CAMPBELL, BYRD & BLACK, P.A.
LAWYERS

JACK M. CAMPBELL
HARL D. BYRD
BRUCE D. BLACK
MICHAEL B. CAMPBELL
WILLIAM F. CARR
BRADFORD C. BERGE
WILLIAM G. WARDLE
KEMP W. GORTHEY
THOMAS F. BLUEHER

JEFFERSON PLACE
SUITE I - 110 NORTH GUADALUPE
POST OFFICE BOX 2208
SANTA FE, NEW MEXICO 87501
TELEPHONE: (505) 988-4421
TELECOPIER: (505) 983-6043

October 15, 1982

Rosemarie Alderete, Clerk
New Mexico Supreme Court
Post Office Box 848
Supreme Court Building
Santa Fe, New Mexico 87501

Re: Robert Casados, et al. v. Oil Conservation Commission, et al.; Supreme Court of New Mexico Cause No. 14,539

Dear Ms. Alderete:

Enclosed herewith for filing is an original and three copies of Defendant Amoco Production Company's Motion to Strike Issues on Appeal and supporting Memorandum Brief.

Very truly yours,

William F. Carr

William F. Carr

WFC:rr
Enclosures

IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, et al.,

Plaintiffs-Appellants,

vs.

OIL CONSERVATION COMMISSION, et al.,

Defendants-Appellees,

Cause No. 14, 359

and

ALEX J. ARMIJO, COMMISSION OF PUBLIC LANDS,

Intervenor-Appellee.

MOTION TO STRIKE ISSUES ON APPEAL

Defendant-Appellee, Amoco Production Company, moves the Court for an Order striking certain issues raised by Plaintiffs-Appellants, in their Brief in Chief, and in support of this Motion states:

1. This case involves an appeal of a decision of the New Mexico Oil Conservation Commission.

2. The procedures to be followed in taking this appeal are strictly defined by New Mexico Statute.

3. Section 72-2-25B N.M.S.A. (1978 Comp.) provides that the issues on appeal of an Oil Conservation Commission decision are limited to questions presented to the Commission in an application for rehearing.

4. The only issues presented to the Commission by Plaintiffs in an application for rehearing are:

a. whether there was substantial evidence to support the Commission's findings on waste and correlative rights,

b. whether the findings of the Commission are adequate to disclose the reasoning of the Commission on the issues of waste prevention and protection of correlative rights, and

c. whether, without additional data, the decision of the Commission is arbitrary and capricious.

5. Plaintiffs-Appellants have raised certain additional issues for the first time in their Brief in Chief, which issues were not presented to the Oil Conservation Commission in an application for rehearing.

6. Plaintiffs-Appellants failed to exhaust their administrative remedies as to the new issues raised in their Brief in Chief.

7. The Court lacks jurisdiction to decide the new issues presented in Plaintiff-Appellants' Brief in Chief.

8. These issues should be stricken from the appeal.

9. This motion substantially affects the disposition of this case.

Respectfully submitted;

CAMPBELL, BYRD & BLACK, P.A.

By: William F. Carr

William F. Carr
Post Office Box 2208
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421

ATTORNEYS FOR DEFENDANT-APPELLEE,
AMOCO PRODUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 1982, I caused a true copy of the foregoing pleading to be mailed to Ernest L. Carroll and William Monroe Kerr, Kerr, Fitz-Gerald & Kerr, P.O. Drawer 511, Midland, Texas 79702, attorneys of record for Plaintiffs-Appellants.

William F. Carr

IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, et al.,

Plaintiffs-Appellants

vs.

OIL CONSERVATION COMMISSION,
et al.,

Defendants-Appellees, No. 14,359

and

ALEX J. ARMIJO, COMMISSIONER
OF PUBLIC LANDS,

Intervenor-Appellee.

BRIEF IN SUPPORT OF DEFENDANT-APPELLEE'S

MOTION TO STRIKE ISSUES ON APPEAL

Defendant-Appellee, Amoco Production Company (hereinafter referred to as Amoco) moves the Court for an order striking certain issues raised by Plaintiffs-Appellants (hereinafter referred to as Plaintiffs) in their Brief in Chief on the grounds that Plaintiffs failed to properly raise these issues before the New Mexico Oil Conservation Commission and thereby failed to exhaust their administrative remedies. This failure to exhaust administrative remedies leaves the Supreme Court without jurisdiction to decide the questions being asserted by

Plaintiffs for the first time before the New Mexico Supreme Court. Pubco Petroleum Corporation vs. Oil Conservation Commission, 75 N.M. 36, 399 P.2d 932, 933 (1965).

Amoco made application for approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement to the New Mexico Oil Conservation Commission (hereinafter referred to as Commission) on May 28, 1980. A public hearing was held on this application on July 21, 1980 and on August 14, 1980 the Commission entered Order No. R-6446 approving the Unit Agreement (TR.8-15). On September 2, 1980, pursuant to Section 70-2-25A N.M.S.A. (1978 Comp.), Plaintiffs filed an Application for Rehearing (TR.16-31) and on January 23, 1981, after rehearing, the Commission entered Order No. R-6446-B which again approved the Unit Agreement (TR.34-45). Plaintiffs then filed Petitions to Appeal from Orders No. R-6446 and No. R-6446-B in the District Courts of Harding, Quay and Union Counties, New Mexico (TR.1). These petitions were consolidated for hearing before the District Court of Taos County (TR.166-173) and on May 6, 1982 the District Court affirmed the Oil Conservation Commission orders approving the Bravo Dome Carbon Dioxide Gas Unit Agreement.

The legislature has strictly limited the scope of review of an Oil Conservation Commission decision. Section 70-2-25A N.M.S.A. (1978 Comp.) sets out the procedures required for filing an application for rehearing. It reads:

A. Within twenty days after entry of any order or decision of the Commission, any party of record adversely affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The Commission shall grant or refuse any such application in whole or in part within ten days after the same is filed, and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the Commission may enter such new order or decision after rehearing as may be required under the circumstances. (emphasis added)

Section 70-2-25B provides that a party may appeal a decision on rehearing, or the Commission's refusal to rehear a case, to the district court of the county wherein any property affected by the action is located. This section provides in part:

B. Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision by filing a petition for review of the action of the Commission within twenty days after the entry of the order following rehearing or after the refusal or [of] rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the Commission and shall set forth the order or decision of the Commission complained of and the grounds of invalidity thereof upon which the applicant will rely; [redacted] that th[redacted]estions reviewed on [redacted]y [redacted] presented to the [redacted]pplicat[redacted] for rehearing. (emphasis added)

Section 70-2-25B further provides for a second appeal:

> Appeals may be taken from a judgment or decision of the District Court to the Supreme Court in the same manner as provided for appeals from any other [redacted] entered by District Court in this state. The trial of such application for relief

from action of the Commission in the hearing of any appeal to the Supreme Court from the action of the District Court shall be expedited to the fullest possible extent.

The New Mexico Supreme Court in Pubco Petroleum Corporation vs. Oil Conservation Commission, construed Section 65-3-22, N.M.S.A. (1953 Comp.), which is the predecessor to Section 70-2-25 N.M.S.A. (1978 Comp.) and in all relevant respects is identical to it. In Pubco, Consolidated Oil & Gas, Inc. had filed an application with the Commission seeking changes in an existing proration formula. Following denial of this application, Consolidated timely applied for and was granted a rehearing on their application. On rehearing, the Commission entered its order amending the proration formula. Pubco had not filed for a rehearing following entry of the order entered after rehearing but instead filed a petition in the District Court of San Juan County for review of the Commission's order entered on rehearing, asserting the invalidity of that order "for various and sundry reasons". 399 P.2d at 933.

Pubco's petition for review was opposed by the Commission and by Consolidated on the grounds that Pubco had failed to exhaust its administrative remedies by not applying for a rehearing of the second Commission Order. The petition for review was dismissed by the District Court and Pubco appealed this decision to the Supreme Court. In upholding the District Court's dismissal of the petition for review, the Supreme Court stated: "Subsection (a) specifically required the filing of an application for rehearing setting forth the claimed invalidity of the order

entered by the Commission. Its purpose is to afford the Commission [redacted] reconsider and correct an erroneous decision [redacted] (emphasis added) 399 P.2d at 933. Because Pubco failed to apply for rehearing before the Commission, the Supreme Court reached "the conclusion that appellant [Pubco] has failed to exhaust its statutory administrative remedies." 399 P.2d at 933. It therefore concluded that as a result of this failure to exhaust administrative remedies, the trial court was without jurisdiction to review the order. The decision in Pubco stands for the principle that a party to a Commission proceeding must give the Commission an opportunity to reconsider and correct any error it may have made by filing an application for rehearing which sets forth the respect in which any order or decision of the Commission is believed to be erroneous. Until an alleged error is so presented to the Commission through an application for rehearing, administrative remedies have not been exhausted and the question cannot be reviewed by the courts.

