Amoco Production Company
Denver Region
1670 Broadway
P.O. Box 800
Denver, Colorado 80201
303-830-4040

Kent J. Lund
Attorney
February 16, 1988

VIA FEDERAL EXPRESS

Mr. David R. Catanach
State of New Mexico
Oil Conservation Division
State Land Office Building
P.O. Box 2088
Santa Fe, New Mexico 87504-2088

RE: Case No. 9129

Dear Mr. Catanach:

Pursuant to your order at the end of the January 20, 1988, hearing in this case, enclosed is Amoco's Brief on the notice issues. We appreciate your consideration of the matters set forth in our brief.

Sincerely,

Kent J. Lund

KJL:meb

Encl.

cc: James G. Bruce, Esq.
William F. Carr, Esq.
W. Thomas Kellahin, Esq.

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

APPLICATION OF VIRGINIA P. UHDEN, HELEN ORBESEN, and CARROLL O. HOLMBERG TO VACATE ORDER NOS. R-7588 and R-7588-A, AND TO ESTABLISH EIGHT NON-STANDARD SPACING AND PRORATION UNITS, SAN JUAN COUNTY, NEW MEXICO

NO. 9129

BRIEF OF AMOCO PRODUCTION COMPANY

Pursuant to the Examiner's order at the conclusion of the January 20, 1988, hearing in this case, Amoco Production Company ("Amoco") respectfully submits the following brief:

I. FACTS

By their Amended Application dated December 31, 1987, Applicants Virginia P. Uhden, Helen Orbesen and Carroll O. Holmberg ("Applicants") applied for an order vacating Division Order Nos. R-7588 and R-7588-A "as to Applicants insofar as they establish 320 acre spacing, and to establish eight non-standard spacing and proration units in Sections 28 and 33, Township 32 North, Range 10 West, N.M.P.M. ... " in San Juan County, New Mexico. Applicants alleged that they are mineral interest owners within the Cedar Hill Fruitland Basal Coal Gas Pool and alleged that they "were not given actual notice" of Case No. 8014 or Case No. 8014 (reopened). Applicants claimed that they had no opportunity to appear and present evidence in opposition to 320 acre spacing and that their constitutional due process rights were violated. Applicants alleged that, had they received notice, they would have appeared to

protest the Oil Conservation Division proceedings which resulted in 320 acre spacing.

Applicants' Amended Application (paragraph 10) expressly admits, however, that the first wells drilled in the Cedar Hill Fruitland Basal Coal Pool, which had been drilled on 160 acre spacing, "were in communication." Nevertheless, Applicants alleged that Sections 28 and 33 in the pool "should be developed on eight 160 acre spacing and proration units, with production limitations on wells located within said sections."

Applicants requested that Division Orders R-7588 and R-7588-A be vacated "as to them" and that the Division establish 160 spacing and proration units in Sections 28 and 33 only. Alternatively, Applicants requested that the Division "make said spacing orders {establishing 320 acre spacing} effective as to Applicants as of the date notice was provided to Applicants by Amoco Production Company."

For the reasons set forth below, Applicants' Amended Application must be denied in its entirety. Pursuant to the Examiner's Order, this brief will focus on Applicants' notification arguments, but must necessarily discuss some of the evidence presented in case numbers 8014, 8014 (reopened) and the present case, case number 9129.

II. NOTICE FOR THE CEDAR HILL FRUITLAND BASAL COAL GAS POOL SPACING PROCEEDINGS WAS FULLY AND PROPERLY EFFECTUATED BY THE OIL CONSERVATION DIVISION

N.M. Stat. Ann. §70-2-7 provides that the Oil Conservation Division "shall prescribe its rules of order or procedure" for hearings or other proceedings before the Division. "Any notice required to be given under

this act or under any rule, regulation or order prescribed by the commission or division shall be by personal service on the person affected, or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county, or each of the counties if there be more than one, in which any land, oil or gas, or other property which may be affected shall be situated." (emphasis added). That statute further specifies how the notice shall be constituted and given by the Director of the Division.

