

2007

Weststar Exploration Company, Inc. v. Cochrane Resources, INC. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTSTAR EXPLORATION COMPANY, INC.,)
a Nevada Corporation,)

Plaintiff/Appellant,)

vs.)

COCHRANE RESOURCES, INC., et al.,)

Defendants/Appellees.)

Case No. 20070413-CA

JOINT BRIEF OF APPELLEES COCHRANE RESOURCES, INC., P & M
PETROLEUM MANAGEMENT, LLC, NEWFIELD ROCKY MOUNTAINS, INC.
fka INLAND RESOURCES, INC. and QEP UINTA BASIN, INC.

Appeal from the Eighth Judicial District Court of Uintah County
Honorable John R. Anderson

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UTAH APPELLATE COURTS

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LIST OF PARTIES

Weststar Exploration Company, Inc.

Washington Mutual Bank

Cochrane Resources, Inc.

P & M Petroleum Management LLC

Newfield Rocky Mountains Inc. fka Inland Resources, Inc.

QEP Uinta Basin, Inc.

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STATEMENT OF JURISDICTION

Utah Code Ann. Section 78-2a-3(2)(j) gives this Court jurisdiction over this appeal.

STATEMENT OF ISSUES

The issues on appeal are:

1. Did the trial court commit error in granting summary judgment dismissing Plaintiff's complaint, ruling that Plaintiff failed to provide any admissible evidence of ownership of a pipeline which Plaintiff claims was wrongfully used by Defendants?

2. Should the Plaintiff be allowed, first by a motion to reconsider after the entry of summary judgment and then on appeal, to change its theories, submit new documents and claim rights under an agreement signed after the claimed damages occurred?

3. Are other owners of the pipeline indispensable parties to a claim of trespass of the pipeline?

STANDARD OF REVIEW

When reviewing a ruling on summary judgment, the Court follows a correctness standard. Schaerrer v. Stewart's Plaza Pharm., Inc., 2003 UT 43, ¶14, 79 P.3d 922.

A motion to reconsider is not recognized by the court. A trial court ruling on a motion to reconsider is reviewed under an abuse of discretion standard. Radakovich v. Cornaby, 2006 UT App 454, ¶5, 147 P.3d 1195; Tschaggeny v. Milbank Ins., 2007 UT 37, ¶15, 163 P.3d 615.

APPLICABLE STATUTES AND RULES

Utah R. Civ. P. 19. See Addendum A.

Utah R. Civ. P. 56. See Addendum B.

Utah R. Civ. P. 59. See Addendum C.

Utah R. Evid. 1002.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.

STATEMENT OF THE CASE

The trial court granted summary judgment, dismissing the Plaintiff's Complaint seeking trespass damages for using a pipeline to transport small quantities of natural gas. The court found that Plaintiff had provided no proof of the allegations in Plaintiff's Complaint. Plaintiff's complaint, filed in February 2005, claimed damages in trespass beginning in 2001 for Defendants' use of the pipeline based on a claim that the Plaintiff was the sole owner of the pipeline.¹

The Complaint alleges in paragraphs 7, 8, 9, 10 and 11 as follows:

7. The subject of this lawsuit is the unauthorized use of approximately 4 miles of a natural gas pipeline and easement, which runs in an east/west direction and

¹

That allegation in the complaint has never been amended. However, Plaintiff has taken various other positions in this case, including admitting that others owned the pipeline and now, on appeal, claiming a possessory interest in the pipeline.

has a total length of approximately 8 miles, located in the North Bonanza field, in Section 36, Township 7 South, Range 24 East, Section 31, Township 7 South, Range 25 East, Sections 6 and 7, Township 8 South, Range 25 East, and Sections 12, 13, 23, 24, 26, and 27, Township 8 South, Range 24 East, Salt Lake Base & Meridian, Uintah County, Utah (hereinafter the "Pipeline").

8. Plaintiff is the current owner of the Pipeline.

9. During the times of the unauthorized use of the Pipeline, which unauthorized use is the subject of this litigation, the Pipeline was owned by either the Plaintiff or by Mr. William C. Gilmore, who resides in Houston, Texas, or by other business entities owned or controlled by Mr. Gilmore. Mr. Gilmore and the other business entities mentioned in the previous sentence are collectively referred to herein as "Plaintiff's Predecessors in Interest" or as "Plaintiff's Predecessors."

10. Mr. Gilmore is the president and controlling shareholder of the Plaintiff.

11. Plaintiff has sole right to pursue, and the sole ownership of, the claims hereby presented by assignment from Mr. Gilmore and the other business entities referenced in the previous paragraph.

(R. 11-12).

Mr. Gilmore testified in his deposition² that Bonanza Gas built and owned the pipeline at issue in this matter. (Gilmore Dep. at 95, 96, R. 479). Mr. Gilmore further attested that Bonanza Gas was either a partnership with seven or eight partners or a

²

For the Court's convenience, pages from Mr. Gilmore's deposition, submitted to the trial court prior to summary judgment and referred to in this brief, are attached in the addendum. Page 18 of the (summary judgment) oral argument transcript is also attached. That page contains quotations from pages 145 and 146 of Mr. Gilmore's deposition testimony. Following citations to these pages, their location in the record is specified, and references to other supporting materials in the record are supplied.

corporation with multiple shareholders. (Gilmore Dep. at 10-11, 13, 15, 93-94, R. 223, 225, 227-28, 479).³ In addition, Mr. Gilmore averred that Ted Collins Jr. (Gilmore Dep. at 114, 151-52, R. 332-334), Herbert E. Ware, Jr. and Houston Exploration Company (hereinafter referred to as "Houston Exploration") owned interests in the pipeline. (Gilmore Dep. at 86, 112, 114, 151-52, R. 331-335). In his deposition, Mr. Gilmore denied that Plaintiff represented the interests of Houston Exploration, Ted Collins Jr. and Herbert E. Ware, Jr. (Gilmore Dep. at 112, Transcript of oral argument at 18 quoting Gilmore Dep. at 145-46, R. 335, 901).

All Defendants denied the allegations that Plaintiff owned the pipeline at the time for which it claimed damages, or had the right to recover for use of the pipeline. (R. 17-18, 34-35, 43-45). In part, these denials were made because it was known that the pipeline, and other assets associated with it, had been the subject of a receivership involving Bonanza Gas, under which Ken Allen/Cochrane Resources had been appointed by the court to operate the pipeline, and that revenues gained from its operation had been used to pay expenses of operating the pipeline and repairs to it. (Gilmore Dep. at 85-87, 102, 152, R. 330-332, 480). Mr. Gilmore, in his deposition, admitted that the pipeline had been operated by Cochrane Resources under court order. (Gilmore Dep. at 86, 102,

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Documentation submitted by Plaintiff after the trial court granted the motion for summary judgment showed that Bonanza Gas was a Texas Corporation. (R. 584).

152, R. 330-332). The documents provided by Plaintiff by attachment to its Motion to Reconsider show that Cochrane Resources paid the rental payments to the BLM on the pipeline right-of-way for the years 2002 through 2005. (R. 609-619). Bonanza Gas was billed for the BLM easement rental in 2001. (R. 604, 606-607).

The defendants attempted to conduct discovery to determine what evidence existed to support Weststar's allegations that Weststar owned the pipeline at the time of the alleged trespass. Weststar was asked repeatedly for evidence supporting Weststar's allegations that it was the owner of the pipeline. The only information provided was Mr. Gilmore's claim that he became the owner of the pipeline by virtue of an unrecorded assignment from Bonanza Gas and then he transferred the interest to Weststar. (Gilmore Dep. at 33, R. 481, 358-365, 371, 417). Despite numerous requests and promises, Plaintiff never produced the "unrecorded assignment" from Bonanza Gas to Mr. Gilmore. In Appellant's brief, that position has changed to a claim that Mr. Gilmore obtained title to the pipeline by virtue of being a shareholder of Bonanza Gas.

Weststar never provided any admissible evidence to support its allegations that Plaintiff had title to the pipeline and sole right to use the pipeline as alleged in its Complaint. All admissible evidence showed the pipeline was owned by Bonanza Gas, which was

not a party to the case. The trial court, therefore, granted summary judgment dismissing the complaint. (R. 533, 537).

More than a month after the court granted summary judgment, Plaintiff filed its Motion to Reconsider, attempting to change its theories and attaching documents that it had never produced in discovery. (R. 668). The motion and documents were not proper and, in addition, did not strengthen the Plaintiff's claim, but rather showed ownership of the pipeline by Bonanza Gas. The documents further showed that the pipeline was operated during the time in question by Cochrane Resources under the receivership order. The trial court denied the motion to reconsider. (R. 834).

Course of Proceedings and Facts

1. Weststar filed its Complaint on or about February 9, 2005. Plaintiff's complaint sought damages for trespass, claiming sole ownership of the pipeline from 2001 to 2005. (R. 3-12).

2. The pipeline is located on a BLM easement in Uintah County, Utah and is subject to the permit terms of the BLM. It is alleged that Defendants used 4 miles of the pipeline to transport small quantities of gas from Chevron and QEP to operate equipment on certain gas wells. (R. 10).

3. The parties held a telephone attorneys' planning meeting on June 29, 2005. The Scheduling Order memorializing the deadlines in the Report of Attorneys' Planning Meeting was signed by the court on July 22, 2005. (R. 112). Under the discovery plan, the

parties were to submit their initial disclosures to each other by July 22, 2005, and complete fact discovery by October 31, 2005. (R. 112).

4. All parties in the case, except Weststar, submitted their initial disclosures to all other parties by the July 22, 2005 deadline. (R. 30-31, 39-40). Plaintiff never filed its initial disclosures until the court granted a motion to compel. (R. 135-138).

5. The failure of Plaintiff to meet the deadline for initial disclosures marked the beginning of a pattern that lasted throughout this litigation, whereby Plaintiff failed to meet discovery deadlines, failed to provide documents and other information when requested by the other parties (and agreed to by Weststar) and otherwise failed to prosecute this action.

6. After numerous attempts, the parties took the deposition of Plaintiff's president, Mr. Gilmore, on October 3, 2005.

7. Gilmore testified, in his deposition, that he formed Bonanza Gas Company sometime in the early 1990s. (Gilmore Dep. at 10-11, 13-16, R. 222-225, 227-228). Bonanza Gas obtained the easement for the pipeline from the BLM and owned, constructed and operated the pipeline. (R. 598).

8. Gilmore testified that he had an unrecorded assignment of ownership of the pipeline from Bonanza Gas to himself personally, and an unrecorded assignment of ownership from himself to

Plaintiff. He and his attorney agreed to produce those documents to all counsel. He did provide a form Assignment of Oil and Gas Leases from himself to Weststar that might be construed to include a pipeline, but he never produced any assignment from Bonanza Gas. (Gilmore Dep. at 34, R. 220).

9. Gilmore also testified that Weststar had assigned a fifty (50%) percent interest in the pipeline to Houston Exploration Company on March 26, 2004. (Gilmore Dep. at 112, R. 335). He further testified that two individuals with whom Gilmore has a long history of litigation, Ted Collins and Herbert Ware, Jr., each had a longstanding 8.33% ownership interest in the pipeline. (Gilmore Dep. at 114, R. 334). Weststar did not claim to represent the interests of Houston Exploration, Collins or Ware. (Transcript of oral argument at 18 quoting Gilmore Dep. at 145-46, R. 901).