The case before the Court is different from Pubco for here the Plaintiffs applied to the Commission for rehearing after entry of Commission Order No. R-6446. The issues raised in that application were reviewed by the Commission, and the Commission thereby had the opportunity to reconsider and correct the alleged errors in Order No. R-6446.

Following the rehearing the Commission entered Order R-6446-B which contained new and more elaborate findings which had been requested by Plaintiffs in their Application for

Rehearing (TR.16-31). Plaintiffs did not file a new application for rehearing challenging any new matter arising from Order No. R-6446-B but, instead, appealed the Commission's action to the District Courts. Plaintiffs pursued this course of action instead of following Section 70-2-25A which provides for the filing of an application for rehearing after entry of any Commission order. Plaintiffs therefore failed to provide the Commission with the opportunity to correct an allegedly erroneous decision and, as noted in Pubco, thereby failed to exhaust their administrative remedies as to any issue other than those raised in the application for rehearing filed following entry of Order R-6446.

The questions (issues) presented to the Commission in Plaintiffs' application for rehearing are, therefore, the only ones that may be reviewed on appeal for this court lacks jurisdiction to decide any other matters. The application for rehearing attacked Order No. R-6446 on the following grounds: (1) the [redacted] not substantiate the findings and conclusi[redacted] sought and the Commission failed to make factual findings [redacted]sive to show the basis for the Commissi[redacted] Order"; (2) additional findings concerni[redacted]te must be made; (3) additional findings concerning protection of correlative rights are necessary; (4) th[redacted]esented no evidence that the correlative righ[redacted] interests in production were

protected under the proposed agreement; (5) the data is insufficient [redacted]tive conclusions or predict that the "pro[redacted]plan will in any ways serve the cause of conse[redacted] interest, the prevention of waste or the p[redacted]ative rights"; (6) a prediction of a useful a[redacted] life of the field or fields is impossible; ([redacted]are necessary; (8) the application for approval [redacted]emature; and (9) unless more facts are developed, the Oil Conservation Commission's decision that the unit [redacted] and will protect correlative rights is arbit[redacted] (TR.16-31). Simply stated, Plaintiffs only challenged the Commission's order on the grounds that there was not substantial evidence to support its findings on waste and correlative rights; that the findings were inadequate to disclose the Commission's reasoning and that without additional data the decision of the Commission was arbitrary and capricious.

These are the only issues which were presented to the Commission in the application for rehearing, and under Section 70-2-25B and Pubco Petroleum Corp. vs. Oil Conservation Commission, these are the only issues on appeal to the District Court and Supreme Court. In fact, in their Petition to Appeal from Order No. R-6446 and Order R-6446-B of the Oil Conservation Commission to the District Court the Plaintiffs properly limited the issues on appeal to correlative rights and waste--issues the Plaintiffs raised in their Application for Rehearing. Paragraphs 6 and 7 of the Petition to Appeal state the Plaintiffs' contentions on appeal to the District Court as follows:

6. Commission Order No. R-6446 and Order No. R-6446-B are both invalid and should be set aside by the Court because the record as made before the Commission is devoid of substanital ev[redacted]indings and conclusions th[redacted]

A. Unitization at this time or in the foreseeable future under the Unit Agreement will prevent waste cognizable by the Commission;

B. Unitization under the Unit Agreement will protect the correlative rights of either the Plaintiffs or others who own fee interests in oil, gas and other minerals which may have become committed to the unit.

7. Commission Order No. R-6446 and Order No. R-6446-B are both invalid and should be set aside by the Court because the Commission did n[redacted]sh or set forth the extent th[redacted]s prohibited in the Oil and Gas Act, gas [sic] occured, is occurring presently, or is likely to occur in the future. With respect to co[redacted]o attempt has been made to de[redacted]ghts beyond stating all persons in[redacted]eated the same, a concept which is[redacted]in the definition of correlative ri[redacted]ection 70-2-33 (h) N.M.S.A. 1978. (T[redacted]

In their appeal to this Court, Plaintiff's summarized argument is:

> The Commission's Order should be set aside on several grounds. Neither the State of New Mexico nor the Commission has the power and ability the Commission claims for itself to compel drilling and producing in re-writing the contract. Since the basic premise of the Commission's Order is that it does have such power, the Order itself should be set aside. Neither is a preliminary agreement nor a preliminary contract tantamount to approval. There is a defect in notice to interested parties. Further the Commission lacks tools with which to properly exercise the powers it has reserved unto itself. (Brief-in-Chief, p. 12-13)

These issues were not raised in an application for rehearing.

Conclusion

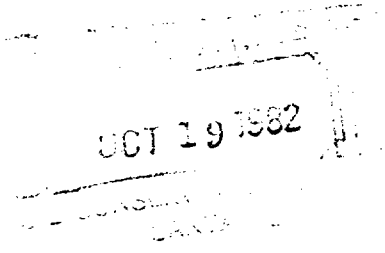
Amoco submits that Plaintiffs, having failed to file an application for rehearing after entry of Order No. R-6446-B, failed to exhaust their administrative remedies as to any issue arising from that order. The only issues properly before the Court for determination, therefore, are those presented to the Commission by the application for rehearing filed by Plaintiffs following entry of Commission Order No. R-6446. All other issues should be stricken from this appeal.

Respectfully submitted,

CAMPBELL, BYRD & BLACK, P.A.

By William F. Carr
William F. Carr
P. O. Box 2208
Santa Fe, New Mexico 87501
Phone: (505) 988-4421

ATTORNEYS FOR DEFENDANT-APPELLEE,
AMOCO PRODUCTION COMPANY



CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of october, 1982, I caused a true copy of the foregoing pleading to be mailed to Ernest L. Carroll and William Monroe Kerr, Fitz-Gerald and Kerr, P. O. Drawer 511, Midland, Texas 79702, attorneys of record for Plaintiffs-appellents.

William F. Carr
William F. Carr

IN THE DISTRICT COURT OF TAOS COUNTY

STATE OF NEW MEXICO

ROBERT CASADOS, et al,

Petitioners,

vs. Cause No. 81-176

(Consolidated)

OIL CONSERVATION COMMISSION, et al,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT

OIL CONSERVATION COMMISSION

This supplemental brief is submitted in response to request of the court at a hearing held in this matter on December 7, 1981. It is the purpose of this brief to respond to that request and to supplement the presentation made by respondent Oil Conservation Commission in a trial brief submitted to the court in this matter, and also in arguments presented to the court at the December 7, 1981, hearing on this matter.

The question posed by the court at the hearing related to the power of respondent Oil Conservation Commission to enter orders R-6446 and R-6446-B in response to the application of Co-respondent Amoco Production Company, for approval of the Bravo Dome Carbon Dioxide Unit Agreement and proceedings which followed that application. The question posed is:

> Whether the Commission has the power to approve a voluntary preliminary exploratory unitization agreement or a final unitization agreement with preliminary findings before the limitations of a field have been determined to a geologic probability.

This inquiry contains two separable elements which will be addressed. The first relates to the propriety of issuing the order prior to more definite geologic data becoming available and the second relates to the propriety of the Commission continuing to review unit operations. The two questions may be stated:

> 1. Whether the New Mexico Oil Conservation Commission acted within the scope of its authority in issuing these orders prior to all data and factual materials relating to the subject matter of the application becoming available?
>
> 2. Whether the respondent Oil Conservation Commission exceeded the scope of its statutory authority in issuing orders which retained continuing jurisdiction over the applicant, the Bravo Dome Carbon Dioxide Unit Agreement, and matters related thereto?

In order for this court to accurately answer either of these questions, it is necessary that a brief review be given of exactly what action was taken by the respondent Oil Conservation Commission and exactly what orders were entered. Contrary to the statements set out in the brief of petitioners, the provisions of Order No. R-6446-B are not "czar-like" and do not purport to grant to the Commission the far-reaching powers which petitioners claim the Commission may not exercise.

Petitioners attempt to reverse the test for review of administrative orders by claiming that in this instance the findings portion of the administrative decision must be supported by the order portion of that administrative decision. Petitioners argue that the findings contain matters which are not set forth in the order portion of the decision and therefore the orders are invalid. This mistaken and inverted view of administrative orders is then tested and the argument is made that since the orders fail to meet the inappropriate

and illogical standard of review, that the orders should be stricken.

