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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 11792

AMENDED APPLICATION OF DOYLE HARTMAN TO GIVE FULL FORCE AND EFFECT TO COMMISSION ORDER R-6447, TO REVOKE OR MODIFY ORDER R-4680-A, TO ALTERNATIVELY TERMINATE THE MYERS LANGLIE-MATTIX UNIT, LEA COUNTY, NEW MEXICO.

OXY USA INC.'S REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

OXY USA INC. ("OXY") by its attorneys, Kellahin and Kellahin, W. Thomas Kellahin and Campbell, Carr, Berge, & Sheridan, P.A., William F. Carr, and Paul R. Owen, submits this Memorandum as a Reply in Further Support of its Motion to Dismiss the application of Doyle Hartman in NMOCD Case 11792.

STATEMENT OF UNDISPUTED FACTS

Hartman included in his Response to OXY's Motion to Dismiss a Statement of Undisputed Facts. Many of such "facts" are not "facts" at all, but rather argumentative opinions and characterizations of Hartman's counsel. Neither the Rules of the Commission or the Rules of Civil Procedure require OXY to respond individually to each allegation. However, if requested, and to the extent the Hearing Examiner finds it necessary, OXY will respond specifically to each factual allegation. Many of the facts characterized by Hartman as "undisputed" are in fact incomplete, misleading, and inaccurate misconstructions of the events leading up to this dispute. The following Statement of Undisputed Facts is an accurate characterization of the events leading up to this dispute, and will provide an accurate framework from which the Division may determine the validity of Hartman's Application. To the extent that Hartman's statement of "undisputed" facts differs from the following statement of undisputed facts, then such "facts" recited by Hartman are in fact disputed by OXY.

I. The 1973 Unitization

1. In 1973, Skelly Oil Company ("Skelly") a working interest owner in various oil and gas leases in the Langlie-Mattix Field, Lea County, New Mexico formulated a Unit

Agreement and Unit Operating Agreement for the development and operation of the Myers Langlie-Mattix Unit ("MLMU") for secondary recovery purposes. Skelly sought the approval or joinder in such agreements of working interest owners and royalty owners in the Langlie-Mattix Field.[1]

2. In November 1973, the New Mexico Oil Conservation Commission ("NMOCC") approved the MLMU Unit Agreement and Operating Agreement and authorized the proposed 80-acre five-spot waterflood (Orders R-4660 and R-4680).[2] Shortly after receiving NMOCC approval Skelly also obtained the required approval of the Commissioner of Public Lands in New Mexico and the United States Geological Survey (since the Unit contains both state and federal lands). All Working Interest Owners, including Hartman's predecessors, voluntarily committed their respective working interest to the Unit, paid their share development costs and agreed to participate on a volunteer basis, subject to the terms of the Unit Agreement and Unit Operating Agreement. Pertinent provisions of the Unit Agreement[3] are as follows:

> (Section 9) - Cost and expenses incurred by the Unit Operator in conducting unit operations shall be apportioned among, borne and paid by the

---

[1] See OXY Exhibit 1 which is a Unit plat. OXY Exhibits 1-20 are attached to OXY's Motion to Dismiss. Exhibits to this Reply Brief are numbered 21 to 45, and are contained in a separately bound submission that is incorporated herein by reference.

[2] See Exhibits A and B to Hartman's Application.

[3] See OXY Exhibit 18, which is a copy of the original Unit Agreement obtained from the Public Records of Lea County, New Mexico.

> Working Interest Owners in accordance with the Unit Operating Agreement. ...
>
> (Section 12) - [T]he object and purpose of [the Unit Agreement] is to formulate and to put into effect a secondary recovery project in order to effect additional recovery of unitized substances, prevent waste and conserve natural resources. ...

Pertinent provisions of the Unit Operating Agreement[4] are as follows:

> (Section 11.1) - Unit Operator initially shall pay and discharge all costs and expenses incurred in the development and operation of the Unit Area. Each Working Interest Owner shall reimburse Unit Operator for its proportionate share of all such costs and expenses as follows: All operating expenses shall be shared in accordance with their respective unit participation . . . . All capital expenditures for development and for the purchase and installation of material classified as investment items shall be shared by Working Interest Owners . . . .
>
> (Section 11.5) - Each Working Interest Owner grants to Unit Operator a lien upon its oil and gas rights in each Tract, its share of Unitized Substances when produced and its interest in all Unit equipment, as security for payment of its share of Unit expense, together with interest thereon at the rate of ten percent (10%) per annum. Unit Operator shall have the right to bring suit to enforce collection of such

---

[4] See OXY Exhibit 21, attached, which is a copy of the original Unit Operating Agreement. A copy of the Operating Agreement was also attached as Exhibit 19 to OXY's Motion to Dismiss. Exhibit 21 hereto is a complete copy of the agreement as obtained from the Public Records of Lea County, New Mexico.

