STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION

APPLICATION OF PREMIER OIL & GAS, INC. TO HAVE THE DIVISION ORDER EXXON COMPANY ,U.S.A. TO APPEAR AND SHOW CAUSE WHY ITS AVALON (DELAWARE) UNIT OPERATING AGREEMENT SHOULD NOT BE AMENDED TO CONFORM TO THE REQUIREMENTS OF THE STATUTORY UNITIZATION ACT, EDDY COUNTY, NEW MEXICO.

CASE NO. 11838

CERTIFICATE OF SERVICE

I hereby certify that a copy of Yates Petroleum Corporation's Motion to Dismiss was served, via hand delivery, to W. Thomas Kellahin, Esq., Kellahin & Kellahin, 117 North Guadalupe Street, Santa Fe, NM 87504-2265, this 18th day of August, 1997.

Respectfully submitted,

CAMPBELL, CARR, BERGE & SHERIDAN, P.A.

By: _____
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ATTORNEYS FOR YATES PETROLEUM CORPORATION

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YATES PETROLEUM CORPORATION'S MOTION TO DISMISS

Yates Petroleum Corporation, ("Yates") hereby moves the Division for an Order dismissing with prejudice the application of Premier Oil & Gas, Inc.("Premier") in the above referenced case and in support of its motion states:

1. Yates is a working interest owner in the Avalon Delaware Unit which is operated by Exxon Company U.S.A. ("Exxon"), and which was approved by the Oil Conservation Commission by Order No. R-10460-B.

2. Yates supported Exxon's application for statutory unitization of the Avalon Delaware Unit Area, and presented testimony in support of that application at the hearings before the Oil Conservation Division and the Oil Conservation Commission.

3. At these hearings, Exxon reviewed the proposed Avalon Delaware Unit and presented as its Exhibit 3 the Unit Operating Agreement. Attached to the Unit Operating Agreement as Exhibit "H" was a list of the wellbores which qualified thereunder as Unit wells. Finding 20 of Order No. R- 10460 incorporated the Unit Operating Agreement by reference into the approval Orders.

4. Premiere actively participated in each hearing on the Avalon Delaware Unit and opposed the inclusion therein of certain acreage operated by Premier.

5. After losing before the Division, Premiere unsuccessfully appealed this matter to the Oil Conservation Commission. The Commission again approved the Avalon Delaware Unit (Order No. R-10460-B) on March 12, 1996. The decision became final in April 1996 when the Commission refused to act on Premier's Application for Rehearing. Premier then unsuccessfully appealed to the District Court of Eddy County, New Mexico. Premier's Supreme Court appeal of Order No. R-10460-B is set for oral argument on September 8, 1997.

6. With the instant application, Premier now asks the Division reconsider its prior Order, amend the Unit Operating Agreement, force Exxon to include the Premier FV-1 Well in the Unit and "to qualify said wellbore as a useable wellbore committed to its Avalon (Delaware) Unit."

ARGUMENT

I.
PREMIER'S APPLICATION IS AN IMPERMISSIBLE ATTACK ON A FINAL ORDER OF THE COMMISSION

Fifteen months after the Commission's Order approving the Avalon Delaware Unit became final, Premier asks the Division to reopen the case. In its application, Premier asks the Division to force Exxon to take Premier's FV-1 Well into the Unit. Paragraph by paragraph Premier reargues the issues it has appealed to the courts.

In New Mexico, in the absence of an express grant of authority, the power of an administrative agency to reconsider its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power. ***Armijo v. Save 'N Gain***, 108 N.M. 281, 286, 771 P.2d 989, 994 (Ct. App. 1989). A copy of ***Armijo*** this decision is attached to this Motion to Dismiss.

In this case, Premier seeks the reexamination of issues presented to the Commission in December 1995 and decided by an Order which became final in April 1996. Division or

Commission review of these issues conflicts with the express provisions of the Oil and Gas Act.

The Oil Conservation Division and Commission are creatures of statute whose powers are expressly defined and limited by the Oil and Gas Act. ***Continental Oil Co. v. Oil Conservation Comm'n***, 70 N.M. 310, 373 P.2d 809 (1962). The Act contains specific provisions which prescribe limited circumstances under which Division and Commission decisions may be reviewed.

The Act provides for *de novo* review of Division orders by the Commission on the application of an adversely affected party of record. NMSA 1978, § 70-2-13. Likewise, the Act provides for the rehearing of a Commission decision if a party of record files an application for rehearing within 20 days of the date of the order and the Commission grants the application within 10 days. NMSA 1978, § 70-2-25. This is the only provision in the Act which authorizes a rehearing on any matter decided by the Commission.

In this case, Premier has had the original approval Order reviewed as authorized by statute. It sought and received *de novo* review by the Commission and filed an application for rehearing which was denied. The Division can only reopen a case to consider an new issue within its jurisdiction that was not decided in the original hearing.[1] Upon denial of Premier's application for rehearing, the Commission's Order thereupon became final and may not be now reopened by the Commission, much less the Division.