The operative (order) portion of Order No. R-6446-B contains eleven subsections which: 1) approve the unit agreement; 2) approve the initial plan as a proper conservation measure; 3) require reports to the Commission by the operator of any expansions or contractions of the unit area; 4) require periodic demonstrations by the operator that the unit agreement is operating to prevent waste and protect correlative rights; 5) require that the demonstration of the prevention of waste and protection of correlative rights be made at a public hearing at least every four years; 6) require the submission of all plans of development of the unit area to be submitted to the Commission for approval; 7) require that the operator file tentative four-year plans; 8) specify that the four-year plans shall be for informational purposes only; 9) set forth the requirement of filing the first operating plan; 10) set the effective date of the unit agreement; and 11) state that the Commission retains jurisdiction over this matter. Nowhere in these provisions is there any indication that the operator of the unit or any party participating in the unit is required to submit any of its contractual relationships to the Commission for modification.

I.

THE COMMISSION HAS A STATUTORY DUTY TO ENTER THESE ORDERS WHICH ACT TO PREVENT WASTE PRIOR TO MORE GEOLOGICAL INFORMATION BECOMING AVAILABLE

Orders No. R-6446 and R-6446-B entered by the Oil Conservation Commission find that the approval of the Bravo Dome Carbon Dioxide Unit Agreement would act to prevent waste (see Trial Briefs of respondents for citation of substantial evidence supporting this finding). In addition, Orders No. R-6446 and R-6446-B find that the Bravo Dome Carbon Dioxide Unit Agreement operates to protect correlative rights. This finding is also supported by substantial evidence as demonstrated by briefs and arguments of respondents previously submitted in this matter.

Petitioners complain that respondent Oil Conservation Commission entered its order in this matter prior to all detailed factual data becoming available and in support of such position refers this court to several instances in Order No. R-6446-B in which the Commission states that "at least initially" or "at this time" the orders act to protect correlative rights. Petitioner than argues that since the data is not available to enter an order resolving for all time the correlative rights of all parties in the Bravo Dome Carbon Dioxide Unit, that the Commission is barred from entering <u>any</u> order.

This position is directly contrary to statutory mandates and case law authority in the State of New Mexico placing

requirements on the New Mexico Oil Conservation Commission. A similar argument was made in the case of Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939. In that case the court held that the Commission had made findings of fact "insofar as can be practicably determined" and that it would be inappropriate to delay the entry of orders which would act to prevent waste simply because there was insufficient data presently available to accurately and permanently set forth the correlative rights of the respective parties. In that case the court said:

> The prime objective of the statutes under consideration is, "in the interest of the public welfare, to prevent waste of an irreplaceable natural resource." El Paso Natural Gas Co. v. Oil Conservation Com'n, supra. The Graces would have us hold that the Commission is powerless to enter proration orders in respect to newly discovered pools until sufficient data has been gleaned to make the reserve computations. We do not agree. Prevention of waste is paramount, and private rights, such as prevention of drainage not offset by counter drainage and correlative rights must stand aside until it is practicable to determine the amount of gas underlying each producer's tract or in the pool. 87 N.M. at 212. (emphasis added)

The New Mexico Oil Conservation Commission has entered an order directly in line with its statutory mandate as interpreted by the New Mexico Supreme Court in this case. The Commission approved a unit agreement which it found would act to prevent waste, that unit agreement presently acts in an equitable way to protect correlative rights, and that unit agreement provides for subsequent adjustment of the equities as additional information becomes available. (Article 5.2 of Exhibit 1 to the Hearing)

This finding in Grace that the Oil Conservation Commission must accept as its primary responsibility the prevention of waste and must act to prevent waste in situations where detailed factual data may not be available with regard to doing exact

equity between all parties in regard to correlative rights has been followed and explicitly re-adopted in the case of Rutter and Wilbanks Corp. v. the Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). In addition the primary case relied upon by petitioners in support of the necessity of detailed findings relating to correlative rights is Continental Oil Co. v. the Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962) supports this position. In that case the court was presented with an order which did not refer to the prevention of waste but relied upon only the duty of protection of correlative rights to support the Commission's action. The court found that in order to support the order under such circumstances, more detailed correlative rights related findings were required but despite such finding that detailed findings were desirable, that court stated that the prevention of waste was "the paramount power" (Continental Oil Co. v. Oil Conservation Commission, 70 N.M. at 318).

That this authority is granted by the statutes is clear, not only from court decision interpreting those statutes, but from the statutes themselves. Section 70-2-11 sets forth the powers of the Oil Conservation Commission to prevent waste and protect correlative rights. That section provides in part that the Commission:

> ...is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the Division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.

For additional statutory authority this court is referred to briefs previously filed in this matter.

In response to the statutory mandate imposed upon it, and by the interpretation of that statutory mandate rendered by the courts of this state in various proceedings, the Oil Conservation Commission in entering Orders No. R-6446 and R-6446-B has acted to prevent waste and has acted to protect correlative rights to the extent practicable. Such action was not only within the statutory authority of the agency, but such action was in fact the duty of the agency.

II.

THE NEW MEXICO OIL CONSERVATION DIVISION IS EMPOWERED TO MAINTAIN CONTINUING JURISDICTION OVER MATTERS PRESENTED FOR ITS CONSIDERATION.

In view of the possibility of changing circumstances, as additional information becomes available, both Orders R-6446 and R-6446-B entered by the New Mexico Oil Conservation Division approving the Bravo Dome Carbon Dioxide Unit Agreement by their own terms retain jurisdiction in this matter "for the entry of such further orders as the Commission may deem necessary." (Order Paragraph No. (11) of Order No. R-6446-B.) The authority of the Commission to retain such jurisdiction is once again found in New Mexico Statutes, New Mexico case law, and is supported by the general rules of administrative law.

Although the power of the New Mexico Oil Conservation Division to exercise continuing jurisdiction has not in the past in reported cases been directly attacked, there is in several cases the implication that the exercise of such jurisdiction is appropriate. Once again this court is specifically referred to the cases Grace v. Oil Conservation Commission, 87 N.M. 205, 531

P.2d 939 (1975) and Rutter and Wilbanks Corporation v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). In both of these cases the court found that in view of the Commission's primary responsibility for preventing waste that orders entered which acted in the near term to protect correlative rights were appropriate until additional information relative to correlative rights was obtained. In neither of these cases did the court either insist upon the imposition of a formula initially which would be ultimately supportable nor did the court in either of these cases determine that the parties would be permanently and ultimately bound by the formula adopted.

In addition, the court is once again referred to Section 70-2-11 NMSA, 1978, which grants to the Commission the powers necessary to accomplish its duties whether or not specified by statute. The nature of the exploration for, development of, and production of natural resources is by its very nature a complex, long-term operation which cannot be planned with finality at its initial stages. To require the Oil Conservation Commission to adopt or impose, at this time, plans which could not be subsequently amended would prevent the Oil Conservation Commission from performing its duties of preventing waste and protecting correlative rights. By the same token, refusal to allow the Oil Conservation Commission to act at this time would deny to the Oil Conservation Commission the power to perform its statutory duty of preventing waste. The mechanism most suitable in instances of this sort for allowing the Commission to act to perform its statutory duties is the mechanism of allowing the Commission to act presently while retaining jurisdiction for subsequent review and action.

Although this matter has not been directly challenged in New Mexico, there are in the federal system several cases which address the continuing jurisdiction of administrative agencies. In the case of the Environmental Defense Fund v. The Environmental Protection Agency, 465 F.2d 528 (D.C. Ct. App. 1972) the District of Columbia Court of Appeals was confronted with a challenge to an interim decision of the Environmental Protection Agency which decision provided that its interim decision would be reviewed on receipt of additional information. In discussing the propriety of this exercise of continuing jurisdiction, the Court of Appeals stated:

> "That course is sound practice, and indeed is an implicit requirement of law, for the administrative process is a continuing one, and calls for continuing re-examination at significant junctures. Citations omitted. 465 F.2d at 541.

The Environmental Defense Fund case, supra. relied upon American Airline, Inc. v. CAB, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843, 87 S. Ct.73, 172 Ed.2d 75 (1966) which had a somewhat more extended discussion of the ability of administrative agencies to continue their jurisdiction over matters and subsequently review and possibly amend their decisions. The court in the American Airlines case found that the question before them for review was one which involved expert opinions and forecasts which could not be decisively resolved by testimony and that in light of that type of problem the administrative process was particularly useful because of its ability to continue to oversee and supervise matters. The court said:

> "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in light of experience....In any event, it is the obligation of

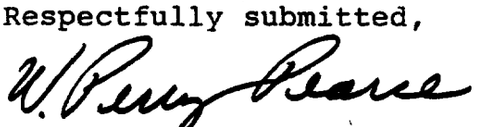
an.... agency to make re-examinations and adjustments in the light of experience." 559 F.2d 624 at 633

It is particularly significant that the ruling of the CAB being challenged in the American Airlines case contained the language "at this time" in referring to certain of its findings. This is precisely the method adopted by the Oil Conservation Commission in the matter presently under review and it is particularly appropriate in situations in which to allow parties to proceed without this order being entered would cause waste and yet to prohibit them from proceeding at all would cause a failure to develop the natural resources in question.