> indebtedness with or without seeking foreclosure of the lien. In addition, upon default by any Working Interest Owner in the payment of its share of Unit expense, Unit Operator, without prejudice to other existing remedies, shall have the right to collect from the purchaser the proceeds from the sale of such Working Interest Owner's share of Unitized Substances until the amount owned by such Working Interest Owner, plus interest as aforesaid, has been paid.

3. To summarize, upon non-payment of joint interest bills, the Unit Agreement and Operating Agreement allow the Operator three options:

> Option One - Bring suit to collect for unpaid expenses with or without foreclosing. Under this option, the working interest owner keeps his interest in the Unit and continues to receive production revenue but must pay his outstanding indebtedness. The Unit Operator does not have to net-out the debt from the proceeds.
>
> Option Two - The Unit Operator can net-out the indebtedness. The Working Interest Owner keeps his interest in the Unit but does not receive any production proceeds until the Unit Operator recoups his share of the expenses plus interest.
>
> Option Three - The Unit Operator can foreclose on the interest and the delinquent Working Interest Owner would lose his interest in the Unit.

Additionally, Article 17 of the Operating Agreement allows any Working Interest Owner to withdraw from the Agreement by conveying, assigning and transferring without warranty of title its interest to the other Working Interest Owners who do not desire to

withdraw. Such withdrawal does not relieve the Working Interest Owner of any obligation or liability incurred prior to the date of execution and delivery of the assignment.

4. The Unit size as originally proposed would have consisted of 9,923.68 acres. Tract Nos. 4, 5, 9, 50, 51, 67, 78, and 82 did not qualify for inclusion in the Unit - so only 9,006.56 acres were originally unitized.[5] In 1976, Tracts 50 and 51 qualified so that the size of the Unit was expanded to 9,326.56 acres[6]- the present size of the Unit.

II. 1980 Statutory Unitization

5. In 1977, Getty Oil Company ("Getty"), by merger or acquisition of Skelly, succeeded Skelly as the Operator and served in that capacity until 1984. By 1980, the MLMU still contained thirteen tracts for which there was not 100% ratification of the Royalty Owners and which required Getty to maintain separate production facilities resulting in less efficient operations. The unsigned Royalty Interest also stood in the way of entering into lease line agreements with offset lease operators thus prohibiting the conversion of certain producing wells to injection wells.

6. In an effort to address the problems, in January 1980, Getty announced its intention to statutorily unitize the MLMU. Statutory unitization became an option to Getty in 1975 with the passage of the Statutory Unitization Act. On June 21, 1980, Getty filed its

---

[5] See OXY Exhibit 22, attached.
[6] See OXY Exhibit 23, attached.

Application for Statutory Unitization, Case No. 6987.[7] Hartman has never owned any interest in the Tracts without full Royalty Owner ratification.[8]

7. On August 5, 1980, a hearing was held on the Statutory Unitization. At that time, Harvey O. Woods, Getty's landman, testified as follows:

> Q: Mr. Wood, would you please refer to what has been marked for identification as Getty Oil Company Exhibit Number Eleven and identify this for the Commission?
>
> A. Yes. This is the unit operating agreement for the Myers Langlie-Mattix Unit.
>
> Q. Now I'd ask you to review Exhibit Number Twelve and explain to the Commission what it is and what it shows.
>
> A. This is a unit operating agreement, Exhibit D, second revision, July 1, 1976. It outlines the supervision of the unit to be exercised by the now operator. It defines the rights and duties of all parties. It shows how investments and costs are to be shared. It establishes voting procedure for decisions to be made by the working interest owners. This is based on the equal working interest owner participation in the unit; sets forth the accounting procedures,

---

[7] See Exhibit H to Hartman's Response to Motion to Dismiss.

[8] See OXY Exhibit 6. Hartman owns interests in Tract Nos. 19, 20, 21, 22, 23, 24, 25, 26, 29, 63 and 72. The Tracts without full Royalty Owner ratification were Nos. 43, 45, 50, 52, 53, 54, 55, 56, 61, 64, 65, 66, and 81.

and contains other standard provisions in a unit of this type.