10. Gilmore further admitted that, from 2002 into 2005, the pipeline and other assets were operated by Cochrane Resources (one of the defendants) under a court order. (Gilmore Dep. at 86, R. 331).

11. When Plaintiff failed to produce any admissible evidence of ownership of the pipeline, Defendants moved for summary judgment. The motions were briefed and the court held oral argument.

12. The primary issue at oral argument and in the motions for summary judgment was Plaintiff's lack of any admissible evidence

that it, rather than Bonanza Gas, owned the pipeline. (Transcript of oral argument at 12, 48, 50, R. 901). Plaintiff attached, to its memorandum in opposition to Cochrane Resources, Inc.'s summary judgment motion, a 1988 operating agreement between Gilmore Oil and Gas as operator and several nonoperating parties. (R. 453). Plaintiff, at oral argument, produced agreements between Plaintiff and Houston Exploration to which Defendants objected. (Transcript of oral argument at 30, R. 901). Plaintiff argued that those documents gave Plaintiff title to the pipeline. It was pointed out that the 1988 agreement predated the construction of the pipeline by 3 years, that Bonanza Gas was not a party to either agreement, that Mr. Gilmore had earlier testified that Bonanza operated the pipeline and that Gilmore Oil and Gas operated certain wells. (Gilmore Dep. at 11, R. 227, Transcript of oral argument at 25, R. 901).

13. The court granted summary judgment, finding that Plaintiff had failed to provide any admissible evidence of ownership of the pipeline as alleged in the complaint. (R. 533, 537).

14. More than a month after entry of the summary judgment, Plaintiff filed a document it titled Motion to Reconsider and attached numerous documents that it had failed to produce in discovery. Plaintiff alleged that the newly produced documents showed that Plaintiff owned the pipeline. (R. 668).

15. The trial court denied that motion. (R. 834).

16. Plaintiff, on appeal, has changed its theory and no longer claims ownership based on the never produced unrecorded assignment claimed by Mr. Gilmore, but instead alleges that Gilmore acquired the pipeline by operation of law as a shareholder of Bonanza or that Plaintiff had a possessory right to the pipeline based on the operating agreement and a participation agreement between Plaintiff and Houston Exploration.

SUMMARY OF ARGUMENT

Weststar had numerous requests and opportunities to provide proof of the ownership of the pipeline as alleged in the complaint. All evidence and the documents it provided show the pipeline was owned by Bonanza Gas Company, Inc. Weststar's president claimed that he had documentary proof (an unrecorded assignment) and repeatedly promised to supply it. He failed to do so and then, at oral argument, claimed a right to the pipeline under a 1988 operating agreement and the Houston Exploration financing documents. Now, on appeal, Plaintiff's position has changed again, claiming either that Mr. Gilmore acquired the pipeline by operation of law, alleging that Bonanza was dissolved, or that Plaintiff has a possessory right under the terms of the agreements with Houston Exploration.⁴ Those theories were never raised before the trial

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Plaintiff, in its brief, also improperly attempts to include parts of the deposition transcript that were not before the trial

court on the motion for summary judgment and never ruled on by the court below.

Regardless of the shifting of Plaintiff's positions, the record stands uncontradicted that Bonanza Gas owns the pipeline. There has been no admissible evidence showing any transfer of that ownership. For several years, 2002-2005, operation of that pipeline was transferred to Cochrane Resources under a court order. Not until 2006 did the BLM authorize Plaintiff to operate the line, which date was well after any claimed damages occurred.

The additional documents submitted by Weststar in its Motion to Reconsider, after the motions for summary judgment had been granted, should not be considered on appeal. However, even if they are, they establish that Defendants are entitled to judgment as a matter of law.

ARGUMENT

POINT I

PLAINTIFF SHOULD NOT BE ALLOWED TO CHALLENGE THE TRIAL COURT'S DECISION BY ADDING NEW DOCUMENTS AND NEW THEORIES ON APPEAL.

Weststar apparently agrees that the trial court's grant of summary judgment was correct based on the record at the time of the ruling, because Weststar is now attempting to overturn the trial court's decision by first seeking to add new documents (that were never produced in discovery but rather through an improper motion

court. See Appellant's brief at footnote 9.

to reconsider) to the record, and then by arguing that it did not have to show ownership but only a "possessory interest" in the pipeline.⁵ This theory was not pled and was not raised nor argued in connection with the motions for summary judgment in the court below.

Motions to reconsider are not recognized by the Rules of Civil Procedure and are not recognized by the courts. Gillett v. Price, 2006 UT 24, ¶1, 135 P.3d 861; Radakovich, 2006 UT App 454, ¶¶5, 13; Tschaggeny, 2007 UT 37, ¶15. The trial court has discretion on whether to consider a motion to reconsider and the trial court's ruling will only be reviewed using an abuse of discretion standard. Id. at ¶16. Issues not before the court when it rules on a motion for summary judgment are waived and may not be raised later by motions to reconsider or on appeal. Eldridge v. Farnsworth, 2007 UT App 243, ¶ 33, 166 P.3d 639; Hanover v. Fields, 568 P.2d 751, 753 (Utah 1977); Battistone v. Am. Land & Dev. Co., 607 P.2d 837, 838 (Utah 1980).

In addition, it is established law that one cannot put forth "new" evidence after entry of the judgment unless that evidence is "newly discovered" and the proponent "could not, with reasonable diligence discover it prior to oral argument." Utah R. Civ. P.

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Right to possess generally arises from ownership of the property. Owest v. Utah Telecomm. Open Structure Agency, No. 2:05-CV-00471 (D. Utah July 18, 2006) at 12 (attached in addendum); Butler v. Pollard, 800 F.2d 223 (10th Cir. 1986).

59(a)(4); Barnard v. Sutliff, 846 P.2d 1229, 1235 (Utah 1992).

Furthermore,

when a party takes a clear position in a deposition, that is not modified on cross-examination, [the party] may not thereafter raise an issue of fact by his [or her] own affidavit which contradicts the evidence from the deposition, unless [the party] can provide an explanation of the discrepancy. A contrary rule would undermine the utility of summary judgment as a means for screening out sham issues of fact.

Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983); Gaboury v. Ireland Rd. Graco Brethren, Inc., 446 N.E.2d 1310 (Ind. 1983).

Weststar's complaint alleged, and its position below was, that it owned the pipeline through an unrecorded and unproduced assignment from Bonanza Gas to Mr. Gilmore, who in turn assigned ownership to Weststar Exploration Company.⁶ (R. 3). Weststar should not be allowed, for the first time on appeal, to submit records from the BLM, by attaching them to an improper motion to reconsider and then to change its position to claim that it had a possessory

6

The assignment from Gilmore to Weststar has its own set of problems. The document was apparently signed in December 2003 and then recorded in the county recorder's office on March 31, 2004. (R. 365). In an attempt to bootstrap an argument of legitimacy back to the date of the alleged injury in the complaint, the assignment states that, although dated 2003 and recorded in 2004, it is effective January 1, 2000. (R. 363-365). Thus, through this assignment, Weststar would have the Court believe that the pipeline was assigned to Weststar before Weststar was even created as a corporation. (Gilmore Dep. at 93, R. 479). The Nevada corporate records show Weststar was not incorporated until August 9, 2000. A conveyance to a nonexistent entity is a nullity. Young v. Young, 1999 UT 38, ¶22, 979 P.2d 338.

right to the pipeline as operator, under an operating agreement, rather than ownership as alleged in its complaint.

A. PLAINTIFF PROVIDED NO EVIDENCE IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT TO SUPPORT ITS ALLEGATION THAT IT OWNED THE PIPELINE.

The motions for summary judgment were based on Weststar's claim that it owned the pipeline, as alleged in the complaint and as claimed by Mr. Gilmore in his deposition. Despite numerous requests by Defendants and promises by Plaintiff, Plaintiff never produced the unrecorded assignment Mr. Gilmore claimed he had in his office showing the transfer of title from Bonanza Gas. If such a document exists, Plaintiff needed only to produce the same in response to the motions for summary judgment.

When Weststar filed its Memorandum in Opposition to the Motions for Summary Judgment, it attached to Mr. Gilmore's affidavit a form Assignment of Oil and Gas Leases from Mr. Gilmore to Weststar, (R. 365), and attached to one of its memoranda a Model Form Operating Agreement, dated June 22, 1988, between Gilmore Oil and Gas as operator and W. Brett Smith, C.O. Ted Collins, Harry Phillips, Jr., Herbert E. Ware, Jr., Eddy Refining Company, Charles Parker and Lowe Petroleum Company as non operators.⁷ (R. 431). Neither Bonanza Gas nor Weststar was a party to that agreement. (R.

⁷

Gilmore in his deposition testified that Gilmore Oil and Gas operated certain wells and that Bonanza owned and operated the pipeline. (Gilmore Dep. at 11, R. 227.)

423-453). At the oral argument on the summary judgment motions, Plaintiff delivered a Participation Agreement, dated March 1, 2004, between Weststar and Houston Exploration and a Model Form Operating Agreement between Weststar and Houston Exploration. None of those documents shows any transfer of the pipeline from Bonanza Gas nor do they give to Weststar any ownership or possessory rights.

The 1988 operating agreement was dated three years prior to the construction of the pipeline, Bonanza Gas was not a party to the agreement and Mr. Gilmore testified that Gilmore Oil and Gas operated the wells and Bonanza Gas operated the pipeline. The documents involving Houston Exploration were part of the financing between Weststar and Houston Exploration but involved no transfer of ownership from Bonanza Gas.

B. THE DOCUMENTS ATTACHED TO THE MOTION TO RECONSIDER ALSO DID NOT TRANSFER ANY OF BONANZA GAS'S INTEREST, BUT RATHER SHOW THAT PLAINTIFF HAD NO RIGHT UNDER THE BLM PROCEDURES TO OPERATE THE LINE UNTIL 2006.

After the court granted summary judgment, Weststar tried to improve its argument by attaching documents to a motion titled Motion for Reconsideration. The new documents attached to that motion included BLM receipts showing Bonanza Gas and Cochrane Resources being the operators and paying the lease payments on the easement during the time period in question, (R. 601-628), the right-of-way permit issued to Bonanza Gas in 1991 for the pipeline, (R. 597-598), documents submitted by Bonanza Gas to obtain the

right-of-way, (R. 586-595), Certificate of Incorporation showing Bonanza Gas was incorporated in Texas in December 1990, (R. 584), a Decision of the BLM approving an assignment to Weststar from Bonanza Gas of the right-of-way on March 13, 2006, (R. 579), and a letter from the BLM to Plaintiff dated June 8, 2004. (R. 547).

This new evidence (NOT "newly discovered evidence") had been seen neither by the court nor by any of the defendants before the Motion for Reconsideration (and not for the lack of asking). None of the defendants had the opportunity to examine Mr. Gilmore with regard to these documents. In addition, they were not used in support of Plaintiff's opposition to Defendants' motions for summary judgment, nor were they provided, at the very least, at oral argument so that the court could consider them as part of Weststar's arguments in opposition to Defendants' motions for summary judgment. The documents should not be considered by this Court. Those documents should have been "discovered and produced" prior to the motions for summary judgment as required by the scheduling order. (R. 112).

Even if the Court considers these documents, they do not support Plaintiff's claim, and, in fact, contradict Mr. Gilmore's testimony at his deposition, that Weststar was the owner of the pipeline. The documents show that Bonanza Gas had the BLM permit for the right-of-way, that Bonanza Gas and Cochrane Resources operated the pipeline from 2001 to 2005, and that Plaintiff was

told in the June 8, 2004 letter that an assignment and subsequent approval by the BLM were required to allow Plaintiff to operate the pipeline. That approval was not given until March 2006, well after any claim for damages.⁸ (See June 2004 and March 2006 letters attached in addendum.)

