposal site is unable or unwilling to continue to accept such waste water from the Sioux County area.

Second, the record reflects that in the Spotted Tail Creek Field, where the well site is proposed to be located, there has been limited oil production over time. There is insufficient evidence in the record to reflect that the establishment of this disposal site would foster growth in the area's oil production. In the absence of such evidence it is difficult to discern upon what evidence the Commission relied to make a determination that the presence of the disposal well would foster growth/development in the production of oil in the northern panhandle.

Third, the overwhelming evidence suggests that the water to be disposed of at this well site will not be produced in the northern panhandle but will in fact be transported from other states into the northern panhandle for the sole purpose of disposal therein. Again, it is difficult to discern how this avoids "waste" in the production of oil and gas in Nebraska.

Based on these findings as well, the Court finds that the Petitioners have met their burden of proof and have established that the challenged action of the Commission was invalid. The Court finds that the Commission's finding that the development of this well as a commercial disposal well is necessary to avoid waste was in error and is not sustainable by the record. The Court, therefore, holds that the Order of the Commission identified as Order R-890 was in error

and that the holding of the Commission should be and hereby is reversed and the Court orders that the application of Terex should be denied as submitted.

Conclusion

The Court, for reasons more particularly stated above, finds that the Petitioners' Petition for Judicial Review should be and hereby is sustained and granted. The Order of the Commission identified as Order R-890 was in error and that the holding of the Commission should be and hereby is reversed and the Court orders that the application of Terex should be denied as submitted. All other relief not specifically granted herein is denied.

BY THE COURT

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District Judge

CERTIFICATE OF SERVICE

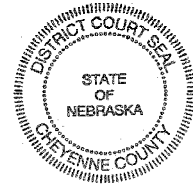
I, the undersigned, certify that on June 29, 2016 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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Date: June 29, 2016

BY THE COURT: Debra A. Hume
CLERK