Pursuant to that statutory mandate, the Division has promulgated notice rules for Division proceedings. The Division's Rules on Procedure 1204-1207 (dated March 1, 1982) were in place for purposes of the January 18, 1984, hearing before the Division in case number 8014. Rule 1204 contained language just like the statute quoted above and Rule 1207 provided that the Division shall prepare, serve and publish all required notices without cost to the applicant. It is undisputed that the Division fully complied with these rules with respect to Amoco's Application which was heard on January 18, 1984, see Order at paragraph 1, and the Division should take administrative notice of its own records which demonstrate that proper notice was given.

Subsequently, Rule 1207 was amended by the Division. Specifically, amendments were effective on certain parts of that Rule on January 1, 1986, and March of 1987. It is critical to note that the new notice rules state that each applicant for a hearing before the Commission or Division "shall give additional notice" as specified in the additional notice rules. Thus, the new notice rules are in addition to the notice

required by N.M. Stat. Ann. 70-2-7, and are an additional burden on the applicant. Since the Division simply reopened the 1984 application in Case No. 8014 for a review in 1986, and because that 1986 review was specified in the Division's 1984 Order in Case No. 8014 (paragraph 15), notice was properly given for the 1986 review hearing. Indeed, Amoco was not the "applicant" for Case No. 8014 (reopened). The official record in the reopened case in February of 1986 demonstrates that proper notice was given.

III. THE OIL CONSERVATION DIVISION LACKS JURISDICTION TO CONSIDER THE CONSTITUTIONALITY OF NEW MEXICO STATUTES AND THE DIVISION'S RULES ON PROCEDURE

As discussed above, Applicants' Amended Application raises constitutional issues. It is axiomatic that the Oil Conservation Division, an administrative agency, lacks jurisdiction and authority to rule on constitutional issues. Instead, Applicants must raise those issues in a judicial forum if it so desires.

IV. NEW MEXICO REVISED ANNOTATED STATUTES 70-2-7 AND THE OIL CONSERVATION DIVISION'S NOTICE RULES ARE CONSTITUTIONAL

The Applicants apparently contend that notice by publication is unconstitutional, and at least with respect to them for purposes of Case No. 8014. In support of this argument, Applicants made reference to an unpublished New Mexico state district court decision and Louthan v. Amoco Production Company, 652 P.2d 308 (Okla. App. 1982).

Applicants have not provided the Division or the protestors with any written order issued by the New Mexico District Court. Moreover, we have been informed that that litigation has been settled and, as a

result, it is doubtful that the District Court's decision, even if relevant, has any precedential value.

The Louthan case is clearly distinguishable. In that case, Amoco drilled a producing oil well in December of 1961 on a 160 acre lease in the northwest quarter of the southeast quarter on a section (section 20) in Major County, Oklahoma. In 1969, Cherokee Resources, Inc. obtained oil and gas leases on the northwest and northeast quarters of Section 20. In 1970, Cherokee applied to the Oklahoma Corporation Commission (Oklahoma's oil conservation agency) to establish 640 acre spacing for Section 20. The application was set for hearing in June of 1970 and the only type of notice required by statute, and the only type of notice given, was by publication. Notice was neither mailed to nor served upon Amoco personally.

The court held that, under those facts, Amoco was denied due process of law. It held that "it was even more important that all mineral interest owners in Section 20 be constitutionally notified since a producing well existed on it - a well that Cherokee knew or should have known about."

At issue in Louthan was whether an oil and gas lessee who had a producing oil well on the property subject of the spacing application should have been provided with some form of actual notice of that application. The court answered in the affirmative, and its reference to royalty interest owners of the pre-existing well was dictum since the only issue before the court was whether Amoco, as an existing oil and gas lessee who had previously drilled a producing oil well, should have been provided with actual notice of those spacing proceedings.

The South Dakota Supreme Court recently considered - but did not decide - the constitutionality of a South Dakota statute similar to N.M. Stat. Ann. §70-2-7. See In Re Application of Koch Exploration Company, 387 N.W.2d 530 (S.D. 1986). The South Dakota statute on notice, like the New Mexico statute, stated that the Board of Minerals and Environment could either provide notice by personal service or by publication. The trial court held that the statute was constitutional, but the Supreme Court did not reach the constitutional issue because the complaining parties had made a general appearance before the Board and participated in all phases of the hearing. Thus, the complaining parties had waived any right to challenge the manner in which notice was given, and the court noted that the requirement of personal jurisdiction may be intentionally waived or a party may be estopped from raising that issue.