Q. Okay, so the voting procedures are tied to the ownership of each of the working interest owners?

A. Absolutely.

Q. Mr. Woods, if statutory unitization is approved pursuant to this application, will the unit continue to be operated under the same unit agreement, unit operating agreement?

A. There will be no change in either agreement. (emphasis added)

(Hearing transcript: p. 26, line 20 through p. 27, line 22).[9]

8. On August 27, 1980, the NMOCC entered Order R-6447,[10] incorporating the terms of the Unit Agreement and Unit Operating Agreement and finding *inter alia*:

> (21) That the Myers Langlie-Mattix Unit Agreement and the Myers Langlie-Mattix Unit Operating Agreement provide for unitization and unit operation of the Myers Langlie-Mattix Unit Area upon terms and conditions that are fair, reasonable and equitable and which include:
>
> (d) [A] provision for carrying any working interest owner on a limited, carried, or net-profits basis, payable out of production, upon such terms and conditions which are just and reasonable, and

---

[9] See Exhibit J to Hartman's Response to Motion to Dismiss.

[10] See Exhibit C to Hartman's Application.

> which allow an appropriate charge for interest for such service payable out of productions, upon such terms and conditions determined by the Commission to be just and reasonable, and allowing an appropriate charge for interest for such service payable out of such owner's share of production providing that any nonconsenting working interest owner being so carried shall be deemed to have relinquished to the Unit Operator all of his operating rights and working interests in and to the unit until his share of the costs, service charge, and interest are repaid to the Unit Operator.

9. On September 15, 1980, when Getty sought the ratification of the Royalty Interest Owners, R. W. Blohm, the Manager for Getty, represented:[11]

> The Oil Conservation Commission approved statutory unitization of the present Unit Area only after a public hearing in which Getty Oil Company appeared before the Commission and reviewed all of the costs and benefits of unitization. Their Order, a copy of which is attached for your review, finds that statutory unitization will benefit the working interest owners and the royalty interest owners in this unit, that the qualified tracts and present unit boundaries will remain the same, and that all tract participation will remain unchanged . . . .
>
> Copies of the January 1, 1973 Unit Agreement and Unit Operating Agreement and their two revisions dated February 1, 1974 and July 1, 1976 are not enclosed since they were previously

---

[11] See Exhibit M to Hartman's Response to Motion to Dismiss.

> provided and remain unchanged. (emphasis added).

10. Hartman contends the Unit size changed as a result of the statutory unitization. That is untrue. In fact, the Tracts involved in the unitization were the same Tracts that had been originally unitized in 1974 with the addition of the two tracts that qualified in 1976.[12] The Order in no way unitized the Tracts discussed above that had not previously qualified by voluntary, contractual unitization. Rather, the hearing examiner simply requested that Exhibit B to the Unit Agreement be revised to delete the Tracts that had not qualified, rather than showing them on the Exhibits with a notation of "(UNQUALIFIED TRACT)."[13]

11. The Order was properly ratified by the Working Interest Owners. Indeed, Hartman's predecessors executed the ratifications, specifically approving statutory unitization, agreeing as follows:[14]

> For consideration and the purposes of the [Unit Agreement and Unit Operating Agreement], entitled as above, both being dated January 1, 1973, and to obtain benefits of unitized management, operation and further development of the oil and gas properties in the Myers Langlie-Mattix Unit pursuant to New Mexico

---

[12] The Order contains a minor factual inaccuracy. It states that the Unit size is 9,360 acres more or less. The true size is 9,326.56 acres as reflected on page 57 of exhibit B to OXY Exhibit 24, attached.

[13] For example, compare OXY Exhibit 22 to OXY Exhibit 24, being Exhibit 10B from the 1980 hearing. On Exhibit 22, Tract 9 is described as an "unqualified tract," but has been removed from page 4 of Exhibit 24.

[14] See Exhibits N and O to Hartman's Response to Motion to Dismiss.

> Conservation Commission Order R-6447 entered on August 27, 1980, approving statutory unitization of the [Unit], the undersigned...represents that it is a Working Interest Owner [obligated to pay or bear costs of drilling, developing and/or producing] and as such does hereby consent to ratify and approve the plan for unit operations contained in the captioned Unit Agreement and Unit Operating Agreement, said Agreements being incorporated herein by reference...

