

**AFFIDAVIT OF BRUCE M. KRAMER**

STATE OF TEXAS            )  
                                      ) ss.  
COUNTY OF LUBBOCK    )

Bruce M. Kramer, being first duly sworn on oath, states as follows:

1.       I am the Maddox Professor of Law at Texas Tech University School of Law, where I have served as a faculty member since 1974. I regularly teach a course and an advanced seminar in oil and gas law. I am the co-author of several treatises, books and law review articles on oil and gas law, including THE LAW OF POOLING AND UNITIZATION, WILLIAMS AND MEYERS OIL AND GAS LAW AND CASES AND MATERIALS ON OIL AND GAS LAW. Since 1980 I have prepared papers and made presentations at approximately 60-70 continuing legal education programs sponsored by such groups as the University of New Mexico School of Law, State Bar of Texas, Rocky Mountain Mineral Law Foundation, Southwestern Legal Foundation and the Eastern Mineral Law Foundation. A copy of my Curriculum Vitae is attached.

2.       I have given expert testimony in cases heard before both state and federal district courts in New Mexico on matters relating to oil and gas law. I have also testified before the New Mexico Oil Conservation Division.

3.       I have reviewed NMOCC Order No. R-111-P, the New Mexico Uniform Trade Secrets Act (NMSA 1978, §§ 57-34-1, *et seq.*), the New Mexico Oil and Gas Act (NMSA 1978, §§ 70-2-1, *et seq.*), the New Mexico Statutory Unitization Act (NMSA 1978, 37-7-1, *et seq.*) NMOCC Order No. R-10449 in Case No. 11195, various pleadings and motions filed by the parties in NMOCC Case No. 11724 and Case No. 11954, NMOCC Order No. R-10864, Case No. 11724, Letter Agreement between Charles B. Gillespie, Jr. and PG&E Resources dated



March 11, 1993, Application of Hanley Petroleum, Inc. and Yates Petroleum Corp. For Unit Expansion, NMOCC Case No. 11954, the April 6, 1998 letter-Order of the Chairman of the Commission, and a letter from William F. Carr to J. Scott Hall and James Bruce dated April 16, 1998.

4. I have been asked by EEX Corporation and Gillespie-Crow, Inc. to prepare this affidavit regarding the custom and practice of the oil and gas industry insofar as it relates to statutory or compulsory unitization, the nature and use of proprietary seismic data and conservation law and practice.

5. I make this affidavit based upon my experience with the oil and gas industry, my knowledge of the law of pooling and unitization, my study of the various pleadings filed of record in this case, my review of copies of various New Mexico Oil Conservation Division files concerning applications for statutory unitizations under the New Mexico Statutory Unitization Act, and my review of various statutory unitization and oil and gas conservation statutes in New Mexico and other states.

6. The testimony stated in this Affidavit is the same as I would give in Court or before the Division under oath if called to testify as a witness in this matter.

7. The New Mexico Statutory Unitization Act authorizes the OCC to compel mineral, royalty or working interest owners to unitize their interests in order to prevent waste, conserve natural resources and protect correlative rights.

8. I am aware that it has been the practice of the NMOCD to maintain the confidentiality of information which an operator regards as proprietary trade secret information and that the mandated, involuntary production of such information has not usually been required

in regulatory proceedings. This is consistent with the practices of other state oil and gas conservation agencies. Accordingly, the requirement under the April 6, 1998 order for the production of confidential and proprietary seismic data is a significant departure from established administrative practice and policy.

9. Based on my experience, it is the custom and practice in the oil and gas industry to treat seismic data and interpretative materials as privileged, proprietary trade secret information. Moreover, the industry has come to rely on the confidential treatment of such information by regulatory agencies in a number of states. A number of states and the Bureau of Land Management have adopted specific rules for maintaining the confidentiality of certain information.