In addition, the court held that the Board had subject matter jurisdiction over the application despite the allegation that notice was improper. Since "the basis for constitutional requirement of notification is to give parties an opportunity to be heard," the court held that an argument of improper notice was "meaningless" where the complaining parties made a general appearance at all proceedings before the Board and participated fully in that hearing.

In short, the New Mexico state district court decision relied upon by Applicants in this case, which has not been provided to the parties to this case, is not dispositive. Moreover, the Louthan decision does not support Applicants' argument. Finally, there is authority upholding the constitutionality of published notice in these circumstances. For

all these reasons, Applicants' consitutional arguments are patently without merit.

V. APPLICANTS HAVE NO LEGAL RIGHT TO RECEIVE PERSONAL NOTICE OF SPACING PROCEEDINGS BEFORE THE DIVISION

Applicants have conveniently failed to inform the Division that they have no right to receive personal notice of spacing proceedings. For example, Mrs. Uhden is the successor in interest to a July 6, 1948, oil and gas lease which Kate E. Cahn entered into with Stanolind Oil and Gas Company, Amoco's predecessor in interest. Paragraph 9 of that oil and gas lease provides:

> As to the gas leasehold estate hereby granted (excluding casinghead gas produced from oil wells), lessee is expressly granted the right and privilege to consolidate said gas leasehold with any other adjacent or contiguous gas leasehold estates to form a consolidated gas leasehold estate which shall not exceed a total area of 640 acres; and in the event lessee exercises the right and privilege of consolidation, as herein granted, the consolidated gas leasehold estate shall be deemed, treated and operated in the same manner as though the entire consolidated leasehold estate were originally covered by and included in this lease, and all royalties which shall accrue on gas (excluding casinghead gas produced from oil wells), produced and marketed from the consolidated estate, including all royalties payable hereunder, shall be prorated and paid to the lessors of the various tracts included in the consolidated estate in the same proportion that the acreage of each said lessor bears to the total acreage of the consolidated estate, and a producing gas well on any portion of the consolidated estate shall operate to continue the oil and gas leasehold estate hereby granted so long as gas is produced therefrom.

Therefore, and assuming that the above clause is representative for all of the lessor-Applicants, the applicable oil and gas leases expressly permit the lessee, such as Amoco, to form drilling and spacing units for gas wells provided that such drilling and spacing unit does not exceed a total area of 640 acres. It is undisputed that Amoco acted prudently in asking the Division to space this pool as required by N.M.

Stat. Ann. Sec. 70-2-17B and, in doing so, acted in accordance with proper conservation purposes.

Even though the Division lacks jurisdiction and authority to interpret oil and gas leases and adjudicate disputes based on oil and gas leases, it is important to note that Amoco was expressly granted the right to form appropriate drilling and spacing units for gas wells not to exceed 640 acres. Based on this express contractual authority, Applicants lack standing to attack the spacing proceedings for the Cedar Hill Fruitland Basal Coal Gas Pool. See generally Kuntz, The Law of Oil and Gas, §48.3 (1972); Lowe, Oil and Gas Law in a Nutshell, Chapter 9, Part 3 (1983).

VI. SINCE APPLICANTS HAVE NOW HAD THEIR HEARING, THEIR ARGUMENTS WITH RESPECT TO NOTICE ARE MOOT

Applicants had their hearing on January 20, 1988. Since constitutional due process of law only requires an "opportunity to be heard," Applicants no longer have even an arguable claim that they should have been given other than publication notice for the prior proceedings. One of Applicants' principal arguments is that, had they been given personal notice, they would have appeared before the Division in 1984 and 1986 to protest a change from 160 to 320 acre spacing. As demonstrated below, Applicants could not have presented technical evidence then, and they did not present technical evidence on January 20, that would justify 160 acre spacing on all or part of the Cedar Hill Fruitland Basal Coal Gas Pool. Such an effort then, as on January 20, 1988, would have been an effort in futility.