C. GILMORE'S ASSERTION IN HIS AFFIDAVIT THAT BONANZA GAS ASSIGNED THE PIPELINE TO HIM IS NOT ADMISSIBLE, AND APPARENTLY ABANDONED, BASED ON THE NEW ARGUMENTS.

The only remaining claim by Plaintiff to support its position is the statement in Mr. Gilmore's affidavit that he had an unrecorded assignment of the pipeline from Bonanza Gas. Mr. Gilmore never presented the document establishing the assignment, despite numerous promises to do so. It has become apparent that no such assignment exists, as he has now changed his position on that claim and is relying on other documents that were attached to the motion to reconsider. Gilmore's affidavit statement violates Rule 1002 of the Utah Rules of Evidence. Additionally, the statement is barred by Utah law because it involves an alleged assignment of a real property interest that must be in writing to meet the statute of frauds. The statement is not admissible as evidence and should not be considered. Mountain W. Surgical Ctr. v. Hosp. Corp. of Utah, 2007 UT 92, 592 Utah Adv. Rep. 23.

⁸

The BLM Decision references an assignment from Bonanza Gas to Plaintiff but no such assignment was provided in the additional documents.

The court correctly granted the motions for summary judgment, because Weststar either could not, or declined to, provide evidence to raise a genuine issue of material fact establishing its ownership of the pipeline at the time the court ruled on the motions for summary judgment. Plaintiff's belated attempts to cure that problem evince only that any right Plaintiff had to operate, possess or use the pipeline did not begin until March 2006, when the BLM approved Plaintiff as the operator.

POINT II

THE DOCUMENTS BETWEEN HOUSTON EXPLORATION AND WESTSTAR FROM 2005 DO NOT CREATE A POSSESSORY RIGHT TO AN INTEREST IN THE PIPELINE, SINCE THE PIPELINE WAS OWNED BY BONANZA GAS, NOT WESTSTAR.

Bonanza Gas built the pipeline in question in 1991. Bonanza Gas was a Texas corporation. It apparently had seven or eight shareholders. (Gilmore Dep. at 93-94, R. 479). At the trial court, Plaintiff, through its president, claimed that the chain of title from Bonanza Gas to Weststar consisted of an unrecorded, unproduced and apparently nonexistent assignment signed by Mr. Gilmore on behalf of Bonanza Gas to Mr. Gilmore. (Gilmore Dep. at 34, 95, R. 220, 479). None of the other seven or eight shareholders in Bonanza Gas is a party to the alleged assignment to Mr. Gilmore. (Gilmore Dep. at 10-11, 13, 15, 94, 96, R. 223, 225, 227-228, 479). According to Mr. Gilmore, the date of this alleged unrecorded assignment is sometime in 2005, the same year as the filing of this lawsuit. (Gilmore Dep. at 95, R. 479). This unproduced assignment

was made after the damages are alleged (in the complaint) to have occurred.

Since that assignment does not exist or has not been supplied, Plaintiff claims that it has a right to bring this lawsuit because it has a right to possession in, rather than ownership of, the pipeline. This alleged right to possession is predicated on a belatedly produced Participation Agreement in which it purported to sell an interest in the pipeline to Houston Exploration, and an Operating Agreement between Weststar and Houston Exploration making Weststar the operator. Plaintiff makes that claim, but neither provides anything evidencing a transfer of title or possession from Bonanza Gas nor points to anything in the documents to support the claim.

Plaintiff's theory appears to be that a person can sell an interest in a pipeline which he does not own, and then enter into an agreement with the buyer giving him, the non-owner seller, the right to possess it. Indeed, these transactions were completed while the buyer's president claims that other parties owned interests in the pipeline, and those parties are not signatories to either agreement. One cannot give oneself rights one does not have by purportedly conveying such non-existent rights to another and then acquiring them back from the other. Sharp v. Riekhof, 747 P.2d 1044, 1046 (Utah 1987); Julian v. Peterson, 966 P.2d 878 (Ut. Ct.

App. 1998); Am. Vending Serv. Inc. v. Morse, 881 P.2d 917 (Ut. Ct. App. 1994).

POINT III

WESTSTAR'S NEW CLAIM THAT GILMORE RECEIVED TITLE TO THE PIPELINE BY VIRTUE OF THE DISSOLUTION OF BONANZA GAS BY OPERATION OF THE LAW IS NOT SUPPORTED BY THE RECORD AND IS NOT CONSISTENT WITH THE LAW REGARDING CORPORATE DISSOLUTION.

Apparently conceding that there is no assignment from Bonanza Gas to Mr. Gilmore, Plaintiff for the first time on appeal argues that Mr. Gilmore obtained title to the pipeline by virtue of the dissolution of Bonanza Gas by operation of law, citing Texas statute and cases for the proposition that the assets of a dissolved company belong to the shareholders. Nothing in the record demonstrates that Bonanza was dissolved, nor is there information as to the number of shareholders. In addition, Weststar omits reference to the law that, when there is a dissolution of a company, creditors and taxes must be satisfied before shareholders have any right to the assets of the dissolved company.

In other words, after any dissolution, there is a liquidation of the corporate assets in which the debts are paid according to their rights and priorities. If, and only if, assets remain available after all corporate liabilities are paid, assets are then distributed to shareholders according to their rights and priorities. The distribution of assets to shareholders is evidenced by conveyances appropriate to the type of asset. Further, all

shareholders are distributed assets based on their number of shares. Gilmore apparently owned only 8.33% of the shares of Bonanza Gas. (Gilmore Dep. at 10-11, R. 227-228). Even the Texas case cited by Weststar in support of its argument is a case involving a deed conveying assets of a dissolved corporation, and demonstrates that, until the liquidation takes place and there is a distribution of assets by conveyance, it is unknown whether and which assets go to which shareholders of a dissolved corporation. Until the liquidation and the distribution by conveyance, the assets remain with record title in the corporation. Since Weststar produced no evidence explaining if and how the assets of Bonanza Gas were distributed and there was no claim before the trial court of any such liquidation, the trial court correctly ruled that neither Gilmore nor Weststar owned the pipeline.

POINT IV

WESTSTAR'S NEW POSSESSORY CLAIMS ARE NOT SUPPORTED BY THE LANGUAGE OF THE DOCUMENTS (i.e., PARTICIPATION AGREEMENT AND OPERATING AGREEMENT AND BLM RECORDS) ON WHICH THOSE CLAIMS ARE BASED.

While Weststar failed to present evidence to support its allegations that it is the sole owner of the pipeline or to contradict the documents it produced showing others to be owners and has changed its argument, that new argument regarding possession still does not defeat the granting of summary judgment against it. Even if one assumes for the sake of argument that Plaintiff's new claims are accurate and that the defects in the

chain of title do not thwart Plaintiff's claims, and the Court further overlooks that Plaintiff's argument is based on evidence that was available but not produced at the time of the original briefing, not newly discovered evidence, Defendants are still entitled to summary judgment. The newly produced Operating Agreement does not support Plaintiff's claim.

Weststar's claim of a right of possession to bring this action by virtue of being the operator under the operating agreement with Houston Exploration Company is not supported by the language of that agreement. The agreement provides that the "Operator shall not be deemed or hold itself out as the agent of the Non-Operator with authority to bind them to any obligation or liability assumed or incurred by Operator as to any third party." (Article V Operating Agreement, R. 782).

The operator under this agreement is Weststar. The only non-operator to sign the agreement is Houston Exploration Company. A reading of the operating agreement does not reveal any language authorizing the operator to bring a lawsuit on behalf of the parties to the agreement, much less can it provide authority to bring an action for non-parties such as Ted Collins and H. Ware.

The narrow authorization for lawsuits mentioned in the operating agreement pertains to lawsuits giving the operator authority to

settle any single uninsured third party damage claim or suit arising from operations hereunder if the expenditure

does not exceed Ten Thousand Dollars (\$10,000.00) and if the payment is complete settlement on such claim or suit. If the amount required for settlement exceeds the above amount (\$10,000.00), the parties hereto shall assume and take over the further handling of the claim or suit unless such authority is delegated to operator.

(Article X Operating Agreement, R. 772).

First, the lawsuit before the Court does not arise from the operations "hereunder" (the operations authorized by the operating agreement). Second, the lawsuit is not a third party uninsured claim. Third, the lawsuit seeks to recover more than Ten Thousand Dollars. Finally, the alleged claim for damages involves claimed actions for years before the operating agreement was in existence. Paragraphs 13 and 19 of Weststar's Complaint both allege that trespass started in 2001 and continued through 2004. The operating agreement does not support Plaintiff's claim.

POINT V

EVEN IF THE COURT FOUND THERE WAS AN ISSUE OF MATERIAL FACT IN DISPUTE REGARDING THE PLAINTIFF'S OWNERSHIP/POSSESSION OF THE PIPELINE, THE CASE SHOULD STILL BE DISMISSED UNTIL THE PLAINTIFF ADDS ALL PARTIES CLAIMING OWNERSHIP/POSSESSION OF THE PIPELINE.

One of the issues raised by the motions for summary judgment was a claim that the case should be dismissed unless all parties claiming ownership/possession of the pipeline were added as parties. (R. 287). If Bonanza Gas was not the owner of the pipeline, then there are eight to ten entities and individuals that claim an interest in this pipeline including Houston Exploration, Ted Collins, H. Ware, W. Brett Smith, Harry Phillips, Eddy Refining

Co., Charles Parker, Lowe Petroleum, and Peter Wareing. (R. 556). If Plaintiff somehow acquired an interest from Bonanza Gas, that interest is probably less than 6.25%.⁹ Plaintiff has provided nothing that illustrates it has the right to sue for trespass on behalf of all these parties, and, in fact, Mr. Gilmore, when questioned specifically about some of the parties, testified that Plaintiff was not representing those parties. (Gilmore Dep. at 112, 152, Transcript of oral argument at 18 quoting Gilmore Dep. at 145-46, R. 332, 335, 901). If there has been a trespass and damage to the pipeline, those entities are entitled to their percentage of any damages and Defendants are at risk if all parties having a claim are not included in the case.

The trial court ruled:

[S]upposing the Plaintiff were able to prove even a partial ownership, the other putative co-owners of the pipeline should have been joined in this suit pursuant to Rule 19 of the Utah Rules of Civil Procedure. Failure to join these parties could also be grounds for dismissal, albeit without prejudice. However because the Plaintiff has not proven any ownership of the pipeline at all, this Court does not have to explore that avenue.

(R. 533-536).

If this Court believes that Plaintiff has a right to seek damages and remands the case to the trial court, the Court should order Plaintiff to add as parties all entities that may have a

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The 1988 Operating Agreement lists Gilmore's interest as 12.25% and one half of that interest was conveyed to Houston Exploration.

claim to ownership/possession of the pipeline. Utah R. Civ. P. 19(a); Kemp v. Murray, 680 P.2d 758, 759-60 (Utah 1984).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the trial court's decision granting summary judgment for Defendants be affirmed.

Dated this 23 day of January, 2008.

McKEACHNIE LAW OFFICES, P.C.

Attorneys for Defendants/Appellees
Newfield Rocky Mountains,
Inc. fka Inland Resources, Inc. and
QEP Uinta Basin, Inc.

