



State of New Mexico
Commissioner of Public Lands

RAY POWELL, M.S., D.V.M.
COMMISSIONER

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December 13, 1995

VIA FACSIMILE & U.S. MAIL

W. Thomas Kellahim, Esq.
Kellahin & Kellahin
117 North Guadalupe
P.O. Box 2265
Santa Fe, NM 87504-2265

Re: NMOCD cases 11297 and 11298, Application of Exxon Corporation for Waterflood Project, Carbon Dioxide Project and Statutory Unitization Avalon-Delaware Unit, Eddy County, New Mexico

Dear Mr. Kellahin:

Your letter of December 11, 1995 to Jami Bailey has been referred to me for reply. In your letter you raise certain questions about Ms. Bailey's participation in a State Land Office decision to approve this particular Unit. You are concerned that her participation may have created a conflict of interest precluding her from sitting on the Oil Conservation Commission as the Commissioner of Public Lands' designee. See Sec. 70-2-4 NMSA 1978.

We share your concern that procedural due process of law be accorded parties appearing before this agency and any others on which a designee of the Commissioner sits. We are mindful of our responsibilities to the public in this regard. See *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 NM 103 (S.Ct. 1992).

In this instance Ms. Bailey and I are satisfied that she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality. In response to the first two questions you pose in your letter, Ms. Bailey has no reservations about participating in this case. Any decision she may make as the Commissioner's designee will be based on the evidence in the record of the case. She had very little personal involvement in the Land Office process concerning this particular unitization. She attended one meeting internally and as a formality signed a letter of preliminary approval prepared by staff. The documents

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concerning the unitization in question are, of course, public records and you are free to examine them if you wish. In that event please call me at 827-5715 to arrange a time for you to inspect the documents.

Your letter is the first occasion that this particular conflict of interest question has come to my attention. As you may know, I have been general counsel here for a relatively short time, and I am continually discovering new areas requiring legal attention. This is one of them.

It seems to me that the Legislature created a statutory conflict of interest, or at least a potential one, when it provided for the Commissioner to participate as a member of the Oil Conservation Commission under Sec. 70-2-4 NMSA 1978. It seems to me that the Legislature was concerned enough for the welfare and protection of public lands that, as a secondary consequence of its action, it created this form of institutional conflict. One of the purposes of having the Commissioner of Public Lands or his designee on the Oil Conservation Commission is to look after the interests of public land trust beneficiaries. There is nothing, of course, that the Land Office can do about this legislative framework.

At the same time, however, as we stated earlier, we do recognize that parties litigating before the Oil Conservation Commission are entitled to have their constitutional rights, including procedural due process, respected. As a transactional matter, this means that the Commissioner's designee should be free from bias and prejudice. We are satisfied that such is the case with Ms. Bailey in this case. In addition, as to the future, we will try to make sure that the Commissioner's designee has not participated in the Land Office decision or transaction that is the subject of the Oil Conservation Commission hearing. The issues before the Land Office may be different from the questions before the Commission, which would mean that participating in a Land Office decision would not preclude a designee from hearing a different issue, albeit arising out of the same facts, before a different administrative body. We haven't researched this issue at this point, partly in the interest of turning around your letter request as soon as possible. We understand that you have a hearing in this matter before the Oil Conservation Commission tomorrow and we would not want to delay that by our review. In any case, we think it is the wiser choice for the Land Office to simply avoid any transactional conflict whenever it can by making sure the Commissioner's designee has not worked directly on the matter before the Commission.

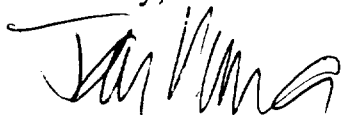
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If there is anything further we can do for you on this matter, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jan Unna', with a stylized, cursive script.

Jan Unna
General Counsel

JU/jc

cc: Jami Bailey
Rand Carroll, Esq.