12. In 1984, Texaco succeeded Getty as Unit Operator. Both Getty and Texaco never gave a Working Interest Owner the option to go "non-consent" on Unit operations, and the Division never required amendment of the Statutory Unitization Order No. R-6447.[15] This is true even though substantial operations took place after statutory unitization in 1980, including the following as described on March 23, 1990 by Texaco:[16]

> In 1981, twelve (12), producers and two (2) injectors were drilled. In 1982, the fourteen (14) newly drilled wells were completed.
>
> In 1983, one (1) replacement well was drilled for Well No. 110, which was plugged. Eight previously NIO [not in operation] injections were returned to injection to lease line agreements reached with the Carter Foundation. Well No. 99 was treated with polymer for profile modification.

---

[15] For example, see OXY Exhibit 25, attached, which is a series of AFEs collectively sent by Texaco in 1989, which proposed the drilling of five infill producers as a continuation of the ongoing infill program. In this Exhibit, which is typical of the AFEs provided to working interest owners by Getty and Texaco, no non-consent option was given to the working interest owners.

[16] See OXY Exhibit 26, attached, which is a plan of development for 1990, filed by Texaco.

> In 1984, one (1) replacement well was drilled for Well No. 108, which was plugged. One (1) well was converted to injection. Ten (10) wells were polymer treated for profile modification.
>
> In 1985, twelve (12) injection wells were polymer treated for profile modification.
>
> In January, 1986, four (4) wells were polymer treated for profile modification and five (5) infill development wells were drilled. The Unit was decertified [by the federal government] as a tertiary recovery project after it was determined that polymer treatments for profile modification did not significantly add to the reserves of the unit. Two injectors were reactivated and eight (8) producers operating below economic limit were shut-in.
>
> In 1987, 33,000' of injection line was replaced with fiberglass injection line. A 3000 Bbl, gun barrel was installed. Other work included the treatment of two wells with "injectrol". Moderate success was achieved on one injectrol treatment.
>
> In 1988 workovers were performed on 16 wells. In 1989, the MLMU Nos. 163, 172, 253 and 254 were cleaned out and acidized. The MLMU No. 27 was converted to an injection well. ...

III. Hartman's Acquisition of Unit Interest and Sirgo's Redevelopment.

13. In 1984, Texaco succeeded Getty as Unit Operator. Shortly thereafter, in 1986, Hartman acquired his interest in the Unit. At about that same time, Texaco initiated an infill drilling program, which was duly approved by the Working Interest Owners and the Commission. Specifically, five 20-acre infill producers (MLMU Well Nos. 253, 254, 255, 256, and 257) were drilled in the Unit during 1986. Although no additional wells were

converted to provide injection backup, several of the wells proved to be successful, utilizing the 20-acre spacing.

14. Beginning in 1990, Sirgo Operating Inc. ("Sirgo") began to obtain substantial working interests in the MLMU and to advance a proposed $44 Million redevelopment program based upon the success of the 1986 program. On May 21, 1991, Hartman filed an application with the NMOCD[17] contending that the NMOCD had jurisdiction pursuant to the Statutory Unitization Act and seeking to enjoin Sirgo from replacing Texaco as operator of the Unit. On May 23, 1991, the NMOCD advised Hartman that the Statutory Unitization Act had no application to the matter and refused to docket his application for hearing.[18]

15. On June 3, 1991, Hartman filed another application with the NMOCD[19] seeking to enjoin Sirgo from replacing Texaco as Operator of the Unit and contending that:

> (a) the NMOCD had jurisdiction pursuant to the Statutory Unitization Act;
>
> (b) Sirgo was attempting to improperly assert operatorship of the Unit in order to initiate a redevelopment plan prepared by Scott Hickman and Associates for the Unit which exceeded the purposes of the Unit;
>
> (c) the Sirgo project was solely a primary recovery project in violation of the Statutory Unitization Act;

---

17 See OXY Exhibit 27, attached.
18 See OXY Exhibit 28, attached.
19 See OXY Exhibit 29, attached.

(d) the Sirgo project failed to provide a fair and equitable participation for Unit Tracts in violation of the Statutory Unitization Act; and

(e) the Unit expenses were exceeding unit income and the Unit had been grossly mismanaged and all former and current operators must be held accountable.

On September 13, 1991, at the request of Hartman, the Commission entered Order R-6447-A and dismissed Hartman's application.[20]

IV. The 1994 Drilling Program

16. On December 31, 1992, OXY acquired the interest of Sirgo in the Unit. On December 1, 1993, OXY also acquired the interest of Texaco in the Unit. OXY took over Unit operations on January 1, 1994.