The question raised by Premier concerning the Unit qualification of the FV-1 Well is not based on new facts nor is it a matter that was reserved for later decision. All data it needed to raise the issue was available to Premier before the 1995 Division Examiner hearing and before the 1996 Commission hearing. Premier simply failed to timely raise this argument. It may not raise this issue now. Furthermore, this issue was not reserved for later decision because the Commission not only approved the Unit plan, it also adopted the

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[1] As the court stated in ***Trigg v. Industrial Commission***, 5 N.E. 394 (Ill. 1936):

> "...There is marked difference in reserving for future decision a matter which has not been determined but remains open for future adjudication, and a general order purporting to reserve jurisdiction over a cause when an order has been entered covering and adjudicating all matters in issue. In this first instance the undetermined matters may be adjudicated at a later time. In the second instance there is no power to relitigate or review the matters already decided by the order nor later to vacate or modify such order."

Operating Agreement by reference into the approval Order and the Operating Agreement identified the wells which had qualified for the Unit.

On the FV-1 Well issue, Premier failed to exhaust its administrative remedies. The exhaustion doctrine is related to and is like the judicial doctrine of *res judicata* in that it is concerned with prevention of litigation of an issue already judicially decided and with requiring parties to raise their claims in a timely fashion. *See* ***International Paper Co. v. Farrar***, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985). This doctrine applies where a person participates in an agency proceeding but has failed to take up an issue. In this case, the exhaustion doctrine prevents Premier from now questioning the validity of Order No. R-10460-B which approved the Unit Operating Agreement for the Avalon Delaware Unit and identified the wellbores which qualified for inclusion in the Unit.

Under the guise of its claim concerning the FV-1 Well, Premier is attempting to obtain a review by the Division of a final Order of the Commission. In paragraph after paragraph of the application at issue, Premier recites the same arguments it has presented to the courts in its appeal of Commission Order No. R-10460-B.

This case is much like NMOCD Case No. 10994, the application of Enserch Exploration, Inc. for a special depth bracket allowable for the South Peterson-Fusselman Oil Pool was granted over the objection of Phillips. In that case, Phillips pursued its statutory appeals to the Commission and to the District Court. While on appeal, Phillips filed an application for an Examiner hearing seeking, among other things, the adoption of a special allowable for the pool. Enserch objected on the grounds that: (1) there was no new data to justify reopening this case; (2) these issues were properly before the court; and (3) it was inappropriate for the Division to review a Commission decision. The Division agreed with Enserch and the case was dismissed. Phillips sought a *de novo* hearing before the Commission on the dismissal of their application.

The Chairman of the Commission responded to Phillips' application for *de novo* review. He denied the request for a hearing *de novo* on their application, noted that the Phillips application was "in essence, a request for the Division to overrule (the) Commission." He then concluded that Phillips had "the process reversed." *See* Case 11334, Letter of William J. LeMay dated September 13, 1995.

In this Case, Premier seeks Division review of a Commission Order. It has the process reversed.

II.
A SHOW CAUSE HEARING IS INAPPROPRIATE

Premier is asking the Division to call Exxon and Yates before it and require them to show cause why this well should not be included in the Unit. Show cause hearings are used to enforce Division orders. If an operator violates a Division order, the Division may call that operator before it with a show cause hearing to assure compliance with its order. That is not the case here.

In this case, a private party seeks to have another operator called before the Division to explain a matter that has been previously approved by the Division. The Division and the Commission have approved the Unit Agreement and the Unit Operating Agreement for the Avalon (Delaware) Unit. These contracts define the circumstances under which a well qualifies for inclusion in the Unit. If Exxon has violated the Commission Order statutorily unitizing the Avalon Unit by not qualifying the Premier FV-1 Well as a Unit well, Premier must first show that it is entitled to a new hearing.

The fact that Premier has a well within the Unit boundaries is not sufficient to establish that this well should qualify for the Unit. Premier, Yates and others operate wells in the Unit area which were drilled to develop deeper reserves but which do not meet the criteria of the Operating Agreement for qualification as a Unit well. If the Division decides to proceed with a hearing on Premier's application, Premier should first be required to establish that there is new data that was not available in 1996 that justifies reopening this case. Until Premier meets this burden, there is no issue properly before the Division to which Exxon or Yates should be required to respond.

CONCLUSION

Premier's application must be dismissed because:

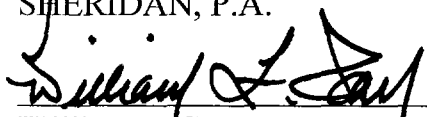
(1) it seeks Division review of a Commission Order which is now on appeal to the Supreme Court;

(2) it is an impermissible collateral attack on a final Order of the Commission in direct violation of the Court of Appeals decision in ***Armijo v. Save 'N Gain***, 108 N.M. 281, 286, 771 P.2d 989, 994 (Ct. App. 1989); and

(3) it is not based on new facts and does not involve an issue reserved for later decision by the Division--the Orders approving the Unit incorporated by reference the Unit Operating agreement for the Avalon Delaware Unit which identified the wells which qualified as Unit wells.

Respectfully submitted,

CAMPBELL, CARR, BERGE & SHERIDAN, P.A.

By: 

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