

FILED
IN COMBINED COURT
LA PLATA COUNTY COLORADO

<p>DISTRICT COURT, LA PLATA COUNTY, COLORADO</p> <p>Court address: 1060 E. 2nd Ave., PO Box 3340, Durango, CO 81301</p> <p>Phone Number : (970) 247-2304-</p> <p>RICHARD PARRY, et al. Plaintiff(s)</p> <p>v.</p> <p>AMOCO PRODUCTION CO., a Delaware Corporation, Defendant(s)</p>	<p>MAY 23 2002</p> <p>DEPUTY CLERK: DP</p> <p>▲ COURT USE ONLY ▲</p> <p>Case Number: 94CV105 Division: II Courtroom:</p>
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**ORDER ON AMOCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON
RETROACTIVITY**

Amoco moves for partial summary judgment on the issue of retroactive application of *Rogers and Garman*, asserting that these decisions should not be applied retroactively under the test in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). As correctly stated by Amoco, Colorado has adopted the same test for retroactive application, *Peo. in Interest of C.A.K.*, 652 P.2d 603, 607 (Colo. 1982).



Much of Amoco's argument is devoted to a discussion of what it alleges to be reliance by the oil industry on the meaning of royalty clauses containing language similar to that construed in *Rogers*.¹ In support of this argument, Amoco offers both affidavits and reports as to what it alleges to be long standing practice in the San Juan Basin. The Court has some question as to whether this would constitute reliance on clear past precedent, as urged by Amoco. No cases were overruled in either *Rogers* or *Garman*. Moreover, as noted by Plaintiffs in other pleadings, there is at least some evidence to indicate that Amoco began taking deductions for post-production costs without regard to the royalty provisions in the leases. And even Amoco concedes that there was uncertainty in the law. Ultimately, however, the Court does not find it necessary to address this issue.

While *Rogers* and *Garman* did determine points of law upon which the court had not previously passed, that alone is not sufficient to satisfy the first prong of the *Chevron* analysis. See *Kereme v. Chemical Const. Corp.*, 623 F.2d 786, 789 (2nd Cir. 1980). As no "clear precedent" was overruled, the issue then becomes whether the holdings in *Rogers* and *Garman* were "clearly foreshadowed," *Chevron*, at p. 106. See *Marinez v. Industrial Com. of Colorado*, 746 P.2d 552 (Colo. 1987): "Only when a decision represents a clear rejection of

¹ This seems to be a combination of the first and third principles articulated in *Chevron*. In *Chevron*, the supreme court noted that the plaintiff in that case filed his claim in reliance upon long-standing precedent overruled in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352; 89 S. Ct. 1835; 23 L. Ed. 2d 360 (1969). The court found this to be significant for both the first and third prongs of the test announced in *Chevron*, at pp. 107-08.

past precedent or practice is an analysis comprehending the second and third *Chevron* factors warranted.”

Amoco argues at length that *Rogers* and *Garman* announce a “new rule” of law not foreshadowed by previous rulings. Much of this argument is devoted to a discussion of what Amoco asserts to be traditional allocation of transportation costs, citing Owen Anderson’s criticism of the *Rogers* decision. See, e.g., Ex. NF. Anderson argues that royalty is not payable on transportation costs, particularly to move the gas beyond the “immediate vicinity of the well,” *Id.*, at p. 18, and criticizes *Rogers* for failing to distinguish between gathering and long-distance transportation, *Id.*, at pp. 16-17. Here, however, Plaintiffs are not seeking recovery of any pipeline transportation costs; thus, the Court need not consider the long-distance transportation issue.² The *Rogers* court also noted that “the general rule regarding transportation costs assumes that gas is marketable as it emerges from the wellhead,” at p. 900, and goes on to explain why transportation costs may be allocated only after the gas is marketable. Thus, the Court does not consider “transportation” to be determinative.

² Whether *Rogers* is actually authority for this proposition is an open question. *Rogers*, at p. 900, states, “the determination whether transportation costs (either short or long distance) are to be allocated between the parties is based on whether the gas is marketable before or after the transportation costs are incurred.” Anderson correctly points out that long distance transportation was not an issue in *Rogers*. In *Rogers*, as in *Garman* and in this case, the issue before the court was “allocation . . . of the costs of gathering, compressing, and dehydrating the gas prior to its entry into the interstate pipeline,” [emphasis supplied] *Rogers*, at p. 890; *Garman*, at fn. 8. The analysis at p. 905 of *Rogers*, beginning with the cite to *Fox Wood III v. TXO Prod. Corp.*, 854 P.2d 880 (Okla. 1992), deals exclusively with costs of gathering, compressing, dehydrating and transporting the gas for delivery into transmission lines. Thus, any holding regarding long distance transportation costs would seem to be *obiter dictum*.

As to whether the holdings in *Rogers* and *Garman* were “clearly foreshadowed” by previous decisions, this Court generally agrees with and adopts the analysis of Plaintiffs and finds it necessary only to briefly address several significant points.

As conceded by Amoco, the decisions in *Rogers* and *Garman* both are grounded upon the implied covenant to market. “Embodied in the covenant to operate diligently and prudently is the implied covenant to market,” *Davis v. Cramer*, 808 P.2d 358, 361 (Colo. 1991). The supreme court has held that *Rogers* is “consistent with our jurisprudence,” p. 901, and remanded the case to the trial court for application of the ruling, although the case did not expressly address retroactive application. While it is true, as asserted by Amoco in its reply, that *Rogers* held that the court of appeals erroneously determined transportation costs to be deductible as a matter of law, in so doing the supreme court noted that the court of appeals followed cases whose reasoning was rejected in *Garman, Rogers*, at p. 908.

Thus, the Court concludes that both *Rogers* and *Garman* were “clearly foreshadowed.” As Amoco cannot meet the first prong of *Chevron*, the Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED.

Done in Chambers this 23rd day of May, 2002.

A handwritten signature in black ink, appearing to read 'D. Dickinson', written over a horizontal line.

David L. Dickinson
District Court Judge

xc: Miller, Dugan