CONCLUSION

In view of the matters presented to this court for its review, both in initial briefs and arguments and in this supplemental brief, the respondent New Mexico Oil Conservation Commission has acted within its statutory authority. The Commission has acted to approve this voluntary unit agreement which acts to prevent waste and to protect correlative rights. Therefore the Commission requests that its orders Nos. R-6446 and R-6446-B be affirmed and that petitioners be denied the relief sought.

Respectfully submitted,



W. PERRY PEARCE
Assistant Attorney General
State of New Mexico
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

CERTIFICATE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING BRIEF WAS MAILED TO OPPOSING COUNSEL OF RECORD THIS 17th DAY OF DECEMBER, 1981.

_____

STATE OF NEW MEXICO COUNTY OF TAOS

IN THE DISTRICT COURT

ROBERT CASADOS, et al.,

Plaintiffs,

v. No. 81-176

OIL CONSERVATION COMMISSION, et al.,

Defendants.

SUPPLEMENTAL TRIAL BRIEF OF DEFENDANT AMOCO PRODUCTION COMPANY

Defendant, Amoco Production Company, submits this supplemental trial brief in response to questions raised by the court at the December 7, 1981 hearing on this appeal. The questions are:

1. Does the Oil Conservation Commission have continuing jurisdiction over a case after a final order has been entered?

2. Can the Oil Conservation Commission approve a unitization agreement before the limitations of the field have been determined to a geologic probability?

Oil Conservation Commission Orders R-6446 and R-6446-B approved the Bravo Dome Carbon Dioxide Unit Agreement, but imposed certain conditions on its approval. Findings 28 through 32 of Order R-6446-B set forth those conditions as follows:

> (28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.
>
> (29) That the Commission may, and should, exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions as may, in the future, be required to prevent waste and protect correlative rights therein.
>
> (30) That those matters or actions contemplated by Finding No. (29) above may include but are not limited to: well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the unit agreement.

(31) That the unit operator should be required to periodically demonstrate to the Commission that its operations within the unit are resulting in prevention of waste and protection of correlative rights on a continuing basis.

(32) That such a demonstration should take place at a public hearing at least every four years following the effective date of the unit or at such lesser intervals as may be required by the Commission.

At the December 7, 1981 hearing, plaintiffs attacked the orders approving the Bravo Dome Unit Agreement on the grounds that the Commission's approval was contingent upon its continuing jurisdiction over the case; that the Commission lacked continuing jurisdiction over the order and; that this jurisdictional defect rendered the order void.

I.

THE OIL CONSERVATION COMMISSION HAS CONTINUING JURISDICTION OVER A CASE AFTER A FINAL ORDER HAS BEEN ENTERED.

This point deals only with the power of the Oil Conservation Commission to reopen and rehear a case after a final order in the case has been entered. It does not consider what actions might be taken by the Commission in such a rehearing. Subsequent actions by the Commission, if any, are not jurisdictional matters. See, Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939, 942-943 (1975). At the December 7 hearing, plaintiffs expressed concern about a number of actions that the Commission might take following a rehearing. Subsequent decisions the Commission, if any, would have to be consistent with its statutory authority. The legality of such decisions cannot be determined until the Commission acts.

An administrative agency can exercise continuing jurisdiction over its orders and decisions only if such authority is expressly granted by statute or if the exercise of continuing jurisdiction has been granted to the agency by implication. Kennecott Copper Corp. v. Employment Security Comm., 78 N.M. 398, 432 P.2d 109 (1967).

There is language in the New Mexico Oil and Gas Act which clearly shows that the Oil Conservation Commission has continuing jurisdiction over its orders. §70-2-23 N.M.S.A. 1978 provides in part as follows:

> 70-2-23 HEARINGS ON RULES, REGULATIONS AND ORDERS — NOTICE — EMERGENCY RULES. -- except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this Act, a public hearing shall be held at such time, place and manner as may be prescribed by the Division.

This section requires the Commission hold a public hearing prior to changing, revoking, renewing or extending any of its orders. Unless it had continuing jurisdiction over its orders, such hearing could not be held by the Commission.

Even if this section of statute is not construed as expressly conferring on the Commission continuing jurisdiction over its orders, such power has been granted to the Commission by implication.

In determining whether the power to reopen and reconsider its prior final decisions have been conferred by implication on an administrative agency, we must first construe the statutes which govern the agency's actions to determine what was the intention of the legislature concerning continuing jurisdiction. Kennecott, supra. In Reese v. Dempsey, et al., 48 N.M. 417, 152 P.2d 157 (1944) the New Mexico Supreme Court found that the intention of the legislature ". . . is the primary and controlling consideration in determining the proper construction" of an act. Furthermore, in reviewing an Act, the entire statute should be considered. Allen v. McClellan, 75 N.M. 400, 405 P.2d (1965); State v. Wylie, 71 N.M. 477, 379 P.2d 86 (1973); Reese, supra pp. 161, 162.

The Commission has been granted broad powers and

responsibilities of a continuing character. The general scope of these powers is announced in two sections of the Oil and Gas Act:

> 70-2-6 COMMISSION'S AND DIVISION'S POWERS AND DUTIES. — A. The Division shall have, and is hereby given, jurisdiction and authority over all matters relating to the Conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this Act or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.
>
> 70-2-11 POWER OF COMMISSION AND DIVISION TO PREVENT WASTE AND PROTECT CORRELATIVE RIGHTS. -- A. The Division is hereby empowered, and it is its duty, to prevent waste prohibited by this Act and to protect correlative rights, as in this Act provided. To that end, the Division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this Act, whether or not indicated or specified in any section hereof.

(The Commission is granted the same power and authority as is conferred upon the Division in the above quoted sections of statute.)

The Oil and Gas Act contains broad definitions of waste and correlative rights. "Waste" is defined to include surface waste, underground waste, production in excess of reasonble market demand and non-ratable taking. §70-2-3-NMSA 1978. "Correlative rights" is defined as affording each property owner in a pool the opportunity to produce his just and equitable share of the oil or gas in the pool. §70-2-33 NMSA 1978.

It is necessary that the Commission be able to reopen and reconsider its decisions for an order which complies with both of the Commission's statutory duties when entered may be discovered to violate correlative rights or cause waste as subsequent data becomes available. To hold that the Commission did not have continuing jurisdiction over its orders would make it impossible for it to efficiently perform its statutory duties. As the Supreme Court of New Mexico noted in Kennecott, supra:

> When a power is conferred by statute, everything necessary to carry out the power and make it effective and complete will be implied.

Also see, Reese, supra; State Ex Rel Clancy v. Hall, 23 N.M. 422, 168 P.2d 715.

The power of an agency to reopen and reconsider a decision has been generally sustained where the function of the agency was classified as non-judicial, administrative, executive, or ministeral and has been denied when the function was classified as judicial or quasi-judicial. 73 ALR.2d 954.

In Wilbur v. United States, 281 U.S. 206, 74 LEd 809, 50 S.Ct. 320 (1930) the United States Supreme Court reviewed the power of the Secretary of the Interior to reconsider and revoke final decisions concerning the rights of certain Indians to share in tribal properties. In upholding the power of the Secretary to reconsider these decisions the Court stated:

> "The decision . . . was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor. The latter was charged, no less than the former had been, with the duty of supervising the payment of the interest annuities. . . ." Wilbur, supra. at 324.

Also see, Siegel v. Mangan, 258 App. Div. 448, 16 NYS2d 1000.

Contrary to the assertions by the plaintiffs in this case, the Oil Conservation Commission does not perform a judicial or quasi-judicial function. In Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809, 818 (1962), the New Mexico Supreme Court reviewed the nature of the Oil Conservation Commission and found that in preventing waste and protecting correlative rights it acts under "legislative mandate". The Court proceeded to find: "As such, it is acting in

an administrative capacity in following legislative directions, and not in a judicial or quasi-judicial capacity."

In carrying out its administrative duties, the Commission authority is of a continuing nature and as such it has the power to reopen and reconsider its decision and orders.

The authority to prescribe its own rules of practice and procedure has also been found to support the continuing authority of an administrative agency to reopen and reconsider a final decision.