10. In New Mexico, it is not clear that the relevant statutes (NMSA 1978, §§ 70-2-1, *et seq.*, and §§ 70-7-1, *et seq.*) or the Division's regulations provide sufficient authority or means for maintaining the confidentiality of trade secret information. On the one hand, the Division appears to have a duty to maintain the confidentiality of a trade secret under § 57-3A-2.B.2.B of the Uniform Trade Secrets Act. However, on the other hand, the New Mexico Open Meetings Act could allow for the ultimate disclosure of confidential information. (See NMSA 1978 § 10-15-1, *et seq.*) Rule 19 NMAC 15. 1105C of the Division's rules provides that the Division may treat certain well data as confidential. However, the confidentiality provisions of that rule have not been extended to geophysical data and other similar information. There is likewise no established procedural mechanism to hold in-camera proceedings to deal with the confidential seismic data.

11. Where geophysical data has significant economic value to its owner, the

implementation of the April 6, 1998 order requiring its disclosure may operate as a taking of private property without just compensation. See, Ruckelhaus v. Monsanto Co., 476 U.S. 986 (1984).

12. In general, confidential geophysical information may be treated as a trade secret under the New Mexico Uniform Trade Secrets Act.

13. In this case, the requirement for the disclosure of proprietary and confidential geophysical trade secret information is not necessary for the Commission to exercise its authority under the Statutory Unitization Act to effect the expansion of an existing unit.

14. Under the Statutory Unitization Act, some of the central findings that must be entered by the Commission before an order approving the expansion of an existing statutory unit may be issued are: (1) that the allocation of unit production to the expansion tract is made in the same proportion to the tracts comprising the original unit, which in the context of an expansion case is treated as a single tract (Section 70-7-10); (2) that the participation formula allocates unitized substances to the separately owned tracts on a fair, reasonable and equitable basis (Section 70-7-6 A.6); and (3) that the operator made a good faith effort to secure voluntary unitization (Section 70-7-6 A.6). The Commission's duty is to determine, upon the relevant evidence submitted to it, whether the proponents for the expansion have satisfied their burden of producing evidence to support the Commission's required findings.

15. There appears to be no statutory authority that requires parties before the Commission to disclose confidential, proprietary trade secrets as a condition precedent to any of the Commission's findings before it can order the expansion of an already extant statutory unit.

16. I have reviewed pertinent case law, statutes and other authorities regarding the

duties of a proponent of statutory unitization or compulsory pooling to make disclosures in those cases. From that review, it is clear that an operator has no duty to disclose all of its data to other working interest owners or the conservation agency. Where independent evidence exists sufficient to establish the required findings in a statutory unitization order, the Commission's interest in requiring the disclosure of confidential data is not reasonable and is outweighed by its duty and obligation to maintain the confidentiality of trade secrets.

17. The New Mexico Trade Secrets Act evinces a public policy to promote the confidentiality of trade secrets and proprietary data. The required disclosure under the April 6, 1998 order would seemingly violate the goals and objectives of that Act.

18. The State Legislature has also recognized the need to keep seismic and other data confidential when the State is acting in its proprietary capacity. NMSA 1978, § 19-1-2.1. The State Land Office through its regulations, SLO Rule 1.046, allows information submitted to it, in regard to a proposed unitization, to be kept confidential for a period of up to six months after submission of that data.

19. It is also the custom and practice of the oil and gas industry to maintain the confidentiality of seismic data. Prior to the disclosure of such information, it is customary that a confidentiality agreement be executed which may both restrict the access to the information and limit the reviewing party's ability to use that information.

20. In determining the boundaries of a unit and allocating unit production, it is the custom and practice in industry to place substantial reliance on well control data.

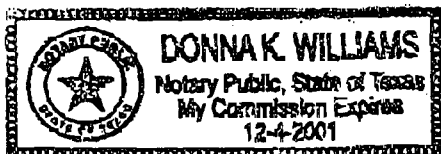
Further Affiant sayeth naught.

Bruce M. Kramer  
BRUCE M. KRAMER

ACKNOWLEDGMENT

STATE OF TEXAS            )  
                                  ) :ss.  
COUNTY OF LUBBOCK    )

24<sup>th</sup> The foregoing instrument was acknowledged before me by BRUCE M. KRAMER on this  
day of April, 1998.



Donna K. Williams  
Notary Public  
My commission expires: 12-4-2001