By: Gayle McKeachnie
Gayle F. McKeachnie

ALLRED & McCLELLAN, P.C.

Attorneys for Defendants/Appellees
Cochrane Resources, Inc., and
P & M Petroleum Management, LLC.

By: Clark B. Allred
Clark B. Allred

MAILING CERTIFICATE

I, Kathlene McKeachnie, am employed by McKeachnie Law Offices, P.C., attorneys for Defendants/Appellees Newfield Rocky Mountains, Inc. fka Inland Resources, Inc. and QEP Uinta Basin, Inc., and certify that I served the attached JOINT BRIEF OF APPELLEES COCHRANE RESOURCES, INC, P & M PETROLEUM MANAGEMENT, LLC, NEWFIELD ROCKY MOUNTAINS, INC. fka INLAND RESOURCES, INC. and QEP UINTA BASIN, INC. upon counsel by placing two true and correct copies thereof in an envelope addressed to:

Wade R Budge #8482
Troy L. Booher #9419
Katie T. Carreau #11043
SNELL & WILMER LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, UT 84101-1004

Laura S. Scott
PARSONS BEHLE & LATIMER
201 South Main #1800
Salt Lake City UT 84111

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah, on the 24th day of January, 2008.


Kathlene McKeachnie

ADDENDUM

- A) Utah R. Civ. P. 19
- B) Utah R. Civ. P. 56
- C) Utah R. Civ. P. 59
- D) Ruling (August 3, 2006)
- E) Order of Summary Judgment (August 23, 2006)
- F) Ruling and Order (November 8, 2006)
- G) Excerpts from Oral Argument Transcript and William Gilmore's Deposition
- H) Qwest v. Utah Telecomm. Open Structure Agency, No. 2:05-CV-00471 (D. Utah July 18, 2006)
- I) June 8, 2004 and March 13, 2006 letters from the BLM

Tab A

Rule 19. Joinder of persons needed for just adjudication.

(a) *Persons to be joined if feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by court whenever joinder not feasible.* If a person as described in Subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading reasons for nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of class actions.* This rule is subject to the provisions of Rule 23.

Tab B

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Tab C

Rule 59. New trials; amendments of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion for a new party, and in the order shall specify the grounds thereof.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Tab D

IN THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
AUG 3 2006
BY JOANNE C. KEE, CLERK
DEPUTY

WESTSTAR EXPLORATION COMPANY,
INC.,

Plaintiff,

vs.

COCHRANE RESOURCES, INC., ET AL.

Defendants.

RULING

CASE NO. 050800069

JUDGE JOHN R. ANDERSON

This matter is before the court on the following motions for summary judgment: Defendant QEP's "Motion for Summary Judgment," dated February 13, 2006; P&M's "Motion for Summary Judgment," dated February 27, 2006; Cochrane Resources' "Motion for Summary Judgment," dated February 27, 2006; and Newfield's "Motion Summary Judgment," dated March 03, 2006. The Court will address all of the motions for summary judgment in this one ruling. The Plaintiff's memorandum in opposition to QEP's motion was received March 20, 2006. the Plaintiff's other opposition memoranda were filed March 21, 2006. Reply memoranda were filed by: QEP on April 03, 2006; P&M on April 10, 2006; Cochrane Resources on April 10, 2006; and Newfield on April 06, 2006. On July 12, 2006, the Court received oral argument in support of, and in opposition to, these motions. The Court, having reviewed the motions and the related memoranda, and having received a request for a decision, now rules upon the motions.

I. The Motions for Summary Judgment

The motions request that this Court grant summary judgment against the Plaintiff thereby dismissing all of the Plaintiff's claims against the Defendants pursuant to Rule 56 of Utah's

Rules of Civil Procedure. The Defendants have presented several different arguments that support their motions for summary judgment, however, this Court has only to consider one argument in determining whether to grant or deny the motions: Does the Plaintiff have a right to relief? The very core of any suit brought into court is the right to relief. An individual cannot maintain suit against someone for trespass when that individual cannot establish ownership of the property in question. Proof of ownership is prerequisite. In this case, the Court finds no indication of Plaintiff's ownership. The Plaintiff has been given more than adequate time to produce evidence establishing his ownership of the pipeline in question, but has failed to do so even after repeated requests. It is for this reason that the Court will order that the Plaintiff's claims be dismissed with prejudice.

The Court notes that even if the Plaintiff were able to prove some sort of ownership of the pipeline, evidence submitted in the forms of affidavits and depositions go to show that the Plaintiff, at best, has only partial ownership of the pipeline. Supposing the Plaintiff were able to prove even partial ownership, the other putative co-owners of the pipeline should have been joined in this suit pursuant to Rule 19 of the Utah Rules of Civil Procedure. Failure to join these parties could also be grounds for dismissal, albeit without prejudice. However, because the Plaintiff has not proven any ownership of the pipeline at all, this Court does not have to explore that avenue.

II. Claims for Indemnification

This suit contains multiple claims for indemnification. In this case, indemnification would only result in the event of a favorable ruling for the Plaintiff. Because the Court has determined that the Plaintiff is not entitled to recovery on its causes of action, all claims related to indemnification are mooted.

III. Defendant QEP's Claims

In addition to its claim for indemnification, Defendant QEP has filed a counterclaim against the Plaintiff for attorney fees

and filed a cross-claim for breach of contract against Defendant P&M and Defendant Newfield.

A. Attorney Fees

QEP argues that, pursuant to Utah Code Ann. § 78-27-56, it is entitled to an award of attorney's fees. Utah Code Ann. § 78-27-56 states that the court shall award reasonable attorney's fees to the prevailing party if the court determines the action was without merit and not brought or asserted in good faith. In this case the court does not believe that the Plaintiff intentionally brought a case that was without merit nor does the court believe that the case was not brought in good faith. It is this Court's opinion that the Plaintiff truly believed that it had a valid case, but was simply unable to provide the proof necessary to prove its argument.

B. Breach of Contract

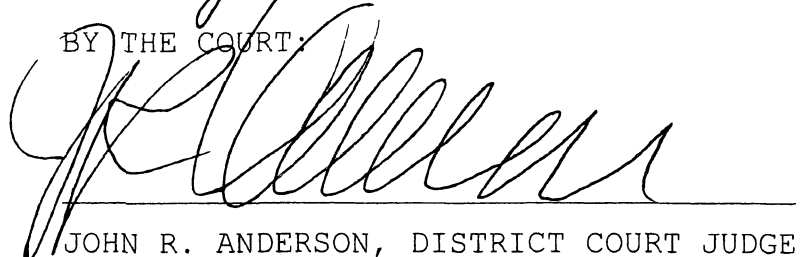
QEP's cross-claim against P&M and Newfield for breach of contract is not before the Court at this time. For that reason, QEP's cross-claim survives this ruling and will be adjudicated at a later time.

IV. Conclusion

Based upon the foregoing, the Court will grant the Defendants' respective motions for summary judgment and will deny Defendant QEP's motion for attorney fees. The Court directs Defendant QEP to prepare an order consistent with this ruling and submit it in accordance with Rule 7 of the Utah Rules of Civil Procedure.

Dated this 2nd day of Aug, 2006.

BY THE COURT:


JOHN R. ANDERSON, DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050800069 by the method and on the date specified.

METHOD	NAME
Mail	GAYLE F MCKEACHNIE ATTORNEY DEF 2575 W HWY 40 VERNAL, UT 84078
Mail	JEFFREY R ORITT ATTORNEY DEF 257 E 200 S STE 700 SALT LAKE CITY UT 84111
Mail	LAURA S SCOTT ATTORNEY 201 S MAIN ST STE 1800 POB 45898 SALT LAKE CITY UT 84145-0898

By Hand	CLARK B ALLRED
By Hand	CLARK A MCCLELLAN
By Hand	DANIEL S SAM

Dated this 3rd day of August, 20 06.


Deputy Court Clerk

Tab E

Jeffrey R. Oritt (Bar No. 2478)
COHNE, RAPPAPORT & SEGAL
257 East 200 South, Suite 700
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ch

Attorneys for Defendant and Counterclaim
Plaintiff QEP Uinta Basin, Inc.

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

WESTSTAR EXPLORATION COMPANY,
INC., a Nevada corporation,

Plaintiff,

v.

COCHRANE RESOURCES, INC., a Utah
corporation; P & M PETROLEUM
MANAGEMENT, LLC, a Colorado limited
liability company; NEWFIELD ROCKY
MOUNTAINS, INC., fka INLAND
RESOURCES, INC., a Delaware corporation;
QEP UINTA BASIN, INC., a Delaware
corporation; and JOHN DOES 1-5 and
MARY ROES 1-5, whose true names are
unknown,

Defendants.

ORDER OF SUMMARY JUDGMENT

Case No. 050800069

Judge John R. Anderson

On July 12, 2006, the Defendants brought on for hearing before the above-entitled court their various Motions for Summary Judgment. William Gilmore appeared on behalf of the Plaintiff with Plaintiff's counsel, Daniel Sam. Defendant QEP Uinta Basin, Inc. ("QEP") was

represented by its counsel, Jeff Oritt. Defendant Newfield Rocky Mountains, Inc. fka Inland Resources, Inc. ("Newfield") was represented by its counsel, Gayle F. McKeachnie. Defendants Cochrane Resources, Inc. ("Cochrane") and P&M Petroleum Management, LLC ("P&M") were represented by their counsel, Clark B. Allred. All Defendants filed Motions for Summary Judgment. The Court, having read all memoranda supporting and opposing the Motions for Summary Judgment, having heard oral argument from all the parties, having reviewed the related memoranda and exhibits thereto, being fully advised in the premises herein, and good cause appearing therefore;

IT IS HEREBY ORDERED as follows:

1. Plaintiff's claims against all Defendants are dismissed, as a matter of law and with prejudice, on the grounds that Plaintiff has produced to the court no evidence of ownership of the pipeline in question, notwithstanding having had more than adequate time to produce said evidence, and having failed to do so after repeated requests. Accordingly, Plaintiff has failed to prove any right to the relief it seeks, as a matter of law.

2. There are various cross-claims for indemnification among the Defendants. Because such claims require a favorable ruling for the Plaintiff, and Plaintiff's claims are being dismissed with this ruling, all such cross-claims related to indemnification (excepting QEP's claims for attorneys' fees and costs against Newfield and P&M) are mooted.

3. Defendant QEP's counterclaim against Plaintiff for attorney's fees pursuant to Utah Code Annotated § 78-27-56 (1953, as amended) is denied on the grounds that it is the Court's opinion, based on the evidence before it, that Plaintiff truly believed that it had a valid

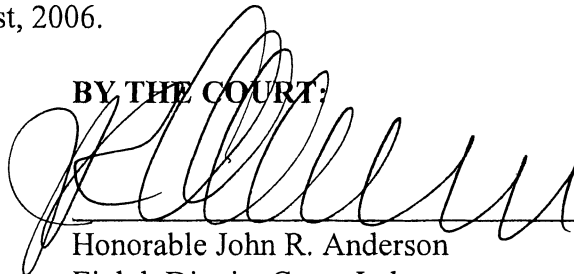
case, but was unable to provide the proof necessary to prove its argument. The Court finds that Plaintiff did not intentionally bring a case that was without merit, and that the case was not brought in bad faith. Accordingly, Defendant QEP's counterclaim for attorney's fees is dismissed.