In Atlantic Greyhound Corp. v. Public Service Commission, 132 W.Va. 650, 54 SE.2d 169, 175 (1949) the Supreme Court of West Virginia found that the Public Service Commission of that state had continuing jurisdiction over its orders by implication. In reaching this conclusion, the court stated:

> Denial of the authority of the Commission to rehear a matter of which it has jurisdiction, in view of its power to prescribe rules of practice and procedure... would disrupt the orderly discharge of the duties and functions which the Legislature, by the enactment of statutes has required it to perform; produce confusion and uncertainty; and add to the number and frequency of unnecessary appeals. Unless legally necessary, a conclusion which produces those results should not be adopted. In the absence of any limitation or precept of law which requires disavowal of that right, and it seems there is none, the power of the Commission to rehear a proceeding of which it has and retains jurisdiction will be recognized and its effective operation sustained and upheld."

The New Mexico Oil and Gas Act authorizes the Oil Conservation Commission to "prescribe its rules of order or procedure in hearings or other proceedings before it. §70-2-7 and 70-2-13 NMSA, 1978. Such power and the general authority cited above further supports the argument that the Commission has continuing authority over its orders by implication.

The case before the court demonstrates the need for the Commission to have continuing jurisdiction over its orders and decisions if it is to effectively and efficiently carry out its

statutory duties. The Commission approved the Bravo Dome Unit Agreement finding that it, at least initially, is fair to the owners of interest therein (Order R-6446-B, Finding 25). Additional evidence would have been desirable but, due to the fact that this is an exploratory unit, that data is as yet unobtainable. The New Mexico Supreme Court has found that, in a situation like this, where certain data is not yet obtainable, the Commission can rely on what is available and enter an order to protect correlative rights. Rutter and Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). If the Commission did not have continuing jurisdiction and if, as additional evidence was obtained, it appeared that correlative rights were being impaired, the Commission would be unable to change its original order.

As noted above, the Oil and Gas Act contains language which shows the legislature intended the Oil Conservaton Commission to have continuing jurisdiction. This agency was directed by the legislature to carry out the administrative functions of preventing the waste of oil and gas and protecting the correlative rights of operators in oil and gas fields. The functions of the agency are broad in scope and of a continuing character which require that it be empowered to reopen and reconsider its decisions as conditions warrant. The absence of such power to reconsider would render the Commission unable to carry out its duties.

The Commission's finding on continuing jurisdiction in Order R-6446-B approving the Bravo Dome Unit Agreement is a correct statement of its authority. How the Commission might act in exercising this power is a matter which cannot be reviewed until the Commission exercises this jurisdiction.

II.

THE OIL CONSERVATION COMMISSION HAS THE POWER TO APPROVE A UNITIZATION AGREEMENT BEFORE THE LIMITATIONS OF THE FIELD HAVE BEEN DETERMINED TO A GEOLOGIC PROBABILITY.

The Commission's power to approve unit agreements comes from its broad statutory authority to do whatever may be reasonably necessary to prevent waste and protect correlative rights as set out in the Oil and Gas Act. §70-2-11 NMSA, 1978.

In Continental, supra, p. 818, the New Mexico Supreme Court found that the prevention of waste is the paramount interest and the protection of correlative rights is subservient thereto. The Court also held in Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939, 946 (1975) that "Prevention of waste is paramount, and private rights, such as prevention of drainage not offset by counter drainage and correlative rights must stand aside until it is practical to determine the amount of gas underlying each producer's tract or in the pool."

The evidence present in the case, as was fully set out in the Trial Brief of Defendant Amoco Production Company, showed that substantial benefits will be derived from unitized operations of the Bravo Dome Unit Area. These benefits include (1) more efficient development and production of carbon dioxide, (2) elimination of wasteful duplication of material and equipment and (3) more efficient well spacing. All of these benefits will result in reduced costs, extended economic lives of wells within the unit, and greater ultimate recovery of carbon dioxide -- which in turn result in the prevention of waste. See, §70-2-3 NMSA, 1978.

Benefits of unitization for primary production can only be obtained if the field is unitized at an early stage in its development when the full extent of the field often cannot be

determined to a geologic probability.

In Rutter and Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582, 587-588 (1975), the Commission entered orders approving to nonstandard spacing units which contained substantially more acres than allowed by state-wide rules. Rutter and Wilbanks challenged the orders on the grounds that part of the lands in the spacing units contained no recoverable reserves and that their interests were being diluted by inclusions of these lands. In upholding the Commission's decision, the New Mexico Supreme Court noted ". . . it also appears that the Washington Ranch - Morrow Pool is still being developed and proof as to its recoverable reserves and its limits and character is far from complete." The Court then quoted with approval the following language froma similar case from Oklahoma:

> "We also recognized the risk, without such a requirement (and under wide spacing) of some owners of mineral interests being enabled to share, at least, for a time, in production to which subsequently developed knowledge (whether gained from wells later drilled on smaller units, or otherwise) indicates they were never entitled, because of the (subsequently established) unproductivity of the locus of their interest. But, in said opinion (p. 853) we had also noted that the prevention of wasteful, excessive drilling (as well as the protection of correlative rights) was a primary legislative consideration in the enactment of the original Well Spacing Act. And, we concluded that it has been the policy of the Legislature to tolerate the lesser hazard (i.e., the possibility that some production, or production proceeds, may be taken from some owners rightfully entitled to it, and transmitted to others not so entitled) . . . in preference to the greater hazard to the greater number of owners and the State in the dissipation of its natural resources by excessive drilling . . . Landowners, Oil, Gas and Royalty Owners v. Corporation Comm., 415 P.2d 942, 950 (1960), referring to Panhandle Eastern Pipeline Co. v. Corporation Comm., 285 P.2d 847 (1955).

Rutter and Wilbanks involved a Commission decision approving a spacing unit based on less data than was desirable as to the extent of the limits of the producing field. It was known

if all lands sharing in the proceeds from production from the wells on these spacing units were actually contributing reserves to the wells.

In the Bravo Dome unit area, the Commission is operating with less data than is desirable as to the full extent of the Tubb Formation but, as in Rutter and Wilbanks, that is because certain data is as yet unobtainable. Yet in both cases the Commission approved the applications on the grounds that such approval would prevent the waste of gas and carbon dioxide. It also found in both cases that orders protected the correlative rights of interest owners in the pool.

In Rutter and Wilbanks, the court upheld the Commission's orders on the grounds that it protected correlative rights as far as it was practicable to so citing Grace, supra. See, Trial Brief of Defendant Amoco Production Company, pp. 10-11.

Rutter and Wilbanks provides authority for the Commission to approve unitization agreements as well as application for non-standard spacing units prior to the time the full limits of the field are established to a geologic probability. In each case, the same basic considerations are involved. In both instances the Commission must act to prevent waste and to protect correlative rights as far as it is practicable to do so.

It is the very nature of the oil and gas business that with each new well drilled in a pool, more data becomes available about that pool. If the Commission could not approve a voluntary unit until the pool limits were fully known few, if any, units could be approved and a unit could never be approved until the pool had been developed to such an extent that it would be too late to derive the above-noted benefits of unitized operations.

For over 40 years unitization has been a fundamental tool used to conserve oil and gas. If no pool could be unitized until

the full extent of the field was known to a geologic probability, the effect of unitization agreements would be defeated and the validity of hundreds of units in the State of New Mexico would be called into question.

CONCLUSION

Defendant Amoco Production Company submits that:

(1) the New Mexico Oil Conservation Commission has continuing jurisdiction over its orders enabling it to reopen and reconsider its decisions as circumstances require.

(2) the Commission also has the authority and duty to approve unitization agreements prior to the time when the limits of the producing field are known to a geologic propbability, and

(3) Orders R-6446 and R-6446-B should be affirmed.

Respectfully submitted

CAMPBELL, BYRD & BLACK, P.A.

By William F. Carr

William F. Carr
Post Office Box 2208
Santa Fe, New Mexico 87501
(505) 988-4421

Certificate of Mailing

I hereby certify that true copies of the foregoing pleading were mailed to all counsel of record this 18th day of December, 1981.

William F. Carr

STATE OF NEW MEXICO COUNTY OF TAOS

IN THE DISTRICT COURT

ROBERT CASADOS, et al.,

Plaintiffs,

v. No. 81-176

OIL CONSERVATION COMMISSION, et al.,

Defendants.

TRIAL BRIEF OF DEFENDANT, AMOCO PRODUCTION COMPANY

STATEMENT OF THE CASE

This suit is brought pursuant to Section 70-2-25, NMSA, 1978, for judicial review of orders entered by the New Mexico Oil Conservation Commission on August 14, 1980 and modified and reaffirmed on January 23, 1981.