VII. APPLICANTS' EVIDENCE PRESENTED ON JANUARY 20, 1988, WAS NOT SUFFICIENT TO REQUIRE A SPACING OF LESS THAN ONE WELL FOR EACH 320 ACRES IN THE CEDAR HILL FRUITLAND BASAL COAL GAS POOL

N.M. Stat. Ann. §70-2-17B states that the Division "may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well ...." In establishing such a proration unit, the Division "shall consider": (1) the economic loss caused by the drilling of unnecessary wells; (2) the protection of correlative rights, including those or royalty owners; (3) the prevention of waste; (4) the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells; and (5) the prevention of reduced recovery which might result from the drilling of too few wells.

In spacing the Cedar Hill Fruitland Basal Coal Gas pool on 320 acre spacing units, the Division fully complied with that statutory mandate. The Division considered substantial technical evidence in both the January 18, 1984, hearing and the February 19, 1986, spacing review hearing. The Examiner in Case No. 9129 incorporated by reference the official records of those prior two hearings for consideration in Case No. 9129.

Significantly, the Applicants' Amended Application, in paragraphs 9 and 10, expressly admit that the first wells drilled in the pool, which were drilled and spaced on 160 acre units, "were in communication." Applicants' geologist, Stephen Perlman, testified at the January 20, 1988, hearing that wells with 160 acre offsets were in communication and were impacted by wells on that spacing pattern. In contrast, Mr. Perlman testified that no such communication or production affects were

the result of a 640 acre offset well, the Leeper B #1. Mr. Perlman further testified that it is possible, even in his view, that 320 acre spacing is appropriate for this Pool. Finally, Mr. Perlman testified that there are no geologic abnormalities in Sections 28 and 33.

The applicable New Mexico statute requires establishment of a proration unit based on technical evidence: a proration unit must be the area that can be "efficiently and economically drained and developed by one well." The statute requires the establishment of proration units to be based on technical evidence, not "pocketbook" evidence. The Division has no legal authority to establish proration units because a royalty owner selfishly wants to be paid a royalty based on a proration unit which is smaller than the technical evidence requires. Since no evidence was presented to justify a change from 320 acre spacing for any part of the Pool, the Amended Application must be denied.

VIII. APPLICANTS' ALTERNATIVE REQUEST FOR RELIEF IS ILLEGAL

Applicants' Amended Application requests, in the alternative, that the Division make the 320 acre spacing order effective as to Applicants "as of the date notice was provided to Applicants by Amoco Production Company." This request must be rejected because it is illegal.

N.M. Stat. Ann. §70-2-18A provides in part that any Division order that increases the size of a standard spacing or proration unit for a pool shall provide that production shall be shared "from the effective date of the said order." Thus, production must be shared as of the effective date of order number R-7588 (February 1, 1984) and Applicants' request to change that effective date is legally unsupportable.

IX. CONCLUSION

For all these reasons, Applicants' notification arguments are without merit and must be rejected. The Amended Application must be denied in its entirety and the 320 acre spacing units for the Cedar Hill Fruitland Basal Coal Gas Pool must remain in full force and effect, effective February 1, 1984.

Respectfully submitted this 16th day of February, 1988.

AMOCO PRODUCTION COMPANY

By Kent J. Lund
Kent J. Lund
Attorney

Amoco Production Company
1670 Broadway, P.O. Box 800
Denver, Colorado 80201
303/830-4250

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foreging Brief was forwarded to the following by placing a copy of same, properly addressed and postage prepaid, in the United States mail this 16th day of February, 1988.

James G. Bruce, Esq.
Hinkle Law Firm
P.O. Box 2068
Santa Fe, New Mexico 87504

William F. Carr, Esq.
Campbell & Black
P.O. Box 2208
Santa Fe, New Mexico 87501

W. Thomas Kellahin, Esq.
Kellahin, Kellahin & Aubrey
P.O. Box 2265
Santa Fe, New Mexico 87501