4. Defendant QEP has pending cross-claims for damages and reimbursement of attorneys' fees and costs against Defendants P&M and Newfield. In addition, Defendant Newfield has a pending third party indemnification claim against RMOC Holdings, LLC on Defendant QEP's claim. These claims are not before the Court at this time and accordingly survive this ruling.

5. Defendant Cochrane has pending third party claims against Washington Mutual Bank and William Gilmore, which claims are not before the Court at this time and accordingly survive this ruling.

6. Defendants are entitled to an award of their reasonable costs incurred in this action against Plaintiff, as the prevailing parties.

DATED this 17 day of August, 2006.

BY THE COURT:

Honorable John R. Anderson
Eighth District Court Judge

Tab F

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CH

IN THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH

WESTSTAR EXPLORATION COMPANY,
INC.,

Plaintiff,

vs.

COCHRANE RESOURCES, INC., et
al.,

Defendants.

RULING AND ORDER

CASE NO. 050800069
JUDGE JOHN R. ANDERSON

This matter is before the Court on Plaintiff's Motion for Reconsideration of Summary Judgment in Favor of Defendants, filed September 28, 2006, and accompanied by supporting memorandum. The Defendants have each filed respective memoranda in opposition to the motion. The Plaintiff has filed reply memoranda in support of the motion. Having reviewed the matter, and having received a notice to submit the motion for decision, the Court now rules upon the motion.

Rule 54(b) of the Utah Rules of Civil Procedure gives the trial court discretion to revise pre-final-judgment orders. In this case, the Court will refuse to exercise its discretion to revise the order for the following reasons.

First, for all intents and purposes, the Court's order granting Defendants' motions for summary judgment against the Plaintiff was a final judgment on the Plaintiff's claims.

Second, the Court is not convinced that granting the Defendants' motions for summary judgment was in error. In this case, the Plaintiff's only shred of evidence supporting ownership of

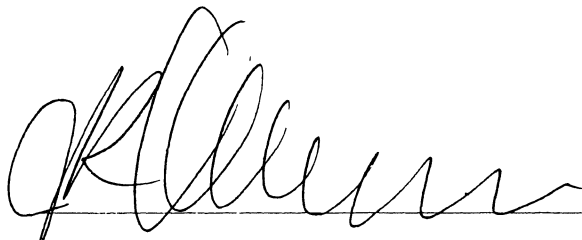
the pipeline was an assignment transferring whatever interests Mr. Gilmore had in the Subject Pipeline to the Plaintiff. The Court acknowledges that this document was before the Court for consideration relating to the motions for summary judgment. What was not before the Court, however, was any evidence regarding what interests Mr. Gilmore had in the subject pipeline prior to that assignment. Mr. Gilmore baldly asserted that Gilmore received title to the Pipeline from Bonanza by unrecorded assignment. Aff. William Gilmore, ¶3. At deposition on October 03, 2005, Mr. Gilmore testified that he had a copy of the unrecorded assignment from Bonanza to Gilmore and that he would produce a copy of that document. Production of tax documents indicating ownership were also promised at that time. None of these documents were ever produced (even though all of them should have been produced as part of initial disclosures). Repeated requests for production of ownership documents were made by the Defendants. Nothing was provided. Therefore, the only evidence proffered on the issue of ownership was the assignment from Gilmore to Weststar. The Court, in granting the Defendants' motions for summary judgment, ruled that, as a matter of law, such evidence did not establish a genuine issue of material fact. If the Plaintiff feels that the decision was in error, the correct course of action for the Plaintiff is not to file a motion for reconsideration, but rather to file an appeal.

ORDER

Therefore, based upon the foregoing, IT IS HEREBY ORDERED that the Plaintiff's motion is DENIED.

Dated this 8th day of Nov., 2006.

BY THE COURT:


JOHN R. ANDERSON, DISTRICT COURT JUDGE

Tab G

1 "You testified that each of them still
2 have an interest in the pipeline," referring to
3 Collins and Ware?

4 "That is right.

5 "So Westar owns the pipeline" -- I'm on
6 page 142 starting at line 11 for the record. "So
7 Westar owns the pipeline minus 8 point whatever
8 percent it is that each of those own?

9 "Yes."

10 This is my questions, Mr. Gilmore's
11 answer.

12 "So they own what?

13 "ANSWER: I assigned what interest I had.

14 "QUESTION: What you had, but you didn't
15 sign for them?

16 "ANSWER: No.

17 "QUESTION: Do you purport to represent
18 their interest in this lawsuit?

19 "ANSWER: No.

20 "Are you purporting to collect damages on
21 their behalf as co-owners or interest owners in the
22 pipeline?

23 "ANSWER: That is a matter and subject
24 that I hadn't given any consideration to.

25 "QUESTION: That is why I ask.

1 A. No.

2 Q. When did that entity go out of business?

3 A. I would say in probably 1997.

4 Q. And again between this 1979 and now say 1979 time
5 period did you form any other business entities besides Gilmore
6 Oil and Gas?

7 A. I had a partnership I put together called Bonanza Gas
8 Company.

9 Q. And when did you put that together?

10 A. In the early 90's.

11 Q. And where was that based?

12 A. Midland, Texas.

13 Q. And what was your title in that company?

14 A. Oh, owner I guess.

15 Q. I guess I should have asked and the earlier questions
16 would be is that partnership still in existence?

17 A. No.

18 Q. When did that go out of business?

19 A. It had been in existence since, I don't really remember
20 but it just kind of died. I am going to say probably in the
21 middle 90's, 1997, 1998 possibly.

22 Q. And you said it was a partnership and were their
23 partners of yours?

24 A. There were yes.

25 Q. How many?

1 A. Oh, there was probably seven or eight.

2 Q. And were those partners companies or individuals or
3 both?

4 A. Both.

5 Q. Was it a limited partnership such that you were the
6 general partner?

7 A. Yes.

8 Q. What was the difference, if there was any, in business
9 operations between Gilmore Oil and Gas and Bonanza Gas Company?

10 A. What was the difference?

11 Q. Yes, I mean you were operating both of them at roughly
12 the same time so I am just wondering what the difference was,
13 if any, between those entities?

14 A. Well, Gilmore Oil and Gas was the operator of oil and
15 gas properties and wells and Bonanza Gas was the operator of
16 a natural gas pipeline.

17 Q. Okay. I will come back to that and again in this time
18 period between when you formed Gilmore Oil and Gas and Bonanza
19 Gas Company and ended it, it sounds like both of them ended
20 roughly the same time 1997 to 1998 is that not true?

21 A. Roughly I would say.

22 Q. Any other business entities that you formed and ran
23 during that time period this 1979 to 1997

24 A. No.

25 Q. Okay. I want to just get these initial questions and

1 Gas and you said it was a operator of oil and gas wells.

2 A. Yes.

3 Q. You said it was a dba, were you the owner and principal
4 or head of Gilmore Oil and Gas?

5 A. Yes.

6 Q. Did you have any employees at any time?

7 A. Yes.

8 Q. Was it always a sole proprietorship throughout its
9 existence?

10 A. Yes.

11 Q. Where were the oil and gas wells that it operated?

12 A. Operated in Texas, Colorado, Nebraska, Wyoming and
13 Utah.

14 Q. And did Gilmore Oil and Gas own any of those oil and
15 gas wells as well as operate them?

16 A. Oh yes.

17 Q. Did it own all of them as well as operate them?

18 A. What do you mean did it own?

19 Q. Well, I am just wondering if Gilmore Oil and Gas was
20 the owner of all of the oil and gas wells it operated?

21 A. Well, if wasn't a hundred percent owner, it was a
22 certain working interest percentage ownership varying from
23 twenty-five to hundred percent.

24 Q. How about Bonanza where you said Bonanza was the
25 operator of a natural gas pipeline, first of all I guess the

1 question is where was that pipeline?

2 A. There was one in Prexus County, Texas and one in Uintah
3 County, Utah.

4 Q. And is the one you just referenced in Uintah County
5 the one we are talking about in this litigation or a different
6 one?

7 A. Well, we haven't described what we are talking about
8 yet and if you want to describe it I will tell you.

9 Q. Sure, I will be happy to. In your complaint you talk
10 about in paragraph seven you reference a natural gas pipeline
11 and easement in the North Bonanza Field total length
12 approximately eight miles then you have various section, tract
13 and range identification numbers. Is that the one that you
14 are talking about?

15 A. Yes.

16 Q. All right and WestStar Exploration you said that you
17 formed in in the year 2000. When you formed it, can you tell
18 me who the officers were at that time?

19 A. I guess I held all the offices. William C. Gilmore.

20 Q. And did that change at any time between when you formed
21 it in the year 2000 to the present as far as who the officers
22 have been?

23 A. No.

24 Q. Again the question going to when the corporation was
25 formed in 2000 who were the directors at that time?

1 A. I was the sole director.

2 Q. And still today?

3 A. Yes.

4 Q. No other directors in the intervening five years?

5 A. No.

6 Q. And shareholders when you formed it?

7 A. Do I have to answer that?

8 MR. SAM: I think it is probably relevant.

9 MR. ORITT: I can give a little foundation that would
10 make Mr. Gilmore feel a little better about that.

11 THE WITNESS: I own all the shares, hundred percent.

12 BY MR. ORITT:

13 Q. When you formed it you owned hundred percent?

14 A. Yes.

15 Q. Has that stayed the same up through the present?

16 A. Yes.

17 Q. Where that comes from Mr. Gilmore just for your
18 interest in paragraph ten of your complaint you say you are the
19 president and controlling shareholder the plaintiff is WestStar
20 and that is where it comes from.

21 A. Yes.

22 Q. I meant to ask you going back to Bonanza Oil and Gas
23 you said that there were seven or eight other partners and I am
24 wondering if you can list for me those that you recall?

25 A. Marall Inc., Eddy Refining and several other

1 individuals.

2 Q. Do you remember any names?

3 A. Peter Wareing. Harry Phillips and a couple of others
4 and I don't remember who they are.

5 Q. As far as you know WestStar, still a Nevada Corporation
6 is that right?

7 A. Yes.

8 Q. It is in good standing?

9 A. Yes.

10 Q. And registered to do business in Utah?

11 A. Yes.

12 Q. Who is Donald Merritt?

13 A. Donald Merritt was a corporation nominee for WestStar
14 whenever the paperwork was initiated.

15 Q. He is not a director and does not hold any titles?

16 A. No.

17 Q. The reason I ask is that at least in the Utah
18 Department of Commerce web site he is listed as
19 President/secretary, treasurer and vice president.

20 A. Yes.

21 Q. But that is not correct?

22 A. Well, I think that the way this company that does the
23 corporation filings they use his name as a nominee.

24 Q. All right, you are listed as a director but nothing
25 other than that and that is why I asked.

1 A. Yes.

2 Q. Can I just now for ease of reference refer to it as the
3 pipeline that we will be talking about that eight mile pipeline
4 that is at issue in this litigation. If I call it the pipeline
5 would that be okay with you that is what we are talking about?

6 A. When I becomes not okay I will tell you.

7 Q. That is great that is all I can ask. So you say that
8 WestStar is the current owner of the pipeline and in my
9 interrogatories I asked what is the evidence of that, what is
10 the facts supporting that and you referenced documents
11 attached at Exhibit A. Well, Exhibit A to your answers were the
12 assignments that we just looked at, actually the only document.

13 So my first question is do you have any other
14 documentation in your files at your office or wherever you keep
15 files of the chronological history of the ownership of the
16 pipeline that is at issue in this litigation other than this
17 assignment of lease?