STATEMENT OF PROCEEDINGS

Amoco Production Company (hereinafter called Amoco) is the operator of the Bravo Dome Carbon Dioxide Gas Unit (hereinafter called Unit) which is a voluntary unit for the exploration and development of carbon dioxide gas from approximately 1,035,000.00 acres of federal, state and fee lands located in Harding, Quay and Union Counties, New Mexico. In forming the Unit, Amoco, as unit operator, submitted the Bravo Dome Carbon Dioxide Gas Unit Agreement (hereinafter called Unit Agreement) to the New Mexico Commissioner of Public Lands and the Director of the United States Geological Survey for approval.

On January 8, 1980, the New Mexico Commissioner of Public Lands gave preliminary approval to the Unit Agreement as to form and content, but pursuant to Rule 47 of the State Land Office Rules and Regulations postponed his final decision pending action by the New Mexico Oil Conservation Commission (hereinafter called

Commission)(RTR 184).*

Amoco made application to the Commission for approval of the Unit on May 28, 1980. Notice was given and on July 21, 1980 a Commission hearing was held on Amoco's application.

On August 14, 1980, Order R-6446 was entered by the Commission approving the Unit. This order provided, among other things, that the Unit would become effective 60 days after approval of the Unit Agreement by the Commissioner of Public Lands.

Final approval was received from the Commissioner of Public Lands on August 28, 1980 (Exhibit RH 8) and the Unit became effective under the order and Unit Agreement on November 1, 1980. The Director of the United States Geological Survey in Albuquerque, New Mexico approved the Unit on August 29, 1980 (Exhibit RH 9).

Certain petitioners filed an Application for Rehearing on September 2, 1980 asking the Commission to set aside Order R-6446 or, in the alternative, to enter additional findings on the questions of the prevention of waste and the protection of correlative rights. Petitioners' Application for Rehearing alleged that: (a) the order and findings are not supported by substantial evidence; (b) the findings in the order are insufficient; (c) the Commission failed to carry out its statutory duties to prevent waste and protect correlative rights; and (d) the Commission's decision is arbitrary and capricious.

The Commission granted the Application for Rehearing by order dated September 12, 1980 but limited evidence to:

"(1) prevention of waste within the unit area,

---

*References to the transcript of the July 21, 1980 hearing are indicated by "TR". References to the transcript of the October 9, 1981 rehearing are indicated by "RTR".

(2) protection of correlative rights within the unit area as afforded by the unit agreement, its plan and participation formula, and

(3) whether the unit agreement and its plan are premature."

A second public hearing was held before the Commission on October 9, 1980 and on January 23, 1981 the Commission entered Order R-6446-B which again approved the Unit and contained extensive findings on waste and correlative rights. This order also imposed certain conditions which, among other things, require periodic hearings before the Commission at which time Amoco will be required to show that unit operations will result in the prevention of waste and protection of correlative rights. (Order R-6446-B, Findings 29 through 36).

Petitions to Appeal from Order Nos. R-6446 and R-6446-B were filed in Harding, Quay and Union Counties on February 11, 1981. The petitions were consolidated and docketed in the District Court of Taos County New Mexico.

POINT I

OIL CONSERVATION COMMISSION ORDERS R-6446 AND R-6446-B ARE NOT ARBITRARY OR CAPRICIOUS AND ARE CONSISTENT WITH THE COMMISSION'S STATUTORY DIRECTIVES.

In the instant case, the Commission was concerned with the establishment of a voluntary unit for the exploration and development of carbon dioxide gas.

The State of New Mexico plays a significant role in the formation of this unit. Article 17 of the Unit Agreement requires approval of the Oil Conservation Commission as a condition precedent to its effectivness. Furthermore, a substantial portion of the unit is state land and therefore, the consent of the Commissioner of Public Lands to the development and operation of these lands as part of the unit is necessary.

The standards to be applied by the Commissioner in making this determination are specifically set out in statute: Section 19-10-46 NMSA, 1978 provides:

> "No such agreement shall be consented to or approved by the Commissioner unless he finds that:
>
> (A) Such agreement will tend to promote the conservation of oil and gas and the better utilization of reservoir energy;
>
> (B) under the operations proposed the state and each beneficiary of the lands involved will receive its fair share of the recoverable reserves; and
>
> (C) the agreement is in other respects for the best interests of the state."

As previously noted, Amoco submitted the Unit Agreement to the Commissioner of Public Lands and received the Commissioner's preliminary approval as to form and content. Under Rule 47 of the State Land Office Rules and Regulations, the Commissioner referred this Agreement to the Oil Conservation Commission for review and comment prior to rendering a final decision on it.

The authority for such Commission action comes from its general statutory authority to do whatever is necessary to prevent waste and protect correlative rights. Section 70-2-11 NMSA, 1978. The Commission held two hearings after giving notices required by law, received evidence and approved the unit agreement finding it would prevent waste and protect correlative rights.

The plaintiffs contend that due to the limited development in the unit area, the decision of the Commission that the Unit Agreement prevents waste and protects correlative rights is premature. Application for Rehearing, paragraph 8. The Commission found, however, that this was an exploratory unit (Order R-6446-B, Finding 13), that there is a current need for carbon dioxide (Order R-6446-B, Findings 18 and 19), and that the

application was not premature (Order R-6446-B, Finding 21). By its very nature, an exploratory unit cannot be prematurely created and approval of such unit by regulatory authorities, likewise, cannot be prematurely given. If unit development is to be effective, the unit must be in operation before there is substantial development of the resource.

POINT II

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT EACH FINDING NECESSARY FOR A VALID ORDER APPROVING THE BRAVO DOME UNIT AGREEMENT.

Plaintiffs attack the sufficiency of the Commission's findings on waste and correlative rights in paragraph 7 of their Petition to Appeal. In Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962), and again in Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975), the New Mexico Supreme Court announced the standards to be applied when the sufficiency of the findings in an Oil Conservation Commission order are at issue. The Court found that the Commission order must contain "sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings" on waste and correlative rights and further found that "administrative findings by an expert adminstrative commission should be sufficiently extensive to show the basis of the Commission's order." Fasken v. Oil Conservation Commission, supra, at 590. In this case, the Court is asked to review the findings to determine if they meet the test announced in Continental and Fasken.

Plaintiffs also attack the Commission's findings by alleging that they are not supported by substantial evidence. In Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939 (1975) the New Mexico Supreme Court defined the scope of review

of an order of the Oil Conservation Commission stating that it will review the order to determine if it is substantially supported by the evidence and by applicable law. The question presented to the court by this appeal, therefore, is whether or not there is substantial evidence in the record which supports the order of the Commission. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Grace, supra, p. 492; Rinker v. State Corporation Commission, 84 N.M. 626, 506 P.2d 783 (1973); Fort Sumner Municipal School Board v. Parsons, 82 N.M. 610, 45 P.2d 366 (1971). In deciding whether a finding has substantial support, the court must review the evidence in the light most favorable to support the finding and reverse only if convinced that the evidence thus viewed together with all reasonable inferences to be drawn therefrom cannot sustain the finding. In making this review any evidence unfavorable to the finding will not be considered. Martinez v. Sears Roebuck & Co., 81 N.M. 371, 467 P.2d 37 at 39 (Ct.App. 1970). These standards of review apply to the decisions of administrative boards. United Veterans Organization v. New Mexico Property Appraisal Department, 84 N.M. 114, 500 P.2d 199, 203 (1972).

WASTE

The definition of waste in the New Mexico Oil and Gas Act reads in part as follows:

> "As used in this act, the term 'waste' in addition to its ordinary meaning, shall include:
>
> A. "Underground waste" as those words are generally understood in the oil and gas business and in any event to embrace the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells any manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient

underground storage of natural gas. . .

> B. "Surface Waste" as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form or crude petroleum oil, or any product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage, or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage or from the production of crude petroleum oil or natural gas, in excess of the reasonable market demand.

Section 70-2-3 NMSA, 1978 (emphasis added).

This definition has been extended to apply to carbon dioxide gas as well as natural gas. Section 70-2-34 NMSA, 1978.

Findings 8 and 9 of Order R-6446-B clearly reflect the Commission's reasoning in reaching its conclusion that approval of the unit will tend to increase the total quantity of carbon dioxide ultimately recovered from the unit area thereby preventing underground and surface waste.

Finding 8 of Order R-6446-B reads in part:

> "That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:
>
> (a) more efficient, orderly and economic exploration of the unit area; . . ."

The record contains substantial evidence to support this finding.

Witnesses for Amoco, Cities Services Company and the plaintiffs all testified that unitized operation and management was the best method to be used to develop this field. Mr. F.H. Callaway, a reservoir engineer who testified for the plaintiffs, stated:

> "I've always been an advocate of field-wide unitization. I feel like that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons, in this case gas, and operates under the most efficient circumstances." (RTR 154)

The evidence offered in the case shows that unit management will provide for orderly development of the unit area (TR 28, RTR 87, 140), and that will enable the operator of the unit to develop the area by drilling wells at the most desirable locations (TR 35) enabling the operator to drain the reservoir in an effective manner with the most efficient spacing pattern (RTR 100). It was also shown that unit management will avoid wasteful drilling and completion practices (TR 35) for the operator will drill only those wells necessary to produce the reserves (RTR 40-50, Rehearing Exhibits 1, 2, and 3). Unnecessary wells will, therefore, be avoided (RTR 45, 61-63).