17. Shortly thereafter, OXY began plans to install a waterflood project within a 760-acre area of the Unit, based upon the success of the Texaco pilot project, for additional recovery of oil by infill drilling and by reducing the waterflood pattern from 80-acre five-spot to 40-acre five-spot. On April 28, 1994, an AFE was sent to each Working Interest Owner proposing the program.[21] The project was approved by the Working Interest Owners at a necessary percentage in accordance with the terms of the Unit Agreement and Operating Agreement.[22] Prior to that time, Hartman had informed OXY that he did not wish to

---

20 See OXY Exhibit 30, attached.
21 See OXY Exhibit 15.
22 *Id.*

participate in a large redevelopment program of the MLMU, and proposed a trade of properties with OXY as his only solution.[23]

18. Beginning with the July 1994 Joint Interest Bill, Hartman ceased paying Unit expenses. Initially, OXY attempted to partially address Hartman's failure to pay by netting out Hartman's indebtedness against production, an option allowed under the Operating Agreement. However, despite the fact that Hartman now contends that he went "non-consent" to OXY's operations, Hartman thwarted OXY's attempt to net out the proceeds and changed purchasers, implicitly threatening OXY if it continued to interfere with Hartman's right to market his crude.[24]

19. On November 22, 1994, OXY filed an application with the NMOCD requesting, among other things, authorization to inject water in new injection wells along with the setting of injection well pressures for those wells.[25] Two different notices about this matter were sent to Hartman, including a notice of hearing set for December 15, 1994, and

---

[23] See, *e.g.*, Hartman Exhibits D-E to Application and Exhibit S to Motion to Dismiss.

[24] See OXY Exhibit 31, attached. This begs the question did Hartman really go "non-consent," as he contends. Under the terms of the language of the Statutory Unitization Order, if Hartman went "non-consent," he was "deemed to have relinquished to the Unit Operator all of his operating rights and working interests in and to the Unit until his share of the cost, service charge and interest are repaid to the Unit Operator." Thus, he could not take his own production, if in fact he went "non-consent."

[25] The Application in no way altered existing well-pressure authorizations. The Application was only for the new injection wells. *See* Order No. 4680-A and exhibits A, B, and C thereto (collectively attached as Exhibit H to Hartman's Application).

a copy of the application[26], which detailed, among other things, that OXY was requesting approval:

> (5) to expand a portion of this Unit by means of a significant change in process used for the displacement of crude oil by a 20-acre infill drilling, reworking, establishment of water injection and initiation of 40-acre 5-spot patterns for the Unit; and
>
> (6) to convert 16 producers to injection wells, to utilize plugged injection well (Unit Well 134) again for injection for the Waterflood Project . .

With the notice of hearing, OXY also sent to Hartman a copy of the Division Form C-108 requesting approval of 16 new injection wells which wells were to be limited to a maximum surface injection pressure of 1800 psi.

20. The Division approved the plan on March 31, 1995.[27] On February 6, 1997, the Division certified that new secondary recovery reserves were being recovered as a result of the project approved by Order No. 4680-A.[28] Hartman has continued to take his share of crude as an estimated amount of 16,728 barrels, presumably receiving the proceeds therefrom, without paying his share of unit costs estimated to be $729,000 as of May 1, 1997.

---

[26] *See* OXY Exhibit 9-11 and Exhibit 32, attached.

[27] See Exhibit Z to Hartman's Response to Motion to Dismiss.

[28] See OXY Exhibit 14.

Hartman is also now claiming his share of the tax advantage related to the 1994 Drilling Program.[29]

21. Thus, it is undisputed that Hartman knew about the 1994 NMOCD hearing, the Statutory Unitization Act, the surface injection pressure limitation, and the scope of the unitization plan previously approved by the NMOCD. However, he chose not to appear at the hearing despite the fact that he had previously raised objections to the project, and he had ceased paying his Joint Interest Bills. At the same time, Hartman has continued to take and market his crude, receive the proceeds therefrom, and attempted to enjoy the benefit of the tax advantages of the 1994 program.

V. OXY's Attempts to Collect Hartman's Debt

22. Since 1994, OXY has advised Hartman of his continued arrearage problem,[30] attempted to net out proceeds from production, offered to negotiate a reasonable purchase or swap of his interest, notified Hartman of his ability to surrender his interest to the other Working Interest Owners,[31] ultimately filing a lawsuit which is now pending by agreement in Lea County, New Mexico. In the lawsuit, OXY is attempting to not only collect from Hartman's share of Unit production, but also from any other non-Unit assets available. Coincidentally, not until OXY filed its lawsuit did Hartman raise the issues (a) of the 1980

---

29 See OXY Exhibit 33, attached.
30 See OXY Exhibit 34, attached.
31 See OXY Exhibits 16-17 and Exhibit 34.

Statutory Unitization Order seeking to prevent OXY's effort to enforce the obligations of a Working Interest Owner as outlined in the Unit Agreement and Operating Agreement or (b) his objection to the injection pressure rate of 1800 PSI.