18 A. Yes.

19 Q. What are the source of documents you have?

20 A. I have an unrecorded assignment from Bonanza to William
21 C. Gilmore and an unrecorded assignment from William C. Gilmore
22 to WestStar.

23 Q. Lets start with the Bonanza one. Why is it unrecorded?

24 A. Just never got it recorded.

25 Q. And what does that assignment reference, what is being

1 assigned?

2 A. Reference to the pipeline.

3 Q. Just the pipeline not oil and gas leases?

4 A. That is correct. The pipeline, the right-of-way and
5 whatever equipment that was associated with it. It describes
6 the pipeline as OTID type material, length, location.

7 Q. What is your recollection of the date of that
8 assignment?

9 A. It is in 2005.

10 Q. Oh, the assignment from Bonanza.

11 A. Affective earlier and I can't remember what the date
12 is.

13 Q. So it is dated in this year but retroactive to some
14 date?

15 A. That is right.

16 Q. And if we were to ask your attorney to get us a copy of
17 that you would be able to get your hands on that at some point?

18 A. Yes.

19 Q. All right, so that is that unrecorded assignment and
20 similarly you said an unrecorded assignment from you to
21 WestStar?

22 A. Yes.

23 Q. Of the same pipeline right-of-way, etc?

24 A. Yes.

25 Q. Again dated 2005 but retroactive?

1 A. It is my understanding that he took on all of the
2 obligations that I had.

3 Q. That Gilmore had?

4 A. Yes.

5 Q. Okay.

6 A. He was the operator. He stepped in my shoes and he was
7 by that I mean he was a custodian, if you will, and had full
8 care and custody of operations of all the properties which
9 included ten wells and six different oil and gas leases. He had
10 responsibilities that the operator had reporting to State and
11 Federal Government, producing the wells, keeping in compliance
12 with the regulations MMS and BLM regulations. Payment of
13 expenses incurred. Maybe I have said reporting to the parties
14 involved as far as expenses and production revenue reporting or
15 any unusual circumstances. There is a thousand things at lease
16 that a operator is responsible for doing and Mr. Allen had been
17 an operator for a number of years. It is my understanding that
18 he is a petroleum engineer and he operates properties nearby
19 here.

20 When he first started operating he operated a number of
21 wells in Cowley Basin Field which later was unitized and the
22 unit operator was Inland Production I think, Inland
23 something, Inland Resources, Inland Production or Inland
24 something. Under those circumstances he relinquished
25 operations on the wells he formally operated to the unit

1 operator. Outside of that, he had at least one other well that
2 he operated nearby that was not in that unit. I believe it is
3 called the Federal 14-18 that he was the operator and had some
4 working interest in. That well too was a recipient of gas run
5 through this whole pipeline system and he is a beneficiary of
6 that as was the QEP Well but those two wells I don't think we
7 in units but I may be wrong about the QEP Well but I don't
8 think that well is in units kind of an outlying well in a unit.

9 Q. Okay. You listed several items that he was to operate,
10 did it include the pipeline that we are talking about in this
11 lawsuit?

12 A. Did what?

13 Q. His duties as operator include the pipeline that we are
14 talking about in this lawsuit?

15 A. He is charged with the responsibility of producing
16 and selling the oil and gas from the properties.

17 Q. Are you telling me that his duties as operator
18 included that pipeline?

19 A. Well, he had a duty to sell the gas and produce and
20 sell gas which came along with the oil and that pipeline was
21 there and available for that and he did some of that is my
22 understanding.

23 Q. Is there a court order in this lawsuit in Texas that
24 appoints Cochrane as operator?

25 A. There was yes.

1 Q. Do you have a copy of that order?

2 A. Yes.

3 Q. Can you get that and provide that to Mr. Sam?

4 A. Yes.

5 Q. Is there an order ever releasing Cochrane as operator?

6 A. The order had a time limit on it.

7 Q. Do you know what that time limit was?

8 A. No.

9 Q. Do you know if that time limit has expired?

10 A. I am sure that it has. Excuse me and part of the
11 responsibilities and obligations of Ken Allen and Cochrane
12 Resources were to take care of the properties and he charged
13 some healthy fees to do so.

14 Q. Did he have an obligation to report to the court?

15 A. No, not to my knowledge.

16 Q. Did he provide reports to you?

17 A. Not what I requested.

18 Q. But did he provide reports to you and maybe not what
19 you requested but were you provided reports or other
20 information?

21 A. Well, I requested that he provide me with certain
22 information and he did not do so.

23 Q. My question was did he provide you information or some
24 kind or reporting that wasn't what you asked for but did he
25 provide you stuff?

1 A. That is my recollection but it is beyond my legal
2 comprehension to answer that. I don't know. A lot of water
3 went under the bridge before this ever happened as it relates
4 to Mr. Cochrane or Mr. Ken Allen and Cochrane Resources.

5 Q. Before this was signed a lot did?

6 A. Yes.

7 Q. You organized WestStar Exploration sometime in the
8 year was it 2000?

9 A. Yes.

10 Q. Do you recall exactly when in 2000?

11 A. No.

12 Q. Can you get us the articles of incorporation showing
13 that?

14 A. Yes.

15 Q. Have you been the sole shareholder from the day of its
16 inception?

17 A. Yes.

18 Q. Now you talked a little bit about a company called
19 Bonanza Oil?

20 A. No, I didn't.

21 Q. Or Bonanza what did you call it, Bonanza Gas Company?

22 A. That is right.

23 Q. Now is that a partnership or a corporation?

24 A. Partnership.

25 Q. Is there some reason it is registered with the State

1 of Utah as a corporation?

2 A. It may have been.

3 Q. But it is your position it is a partnership?

4 A. Well, it was either a corporation and a partnership
5 or a partnership I don't remember.

6 Q. When was it organized?

7 A. In the early 90's.

8 Q. And what was your position with it?

9 A. Owner, president.

10 Q. I guess in the partnership you have been a partner
11 with others?

12 A. Yes.

13 Q. And you earlier said that there was seven or eight
14 others and you gave names of part of those?

15 A. Yes.

16 Q. The corporation then you would be a shareholder and
17 the people you named would be the other shareholders?

18 A. No, there is never any shareholders. I don't remember
19 if it was a corporation or not and maybe it was but if it was
20 Bonanza Gas I was the only owner in it.

21 Q. Well what were these other folks then?

22 A. The corporation may have been the general partner in
23 the partnership. I honestly don't remember.

24 Q. What ever happened to Bonanza Gas Company?

25 A. It just disappeared.

1 Q. What do you mean it disappeared?

2 A. It hasn't existed for a long time and nothing happened
3 about it and probably wasn't done properly would be my guess.

4 Q. You just quit operating it?

5 A. Yes.

6 Q. Didn't do anything formally to dissolve it?

7 A. No.

8 Q. What was owned by Bonanza Gas Company?

9 A. Well, in Utah it owned this pipeline.

10 Q. Anything else?

11 A. It owns another pipeline in Texas.

12 Q. Then you said or I recall your testimony that there is
13 an unrecorded assignment from Bonanza Gas to you of this
14 pipeline?

15 A. That is right.

16 Q. And that happened in 2005?

17 A. Affective date was several years earlier than that.

18 Q. But you signed it in 2005?

19 A. That is right.

20 Q. How did we determine an affective date?

21 A. I don't recall how it was determined.

22 Q. Who determined it?

23 A. I did.

24 Q. You don't know how you determined it?

25 A. No.

1 Q. Did you get any corporate authorization to transfer
2 that asset from Bonanza Gas to you?

3 A. Well, I guess I got it yes.

4 Q. Tell me what you got.

5 A. Just got it from me.

6 Q. You just decided to do it?

7 A. That is right. I didn't have any other stockholders.

8 Q. Did you pay Bonanza Gas anything for it?

9 A. I don't remember.

10 Q. It just happened within the year.

11 A. I don't remember.

12 Q. So my understanding is that Bonanza Gas built the
13 pipeline and sometime in 2005 signed a document signing it to
14 you and then you signed it to WestStar?

15 A. That is right.

16 Q. And then you picked retroactive affective dates?

17 A. That is right. The paperwork should have been done
18 long ago.

19 Q. What is BLM's involvement with this pipeline?

20 A. Well, a lot of the right-of-way is on BLM surface and
21 the right-of-way application was reviewed and approved by
22 BLM and there are certain, I believe they are called rental
23 payments that are made periodically for the continuation of
24 the right-of-way permits. They have over site any other matter
25 that would involve that line on their surface as to anything

1 money from me. He took all that revenue and it wasn't his. He
2 spent a hundred and thirty thousand dollars fixing up messes
3 that he caused he and/or his insurance company ought to be
4 paying for it not me.

5 Q. Anything else you claim that he did fraudulently?

6 A. No.

7 Q. You also claim that he acted illegally. Anything other
8 than what you have already told us to support your claim that
9 he acted illegally?

10 A. No.

11 Q. You also claim that he acted without authority.
12 Anything other than what you have told us that would show that
13 he acted without authority?

14 A. No. In his own handwriting he wrote a letter on a
15 yellow tablet paper said that he and the parties involved
16 decided to use this pipeline rather than let it sit. I am sure
17 you have a copy of that. I actually have the original so you
18 don't have the original, I have it.

19 Q. Okay, anything else?

20 A. Nothing that I know. I hope to find out more as we
21 take further depositions.

22 Q. During this entire time period he was acting under the
23 direction as operator under the direction of the court out of
24 Texas according to your testimony?

25 A. That is right.

1 as far as he is concerned.

2 Q. You claim that he stole money from you?

3 A. Yes.

4 Q. Houston Exploration Company, do you own an interest
5 in that company?

6 A. No.

7 Q. It owns a half interest in this pipeline?

8 A. Yes.

9 Q. Does it also have a half interest in any damages to the
10 pipeline or use of the pipeline?

11 A. I hadn't thought about it.

12 Q. They probably are an essential party aren't they?

13 A. I think most of the damages incurred were prior to
14 their ownership of it and I think equitably if they are due any
15 money it would be any damages incurred after they acquired
16 ownership. I don't know exactly what our documents say about
17 that. At the time this was done I don't think I had any idea
18 about what was actually happening.

19 Q. As of March 1, 2004 now that is the affective date of
20 your agreement with or your assignment with Houston
21 Exploration?

22 A. I think that is right.

23 Q. As half owner of the pipeline that entity be entitled
24 to half of the damages if any after that date would that be
25 accurate?

1 do with it?

2 A. I have some plans yes.

3 Q. What are those plans?

4 A. They are proprietary.

5 Q. What are those plans? I am not going to dance with you
6 and you can talk to your attorney but when I ask a question I
7 expect it to be answered okay.

8 A. The plans are for future use of it to market gas.

9 Q. From your Gilmore wells?

10 A. Maybe and maybe from other wells. These wells, maybe
11 my wells and maybe some one else's wells.

12 Q. Now we have talked about a Ted Collins, he is in these
13 lawsuits with you?

14 A. That is right.

15 Q. And he is a part owner of what you call the Gilmore
16 Wells?

17 A. That is right.

18 Q. Does he have any ownership interest in the pipeline?

19 A. Yes.

20 Q. What is his ownership interest?

21 A. 8.33 percent.

22 Q. What about the Ware does he have an interest in the
23 pipeline too?

24 A. Same percentage.

25 Q. Do they still have that percentage ownership in the

1 don't have a well out there.

2 Q. Okay.

3 A. That to me made me suspect and that was part of his
4 area and he probably ought to know and probably did know there
5 was a well out there and it was just fishy I thought.