Finding 8 of Order R-6446-B further provides that another advantage of unitized operation and management is that it will result in: "(b) more economical production, field gathering, and treatment of carbon dioxide gas within the unit area." Substantial evidence was presented supporting this finding.

Jim Allen, Senior Petroleum Engineer for Amoco Production Company was qualified as an expert engineering witness and testified that unit management and operation is the most efficient way to produce CO_2 from the Bravo Dome Unit area (RTR 87, 154). He testified as to how unit operations will enable the operator to produce CO_2 from the Bravo Dome Unit with substantially fewer surface facilities than would be required by operations on a lease by lease basis (RTR 50-61, 63, Rehearing Exhibits 3, 4, 5, 6, and 7). This in turn results in reduced production costs (RTR 64, 97).

Finding No. 9 of Order R-6446-B provides:

> "That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste."

Mr. Allen testified as to the number of surface facilities

that would be required if the Bravo Dome was developed on a lease by lease basis and then contrasted this number with the number of facilities required under unit operation and management (RTR 50-61, Rehearing Exhibits 3, 4, 5, 6, and 7). He stated that under unit operations, only six surface facilities would be required as opposed to as many as 4435 such facilities if operated under the individual leases. (RTR 60) He concluded his testimony on this subject as follows:

> Q. "(By Mr. Buell)" . . . in your opinion would six surface facilities installations serving 324 wells each be able to be operated a longer economic life than 4435 individual facility installations serving this unit area on a lease basis?"
>
> A. "In my opinion, Mr. Buell, I think it would be considerably cheaper to operate on a unit basis and as such, we would have a longer individual life, well life."
>
> Q. "So under unit operation a greater amount of CO_2 would be recovered than would be recovered under the individual lease operations?"
>
> A. "Yes, sir, in my opinion."
>
> Q. "That would thus prevent reservoir waste in that you'd be recovering the maximum amount of CO_2 possible."
>
> A. "Yes, sir."
>
> (RTR 63-64)

Mr. Allen further testified that the savings reflected by the reduced number of surface facilities is only indicative of a number of economies that would come from unit operations resulting in greater recovery of carbon dioxide gas from the unit area (RTR 97). This testimony was not refuted by any evidence offered at either commission hearing.

Order R-6446-B, therefore, contains findings sufficient to show the Commission's reasoning that unitized operation and management of unit area would clearly prevent waste as defined by the New Mexico Oil and Gas Act. The findings reflect the

Commission's reasoning that unitized management and operation of the unit area was more efficient, that it would result in economic savings which would extend the economic lives of the wells involved, that this would result in the production of carbon dioxide gas that otherwise would not be produced; and thus prevent waste. Each of the findings is supported by substantial evidence.

CORRELATIVE RIGHTS

The Supreme Court of New Mexico has stated that correlative rights are not absolute or unconditional but noted that the legislature has enumerated in the definition of correlative rights (Section 70-2-33 NMSA, 1978) the following definite elements contained in such a right:

> ". . . (1) an opporunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of the gas in the pool." Continental v. Oil Conservation Commission, supra at 818.

In Continental, the court noted that ". . . the protection of correlative rights must depend upon the Commission's findings as to the extent and limitations of the rights." Id. It further enumerated specific correlative rights findings to be made by the Commission, if practicable to do so, prior to the entry of an order, Id.

The strict test announced in Continental concerning correlative rights findings was reviewed by the court in Rutter & Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). This case involved an attack on an Oil Conservation Commission order approving oversized proration units for failing to contain all findings on correlative rights required by the Continental decision. In announcing its decision in Rutter & Wilbanks, the Court stated:

> When the Commission exercises its duty to allow each interest owner in a pool "his just and equitable share" of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by Section 65-3-29(H), NMSA 1953 [Section 70-2-33, NMSA, 1978] is subject to the qualification "as far as it is practicable to do so" see Grace v. Oil Conservation Commission. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute "substantial evidence" or that the orders were improperly entered or that they did not protect the correlative rights of the parties "so far as [could] be practicably determined . . ." 532 P.2d at 588 (emphasis added).

The record in this case, as will be hereinafter shown, contains substantial evidence supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit Area will be protected. (TR 27-29, 45, RTR 14, 17, 32, 38, 80, 98, and 176). The only limitations on the evidence presented result from the very nature of exploratory units (see Order R-6446-B, Findings 10-13) in that certain evidence is not obtainable until the acreage involved has been more fully developed.

Finding 14 of Oil Conservation Commission Order R-6446-B reads as follows:

> (14) that the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production of proceed therefrom from the unit; these methods are as follows:
>
> > (a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
> >
> > (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based

> upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

Mr. Neil D. Williams, a petroleum consultant with extensive experience in unitization, testified that about these two basic types of participation formulas used in exploratory units (RTR 23, 32-34). This testimony was concurred in by Mr. Callaway (RTR 179) and by Mr. Oscar Jordan who made a statement for the New Mexico Commissioner of Public Lands (RTR 185).

In its Finding 15, the Commission concluded that each of the methods of participation described in Finding 14 ". . . was demonstrated to have certain advantages and limitations." Bruce Landis, Regional Unitization Supertindent for Amoco, testified that when it was learned where productive acreage within the unit area was located, the unit agreement had a built-in provision to correct these inequities. (TR 45) He further testified that there could be problems with the participating area approach, if there are obligations outside of the area that destroy the concept of orderly and efficient development (TR 45 and 46). Mr. Callaway testified that the participating area approach was better than a straight acreage approach but that it was not as precise a tool to protect correlative rights as one based on recoverable reserves. (RTR 180). Mr. Jordan's statement for the Commissioner of Public Lands also noted abuses that the Land Office has experienced with participation formulas in unit agreements (RTR 186-187).

Finding 17 of Order R-6446-B reads as follows: "(17) That the method of sharing the income from production from the unit as provided in the unit agreement is reasonable and appropriate at this time." In response to questions about the reasonableness of the "undivided participation" formula in the Bravo Dome Unit Agreement, Mr. Williams testified as follows:

Q. (By Mr. Buell) All right, sir. Let me ask you this question, since you have studied the Unit Agreement, Exhibit No. One, you're familiar with the transcript, you're aware of the fact that in the Bravo Dome Unit all people who have voluntarily committed their interest to the Unit will participate in the unit production from the time of first sale."

A. That is correct.

Q. Do you see anything wrong based on your experience with exploratory units with having, I believe you experts in the field call it an undivided participation from the outset, do you see anything wrong with participation in that manner?"

A. No, I do not. In fact, it's probably the most ideal situation to have in exploratory units. (RTR 16)

Mr. Williams further expanded on this testimony by stating:

"In exploratory units, the participation is based on the surface acre basis and where you are able to get all the land owners and working interest owners to agree to participate in the whole unit, they are all then sharing in the risk and sharing in the benefits proportionate to their acreage as to the whole, regardless to where the production is found." (RTR 32-33)

"Well, geology is not an exact science, so therefore, by all the parties voluntarily agreeing to share whatever there might be, is an ideal situation, in my opinion, regardless of where the production is, because you don't know that to begin with." (RTR 34)

In Findings 25 and 37, the Commission states its conclusions on correlative rights. Finding 25 reads "That the evidence presented in this case establishes that the Unit Agreement at least initially provides for the development of the unit in a method that will serve to prevent waste and which is fair to the owners of interest therein." Finding 37 reads "That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area."

Order R-6446-B contains findings which are sufficiently extensive to disclose the Commission's reasoning that approval of the unit will protect correlative rights. Each of these findings is supported by substantial evidence.

POINT III

IN A VOLUNTARY UNIT WHERE ALL OWNERS MUTUALLY AGREE TO BE PAID ON A PRO RATA BASIS, REGARDLESS OF THE ACTUAL PRODUCTION ON ANY TRACT WITHIN THE UNIT, THE CORRELATIVE RIGHTS OF ALL PARTIES ARE IPSO FACTO PROTECTED.

There is an irrefutable distinction between voluntary unitization and forced or compulsory unitization. The former is a contractual agreement among parties for the purpose of primary or secondary production of resources. See generally, William & Meyers Oil and Gas Law, Volume 6, Section 924, at 508. The latter is usually a statutory proceeding to compel non-consenting interest owners to unitized acreage for purposes of secondary or enhanced recovery. See, for example, the New Mexico Statutory Unitization Act, 70-7-1 et seq. NMSA 1978.