6 Then his boy Mike Alexander in an effort to work out some
7 kind of agreement for Questar to use my line and transport gas
8 from newly drilled wells which I was in agreement to do. I want
9 to be a good neighbor, he indicated that there were gas
10 purchase agreements between Inland and Shenandoah and between
11 Questar and Shenandoah and I guess P&M never did have an
12 agreement with Questar. They may have assumed one but I don't
13 know. He told me they were there but he couldn't let me see
14 them. I don't know if they are there but I bet they are.

15 Q. Okay. I don't have any other questions right now.

16 EXAMINATION

17 BY MR. ALLRED:

18 Q. I have three little areas that I want to clarify and
19 make sure my notes are right on the ownership of the pipeline.
20 A guy named Ware and I guess it is an estate now owns 8.33
21 percent?

22 A. Yes.

23 Q. And Collins owns 8.33 percent?

24 A. Yes.

25 Q. And Houston Exploration has 50 percent under the

1 document that we have seen?

2 A. Yes.

3 Q. So that means WestStar owns forty three and a third
4 percent?

5 A. That is right.

6 MR. SAM: Can I interject something. I thought his
7 prior testimony was that Ware and Collins combined owned 8.33
8 percent but they each own 8.33 percent?

9 THE WITNESS: Yes.

10 MR. SAM: I am sorry.

11 BY MR. ALLRED:

12 Q. On the bankruptcy plan Gilmore and you I guess got the
13 properties out of the Chapter 11 subject to the debt of the
14 bank?

15 A. Yes.

16 Q. I think now I understand how that works. So that just
17 left the unsecured creditors sitting there and there was no
18 equity, nothing left, it just went through seven and discharged
19 them?

20 A. That is correct.

21 Q. You indicated that you talked to Ed Neibauer and Jerry
22 Cowley about the pipeline and they didn't ignore you did they?

23 A. Well, they didn't ignore me but they didn't continue
24 to use the pipeline.

25 Q. And didn't they negotiate back and forth with you about

Tab H

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

QWEST CORPORATION,

Plaintiff,

vs.

UTAH TELECOMMUNICATIONS OPEN
INFRASTRUCTURE AGENCY, an
interlocal cooperative governmental agency;
the CITY OF RIVERTON, a Utah municipal
corporation; and TETRA TECH
CONSTRUCTION SERVICES INC., a
Colorado corporation,

Defendants.

ORDER GRANTING MOTION TO
DISMISS UTOPIA'S
COUNTERCLAIMS AND DENYING
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Case No. 2:05-CV-00471 PGC

In this lawsuit, plaintiff Qwest Corporation claims that 47 U.S.C. § 253, the Federal Telecommunications Act ("FTA"), preempts Utah Code Ann. § 59-12-104(2) and Article XIII, § 3 of the Utah Constitution because they extend tax-exempt status to defendant UTOPIA and thereby allow UTOPIA to offer telecommunications services at low prices. Defendant UTOPIA has filed six counterclaims against Qwest. Five of these (numbers one through four and seven) relate to Qwest's alleged failure to give UTOPIA access to its essential telecommunications

infrastructure as the FTA and Utah's Public Telecommunications Law ("PTL") require. The remaining counterclaim (number six) is a tort claim for alleged interference with economic relations.

Qwest has moved to dismiss UTOPIA's five statutory counterclaims (numbered one through four and seven) that involve access to its infrastructure. It raises two separate arguments in favor of dismissal: first, that UTOPIA fails to state a claim upon which relief may be granted; and second, that this court lacks subject matter jurisdiction over these causes of action. The court will address Qwest's subject matter jurisdiction arguments before its Rule 12(b)(6) arguments because a Rule 12(b)(6) "disposition is a decision on the merits"¹ that can be entered only by a court with subject matter jurisdiction.²

Qwest has also filed a motion for partial summary judgment as to its trespass claim. The court will address this motion after resolving the motion to dismiss.

I. What Are UTOPIA's Causes of Action?

To determine whether it has subject matter jurisdiction, the court must first discern which statutes give rise to UTOPIA's counterclaims. UTOPIA's first four counterclaims allege that Qwest's actions were "[c]ontrary to the provisions of the FTA" or "the provisions of the PTL"³ without stating which specific provisions Qwest allegedly violated. This court must therefore

¹*Osborn v. Shillinger*, 861 F.2d 612, 617 (10th Cir. 1988) (citing *Baker v. Carr*, 369 U.S. 186, 200 (1962)).

²*Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006) (citing *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004)).

³Doc. No. 47, ¶¶ 22, 27, 32, 38.

determine the specific subsections of the FTA or PTL under which UTOPIA's causes of action arise.

Counterclaims one through four allege that UTOPIA, while constructing its network, "requested access to certain of Qwest's essential facilities" and that "Qwest failed to permit UTOPIA to have reasonable access to its essential facilities."⁴ Based on this language, Qwest argues that UTOPIA's counterclaims arise under 47 U.S.C. § 224, the Pole Attachment Act ("PAA"). The PAA requires the FCC to "regulate the rates, terms, and conditions for pole attachments."⁵ Access to poles appears to be a "term" or "condition" subject to FCC regulation under § 224(b); Qwest's argument thus appears to be correct.

But as Qwest further notes, one subsection of the PAA, 47 U.S.C. § 224(c), expressly provides for *state law* preemption — that is, when a state chooses to regulate "with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way," the state's regulations preempt any equivalent FCC requirements.⁶ Utah has certified to the FCC that it has enacted legislation and adopted regulations pursuant to § 224(c).⁷ Contrary to the position asserted by UTOPIA, these regulations were in effect at all times relevant to this litigation. And as the Utah Supreme Court noted, the broad language of § 224(c) means that "any regulation of

⁴See Doc. No. 47, ¶¶ 21-22, 26-27, 31-32, 37-38.

⁵47 U.S.C. § 224(b).

⁶*Id.* § 224(c)(1).

⁷*States that Have Certified that They Regulate Pole Attachments*, 7 F.C.C.R. 1498, 1498 (1992); see also *Utah Cable Television Operators Ass'n v. Pub. Serv. Comm'n*, 656 P.2d 398, 402 (Utah 1982).

utility pole attachment contracts by a state, regardless of the nature or specificity of such regulation, negates FCC jurisdiction over contracts in that state by providing a state forum for complaints concerning such contracts.”⁸ As such, Utah regulations — not FCC regulations — govern disputes “with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way,” even though some pre-2006 Utah regulations specifically mention only pole attachments by cable television companies.

In opposition, UTOPIA argues that its counterclaims are “not based specifically on § 224 but upon the Federal Telecommunications Act as a whole.”⁹ UTOPIA cites no case law in support of this proposition — that a private party may enforce “the entire FTA” or that the FTA “as a whole” creates an implied right of action. Rather, UTOPIA cites 47 U.S.C. §§ 206–07 and 251, and claims that these sections, read in light of § 224, create private rights of action.

The court cannot accept UTOPIA’s argument. The few cases the court found that deal with this issue hold that § 251 does not create a private right of action.¹⁰ Most courts to address the issue have also held that § 207 does not create a private right of action for violations of the

⁸*Utah Cable Television Operators Ass’n*, 656 P.2d at 400.

⁹Doc. 81, at 6 n.4.

¹⁰*AT&T Communications of Cal., Inc. v. Pacific Bell*, 60 F. Supp. 2d 997, 1002 (N.D. Cal. 1999).

Telecommunications Act of 1996.¹¹ In short, the great weight of authority demonstrates that there is no private right of action for violations of the 1996 Act.

Accordingly, the court agrees with Qwest and holds that UTOPIA's first four counterclaims are pole attachment claims that arise under the PTL — the preemptive provisions of Utah law.

II. Does This Court Have Subject Matter Jurisdiction over UTOPIA's First Four Counterclaims?

Now that court has determined UTOPIA's first four counterclaims arise under the PTL, the court must next address whether it has subject matter jurisdiction to hear them. The court holds that it does not have jurisdiction.

Under the PTL, "a dispute over interconnection of essential facilities . . . or the planning or provisioning of facilities or unbundled elements" should be brought "to the [Utah Public Service] commission, and the commission, by order, shall resolve the dispute on an expedited basis."¹² Utah law requires parties to "exhaust applicable administrative remedies as a prerequisite to seeking judicial review."¹³ There is no dispute that UTOPIA filed its counterclaims without first seeking redress from the PSC as Utah Code Ann. § 54-8b-2.2(1)(e)

¹¹See *Intermedia Communications, Inc. v. Bellsouth Telecommunications, Inc.*, 173 F. Supp. 2d 1282, 1287 (M.D. Fla. 2000); see also *Global Naps, Inc. v. Bell Atlantic-New Jersey, Inc.*, 287 F. Supp. 2d 532, 544 n.17 (D.N.J. 2003) (citing cases). But see *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 500 (S.D.N.Y. 2000) (finding that a private right of action exists based on "Sections 206 and 207 of the Telecommunications Act for damages suffered as a result of a violation of the Act").

¹²Utah Code Ann. § 54-8b-2.2(1)(e).

¹³*Housing Auth. v. Snyder*, 44 P.3d 724, 727 (Utah 2002) (quoting *Nebeker v. Utah State Tax Comm'n*, 34 P.3d 180, 184 (Utah 2001)).

provides. Because “this precondition to suit” was not satisfied, this court “lack[s] subject matter jurisdiction.”¹⁴

UTOPIA argues that it need not exhaust its administrative remedies. It claims that the PSC lacks jurisdiction over it because UTOPIA is a municipal corporation. This argument is not well founded. The issue is whether the PSC has jurisdiction over *Qwest* so that it may adjudicate any grievances *against Qwest*. During the hearing on this motion, all parties admitted that the PSC has such jurisdiction; a plain reading of the PSC’s jurisdictional statute, Utah Code Ann. § 54-4-1, shows that admission was correct. UTOPIA has not pointed to any statute that would exempt it from the requirement of submitting its disputes with Qwest — a party over whom the PSC has jurisdiction — to that administrative body.

Whether the PSC has jurisdiction to adjudicate Qwest-initiated proceedings against UTOPIA is another question that the court need not reach. The plain language of Utah Code Ann. § 54-8b-2.2(1)(e) requires UTOPIA, “one . . . of the disputing parties” in this interconnection melee, to “bring the dispute” against Qwest “to the commission” so that “the commission, by order,” may “resolve the dispute on an expedited basis.”

UTOPIA also appears to argue that the PSC lacks jurisdiction over it as a *complaining party* because it is a municipal corporation. This argument is based on the so-called “ripper clause” of the Utah Constitution, which provides: “The legislature shall not delegate to any

¹⁴*Id.*

special commission . . . any power to make, supervise or interfere with any municipal improvement, money, property or effects . . . or to perform any municipal function.”¹⁵

On its face, this clause does not appear to apply here. If UTOPIA were to initiate proceedings against Qwest before the PSC for Qwest’s failure to provide access to facilities, the commission’s decision would not be “interfer[ing] with any municipal improvement, money, property or effects,” but with *Qwest’s* “improvements, money, property, or effects.”

If this clause does apply, however, two elements must be met before it would deprive the PSC of jurisdiction over UTOPIA as a complaining party: first, the PSC must be a “special commission”; and second, UTOPIA must be performing a “municipal function.” The Utah Supreme Court has held that the PSC is a special commission for Ripper Clause purposes,¹⁶ thus satisfying the first element. But based on the 1990 Utah Supreme Court case of *Utah Associated Municipal Power Systems v. Public Service Commission*, UTOPIA cannot prove that it is performing a “municipal function.”