Accordingly, the procedure governing approval of compulsory unitization, given its involuntary and adversarial nature, must provide safeguards and protection for non-consenting interest owners. For example, all compulsory unitization statutes, including New Mexico's, provide for full notice and hearing prior to Commission approval. 70-7-6A NMSA 1978. And again because of the adversarial nature of the proceeding, the Commission must determine whether the participation formula for unitization is fair, reasonable and equitable to both consenting and non-consenting parties.

The elements of conflict and adversity between the parties are simply not present in voluntary unitization. Because such unitization is affected to a negotiation and agreement of the parties, there is no conflict which the court must resolve: the parties themselves have mutually agreed as to how their correlative rights will be protected.

In a voluntary unit, only one set of parties is affected; those who are committed to the unit. The very nature of voluntary unitization assures, ipso facto, that the correlative rights of committed parties are protected. The correlative rights of those not committed to the unit exist independently of the unit and are otherwise protected by lease agreements. The unit agreement in issue here provides for allocation of produced carbon dioxide on a straight, fixed pro rata acreage basis, regardless of the actual production on any tract within the unit. Each interest owner in the unit area was notified of the formula, the vast majority of such owners acknowledge the equity of the formula by contractually ratifying the unit agreement.

Defendant Amoco Production Company submits that those owners whose interests have been joined through commitment to the unit agreement have contractually acknowledged the protection of their respective correlative rights. Such committed owners have consented to unitization and allocation on the basis of the unit agreement. Indeed, there is no justiciable issue of correlative rights with respect to such committed owners.

In Syverson v. North Dakota State Industrial Commission, 111 N.W.2d 128 (W.D. 1960), the North Dakota Supreme Court addressed the issue of correlative rights of both joining and non-joining parties in a voluntary unit. The Court affirmed a regulatory Commission order approving a voluntary unit. In so doing, the decision asserted that the correlative rights of joining interest owners are ipso facto protected by an allocation formula based on a prorata acreage basis:

> Where all mineral and royalty owners under a voluntary unitization agreement . . . are paid on a fixed pro rata basis regardless of the actual production on any tract within the unit, finding by the Industrial Commission that such agreement would be in the public interest, protective of correlative rights . . . will not be disturbed in the absence of

> affirmative proof to the contrary that such agreement is not in the public interest. 11 N.W.2d at 129, (emphasis added).

Here, there is a complete "absence of affirmative proof" by plaintiffs that the allocation of unitized substances under the unit formula is not in the public interest. In the absence of such proof, the allocation formula, consented to by committed parties, establishes the protection of correlative rights of such parties ipso facto.

The correlative rights of non-committed owners are not an issue in this proceeding. But again, the nature of a voluntary unit allows for protection of such rights ipso facto. The proposed unit is wholly voluntary. No one can be compelled to join it. The correlative rights of non-committed parties, vis a vis the unit operation, are amply protected by the terms of their individual leases.

The court in Syverson, supra, outlines the undeniable mechanics of voluntary unitization with respect to non-commiting parties.

> "The provisions of the unitization agreement submitted to the owners of mineral and royalty interests in the field where to be binding only upon those persons having interest in a proposed unit who agreed in writing to such unitization. The appellants, by refusing to sign such agreement, are not affected thereby. Their rights are independent of this agreement and the order approving the unit agreement . . . affect(s) only those owners who have joined in this agreement. 111 N.W.2d at 133 (emphasis added).

With specific respect to the correlative rights of non-commiting parties in a unit area, the North Dakota Supreme Court acknowledged that such rights cannot be affected or impaired by approval of a voluntary unit agreement:

> "By refusing to sign the unitization, as the appellant had the rights to do . . ., they are left in the same position that they would be in if there had been no unit agreement proposed. The respondent, as lessee under the lease with appellant, will be compelled to live up to all of its obligations under

> such lease. Respondent will be compelled to continue. . . the oil wells upon the appellants' lands . . . we fail to see how the appellants are in any way injured by the order appealed from on the record as is before us." Id. (emphasis added)

Here, defendants, and all lessees participating in the unit agreement, must abide by the terms and obligations specified in their leases with non-commiting lessors. As in Syverson, we fail to see how non-commiting interest owners could be injured by approval of the unit agreement.

To the contrary, the claims of protestants here appeared to be nothing less than thinly-failed attempts to frustrate and impair the voluntary efforts of the overwhelming majority of the interest owners in the area. It should not be permitted. The holding of the court in Syverson is equally applicable here:

> "By refusing to join such agreement, however, appellants may not, at the same time, prevent other interests in the field from developing adjoining tracts under such agreement. They have had an equal opportunity with the other owners within the area of the proposed unit to become parties to such agreement on the same basis as all other owners in the field. Whatever the result would be if the appellants could show actual damages, they certainly are not entitled to complain in the absence of such a showing." Id. at 134 (emphasis added).

See also, Baumgartner v. Gulf Oil Corporation, 184 Neb. 384, 168 N.W.2d 510 (1969); Reed v. Texas Co., 22 Ill. App.2d 131, 159 N.E.2d 641 (1959).

In summary, Amoco submits that the correlative rights of the parties committed to the unit are protected ipso facto by the voluntary unit agreement. Those interest owners have acknowledged that the allocation formula adequately protects their correlative rights. The correlative rights of those interest owners who have refused to join the unit are not affected by unit operation, and such rights are adequately protected by their respective leases.

More importantly, defendants submit that the record evidence in both the first and second hearings overwhelmingly supports the Commission's initial conclusion that the unit agreement prevents waste and protects correlative rights of parties to the Unit Agreement and could not in any way adversely affect the correlative rights of non-committed parties.

CONCLUSION

The Bravo Dome Unit area is in an early stage of carbon dioxide development. In an effort to effect efficient and orderly development of this resource, a voluntary unit agreement was entered into by a vast majority of the interest owners in the area. This Unit Agreement was submitted to state and federal authorities for approval. Part of the review made by the state included two hearings before the Oil Conservation Commission which resulted in orders approving the unit agreement. These orders concluded that the Unit Agreement would prevent waste of the resource and would protect the correlative rights of all interest owners in the unit area. The orders are lawful and supported by substantial evidence.

We respectfully submit that the orders of the Oil Conservation Commission approving the Bravo Dome Carbon Dioxide Gas Unit Agreement should be affirmed.

Respectfully submitted

CAMPBELL, BYRD & BLACK, P.A.

By_____

William F. Carr
Post Office Box 2208
Santa Fe, New Mexico 87501
(505) 988-4421

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ROBERT CASADOS, et al.,

Plaintiffs-Appellants,

vs.

OIL CONSERVATION COMMISSION, et al.,

Defendant-Appellees, No. 14,359

ALEX J. ARMIJO, Commissioner of Public Lands,

Intervenor-Appellee.

MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEF

Comes now Defendant-Appellee, Oil Conservation Commission, by and through its attorney, and moves the Court to grant an extension of time not to exceed seven (7) days to file Defendant's Answer Brief, and as grounds therefore certifies the cause for delay as follows:

1. Plaintiffs-Appellants filed their Brief-in-Chief on September 15, 1982.

2. Defendant-Appellee, Amoco Production Company, filed a motion to Stike Certain Issues on Appeal on October 15, 1982, which, pursuant to Rule 16(d) of the Rules of Appellate Procedures For Civil Cases, tolled the time for filing the Answer Brief of the Defendants-Appellees until 10 days after disposition of the motion.

3. Amoco Production Company's motion was granted on November 30, 1982.

4. The order of the Court was not received until the afternoon of December 3, 1982.

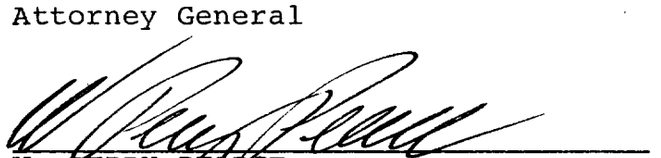
5. That representatives of the Oil Conservation Commission, including its entire technical and legal staff were out of town until December 9, 1982.

6. That the Court has previously granted the extension of Defendant-Appellee Amoco Production Company and that it is necessary for Defendants-Appellees to coordinate their answer briefs.

7. That the Answer Brief of Defendant-Appellee Oil Conservation Commission shall be filed no later than December 17, 1982.

Respectfully submitted,

JEFF BINGAMAN
Attorney General



W. PERRY PEARCE
Assistant Attorney General for the
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Extension of Time to File Answer Brief was mailed to all counsel of record this 9th day of December 1982., properly addressed and postage prepaid.

W. PERRY PEARCE