In *UAMPS*, the Utah Supreme Court set forth this “balancing approach to decide whether any particular activity is a ‘municipal function.’”¹⁷ Courts must consider factors such as

the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and the extent to which the legislation under attack will intrude upon the ability of the people within the

¹⁵Utah Const. art. VI, § 28.

¹⁶*Utah Assoc. Mun. Power Sys. v. Pub. Serv. Comm’n*, 789 P.2d 298, 301 (Utah 1990).

¹⁷*Id.* at 302 (quotation marks omitted).

municipality to control through their elected officials the substantive policies that affect them uniquely.¹⁸

Based on these factors, the *UAMPS* court held that an effort by a consortium of municipalities to build a power transmission line was not a “municipal function.”¹⁹ *UAMPS* was “a political subdivision of the state that combine[d] more than twenty cities, towns, and local agencies for the purpose of generating, buying, and selling electricity across the state.”²⁰ Its construction of a power line was “sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as a municipal function.”²¹ And “the very fact” that so many municipalities banded together to form *UAMPS* went “a long way to demonstrate that the function is one beyond the ability of any local government entity to perform effectively.”²²

The only real difference the court can see between the facts in *UAMPS* and those here is that *UTOPIA* is building a telecommunications network rather than a power transmission line. Otherwise, the discussion in *UAMPS* is applicable in all material respects to this case. The court therefore holds that *UTOPIA* is not performing a “municipal function” within the meaning of article VI, § 28 of the Utah Constitution by constructing its telecommunications infrastructure. The “ripper clause” therefore does not preclude the PSC from exercising jurisdiction over *UTOPIA*, which must present its pole attachment claims to the PSC before bringing suit. In light

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.* at 303 (brackets and quotation marks omitted).

²²*Id.*

of this conclusion, the court need not reach any of Qwest's other arguments, including its argument that UTOPIA cannot claim sovereign immunity under the Utah Governmental Immunity Act.

III. UTOPIA's Seventh Counterclaim Must Also Be Dismissed.

UTOPIA's final counterclaim (misabeled number 7) alleges that Qwest breached an implied covenant of good faith and fair dealing. In full, this cause of action reads:

45. UTOPIA incorporates all preceding paragraphs herein.
46. Qwest is required to permit UTOPIA to have reasonable access to its essential facilities.
47. Such required access includes an implied covenant of good faith and fair dealing.
48. Contrary to the implied covenant of good faith and fair dealing, Qwest has not provided UTOPIA reasonable access to its essential facilities.
49. As a direct and proximate result of Qwest's conduct, UTOPIA has suffered an undetermined amount of damages which damages shall be proven at trial.²³

In moving to dismiss this claim, Qwest argues that UTOPIA has not shown any contract that would create an implied duty of good faith and fair dealing. UTOPIA responded by stating that "[s]uch implied covenant obviously is a part of a contract and therefore the existence of such contract is implicit in the allegation."²⁴ While the existence of a contract may be implicit in its allegation, UTOPIA stops short of alleging the existence of an *explicit* contract that gives rise to the alleged duty. Instead, it claims that the FTA and PTL "granted statutory contract third-party beneficiary status upon UTOPIA because such legislative acts clearly intended to confer a

²³Doc. No. 47, at 20.

²⁴Doc. 81, at 12.

separate and distinct benefit on UTOPIA (47 U.S.C. § 251) and a means to enforce such benefit (47 U.S.C. § 206-207).”²⁵

The court finds no precedential support for UTOPIA’s claim. UTOPIA did not cite, and the court has not found, any case that says § 251 creates a “statutory contract” to which any interested party may claim a “third-party beneficiary” status. This is an especially difficult argument for UTOPIA to make because, as noted above, § 251 does not even create an implied private right of action.²⁶ UTOPIA’s seventh counterclaim therefore should be dismissed.

One final question remains: should the dismissal be under Rule 12(b)(6) and therefore on the merits, or under Rule 12(b)(1) for lack of subject matter jurisdiction? Arguably, the court should dismiss for failure to state a claim because of the apparent lack of support for UTOPIA’s position. But the language of this claim — alleging a failure to provide “reasonable access to [Qwest’s] essential facilities” — is so related to conduct governed by Utah’s PTL that the court holds it arises under the PTL just like UTOPIA’s first four counterclaims. As such, this claim, like the others, must be adjudicated before the PSC, an entity better suited to determining whether Utah’s regulatory scheme creates an “implied duty of good faith and fair dealing.” The court therefore dismisses this claim for lack of subject matter jurisdiction.

²⁵*Id.*

²⁶*AT&T Communications of Cal., Inc. v. Pacific Bell*, 60 F. Supp. 2d 997, 1002 (N.D. Cal. 1999).

IV. Qwest's Fourth Cause of Action Will Be Dismissed Because of Qwest's Admissions.

In its reply memorandum in support of summary judgment, Qwest admitted that its fourth claim “is premised on UTOPIA’s violation of state and local laws and applicable industry standards” and “invokes the expertise and ongoing regulatory function of the commission.”²⁷ Qwest also “agree[d] that this claim should be dismissed.”²⁸ The court therefore dismisses Qwest’s fourth cause of action.

V. Disputed Issues of Material Fact Preclude the Entry of Partial Summary Judgment.

Qwest also has moved for summary judgment on its trespass claims. It alleges that UTOPIA has attached to Qwest’s poles without permission and has removed Qwest’s facilities from poles of unknown or disputed ownership. Qwest asks the court to find as a matter of law that UTOPIA trespassed; this finding, it claims, should facilitate settlement of its pending tort claims.

The standard governing summary judgment motions should be familiar. The court may only enter summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact.”²⁹ “A fact is “material” if, under the governing law, it could have an effect on the

²⁷Doc. # 111, at 4.

²⁸*Id.*

²⁹Fed. R. Civ. P. 56(c).

outcome of the lawsuit.”³⁰ This court must “view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.”³¹

In this case, the court finds that UTOPIA (and Tetra Tech, its subcontractor) have presented evidence that creates a genuine issue of material fact as to who owned some of the poles at the time the alleged trespass occurred. Since trespass requires proof of ownership,³² disputed issues of fact on this point preclude summary judgment at this time.

CONCLUSION

The court GRANTS Qwest’s motion to dismiss (# 67) and DISMISSES UTOPIA’s first through fourth and seventh counterclaims for lack of subject matter jurisdiction. It also DISMISSES Qwest’s fourth cause of action for the same reason. These claims all relate to “pole attachments” and, under Utah’s regulatory framework, must first be resolved by the PSC before they may be heard in court.

³⁰*Terra Venture, Inc. v. JDN Real Estate Overland Park, L.P.*, 443 F.3d 1240, 1243 (10th Cir. 2006) (quoting *Sports Unlimited, Inc. v. Lankfor Enters., Inc.*, 275 F.3d 996, 999 (10th Cir. 2002)).

³¹*Id.* (quotation marks omitted).

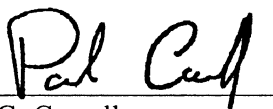
³²*See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1243 (Utah 1998) (citing *John Price Assoc., Inc. v. Utah State Conf., Bricklayers Locals Nos. 1, 2 & 6*, 615 P.2d 1210, 1214 (Utah 1980)).

And disputed issues of material fact require the court to DENY Qwest's motion for summary judgment (# 98).

SO ORDERED.

DATED this 18th day of July, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Paul Cassell", written over a horizontal line.

Paul G. Cassell
United States District Judge

Tab I

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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United States Department of the Interior
BUREAU OF LAND MANAGEMENT

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Vernal, UT 84078
(435) 781-4400 Fax: (435) 781-4410
<http://www.blm.gov/utah/vernal>



IN REPLY REFER TO
3162.3
UT08300

June 8, 2004

William Gilmore
Weststar Exploration Company
811 Rusk, Suite 708
Houston, Texas 77002

Re: Well No. Federal 34 No. 1
NWNW, Sec. 34, T8S, R24E
Uintah County, Utah
Lease No. UTU-52767

Dear Mr. Gilmore:

This correspondence is in regard to the self-certification statement submitted requesting a change in operator for the referenced well. After a review by this office, the change in operator request is approved. Effective immediately, Weststar Exploration Co. is responsible for all operations performed on the referenced well. All liability will now fall under your bond, BLM Bond No. UTB000101, for all operations conducted on the referenced well on the leased land.

Our records show that a right-of-way, UTU-65139, has been issued for the off lease portion of the pipeline to the subject well. In order for Weststar Exploration Co. to obtain the Bureau of Land Management's approval for the use of this right-of-way, you must have this right-of-way assigned over to Weststar Exploration Co. Please contact Cindy McKee at 435-781-4434 for instructions on how to complete the assignment of the right-of-way.

If you have any other questions concerning this matter, please contact Leslie Walker of this office at (435) 781-4497.

Sincerely,

Howard B. Cleavinger
Assistant Field Manager
Minerals Resources

cc: UDOGM
Ted Collins Jr.
Herbert W. Ware Jr.

bcc: Well file U-924
Reading file
Lands



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Vernal Field Office

170 South 500 East

Vernal, UT 84078

(435) 781-4400 Fax: (435) 781-4410



IN REPLY REFER TO:

2880/2880

UTU-65131 et al

(U-084)

MAR 1 3 2006

DECISION

Assignee:	:	Rights-of-Way
	:	UTU-65131, UTU-65163
Weststar Exploration Co.	:	UTU-65158, UTU-65139
811 Rusk, #708	:	
Houston, Texas 77002	:	
	:	
Assignor:	:	
	:	
Gilmore Oil & Gas	:	
115 N Marienfeld #155	:	
Midland, Texas 79701	:	
	:	
Bonanza Gas Company	:	
110 N. Marienfeld 155	:	
Midlan, Texas 79701	:	

Assignment of Rights-of-Way Approved

On February 13, 2006, Weststar Exploration Company filed an assignment in connection with Federal rights-of-way UTU-65131, UTU-65163, UTU-65158, and UTU-65139.

The assignment conveys 100 percent interest in the subject rights-of-way from Bonanza Gas Company and Gilmore Oil & Gas to Weststar Exploration Company

It has been determined that the applicant has met the requirements of 43 CFR s2807.21 and 2887.11, therefore, the assignment are hereby approved, subject to the terms and conditions of the original grants, any conditions of approval attached to the APDs and/or SNs, and the applicable regulations under 43 CFR 2800 and 2880.

The assignments listed above do not require the preparation of an environmental assessment or environmental impact statement as it has been found to not individually or

cumulatively have a significant effect on the human environment. The applicable Categorical Exclusion reference is in 516 DM 11.5 E.9. This references states, Renewals and assignments of leases, permits or rights-of-way where no additional rights are conveyed beyond those granted by the original authorizations.

Copies of serial register pages have been enclosed for your information and records.

Please contact Cindy McKee of our office at (435) 781-4434 if you need additional information concerning this right-of-way.

A handwritten signature in black ink, appearing to read 'R. M. Specht', with a long horizontal flourish extending to the right.

Robert M. Specht
Branch Chief, Lands & Minerals

Enclosures:
As State

cc: Well Files (33-1, og lease UTU-58725, 26-1 og lease UTU-52765, 1-27 og lease UTU-54928, 27-2, 27-3 og lease UTU-52765, 34-1 & 34-2 og lease UTU-52767

CMcKee;cm;3-3-2006