ARGUMENT

I. HARTMAN'S APPLICATION IS AN IMPERMISSIBLE ATTACK ON ORDER NO. R-4680-A

Hartman claims that the 1994 Order, No. R-4680-A, should be vacated and held to be void or voidable. Hartman bases this claim on his position that OXY provided insufficient notice to Hartman of the issues to be decided by Case No. 11168, which resulted in Order No. R-4680-A. However, Hartman had notice of the issues to be decided in Case No. 11168, had the opportunity to present evidence in opposition to OXY's requests in that case, and had the opportunity to appeal the Division's Order in that case. Hartman failed to do so, and may not now question the validity of the Division's determinations in Order No. R-4680-A.

A. The Division May Not Reconsider Its Findings in Order No. R-46480-A.

Hartman seeks reconsideration of the orders which decided all matters at issue in the Getty 1980 MLMU Unitization Case and in the Oxy 1994 Waterflood Expansion Case. The Oil Conservation Division has no inherent or implicit authority to reopen and reconsider these issues.

A claim that challenges directly or indirectly an order or regulation of the conservation agency in a court or proceeding other than that specified by the statute for

review is a collateral attack on the agency's order or regulation. Collateral attacks on agency orders cannot be maintained. This is true whether the collateral attack is before a court or before the agency. "Just as parties cannot collaterally attack an order of an agency in a judicial proceeding that is not a proper review of the order so too must an agency refrain from setting aside an order without a basis founded in changed conditions or changed knowledge of conditions. Otherwise, the agency would be collaterally attacking its own order or acting arbitrarily." 1B. Kramer & P. Martin, *Pooling and Unitization*, §14.02 (1989, 1996). ***Leede Oil & Gas, Inc. v. Corporation Commission***, 747 P.2d 294 (Okla. 1987). The exhaustion doctrine may be asserted when a person has failed to go before an agency for relief at all or when the person has participated in an agency proceeding but has failed to take up an issue that it wishes to raise on appeal. *See* ***Ruyle v. Continental Oil Co.***, 44 F.3d 837 (10th Cir. 1994); ***Fransen v. Conoco, Inc.***, 64 F.3d 1481 (10th Cir. 1995). When an agency remedy was available and parties failed to request the remedy, they have not exhausted the administrative remedy. The prohibition against collateral attacks, the exhaustion doctrine, and the doctrine of collateral estoppel are related to and are like the judicial doctrine of *res judicata* in that they are concerned with prevention of litigation of an issue already judicially decided and with requiring parties to raise their claims in a timely fashion. *See* ***International Paper Co. v. Farrar***, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985).

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

In this case, Hartman seeks the re-examination of issues presented to the Division seventeen years ago. Division review of these issues conflicts with the express provisions of the Oil and Gas Act.

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

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

circumstance where the Division or Commission may reopen and reconsider issues already addressed and decided by a prior order.[32]

Hartman's application does meet these statutory requirements. Neither Hartman nor his predecessors became parties of record in either of the prior cases about which he now complains. There were no applications to the Commission for hearings *de novo* and no rehearings were sought.

Following rehearing, or the denial thereof, orders of the Commission become final. Thereafter, the Commission lacks authority to reopen or reconsider an order. ***See Armijo***, 108 N.M. at 286, 771 P.2d at 994. Final agency orders may only be reviewed by the courts.[33] *See* NMSA 1978, § 70-2-25. The orders about which Hartman complains became final many years ago.

The Division's retention of continuing jurisdiction of the case and the subject matter thereof is not effective as to the issues decided in these cases. Any express reservations in

---

[32] The Division can reopen a case to consider a new issue within its jurisdiction that was not decided in the original hearing. As the court stated in ***Trigg v. Industrial Commission***, 5 NE2d 394 (Ill. 1936):

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

[33] The Texas Courts have recognized that the Railroad Commission lacks inherent or implied power to reopen and reconsider a final Commission decision. Sexton v. Mount Olivet Cemetary Ass'n, 720 S.W.2d 129, 137 (Tex. App. 1986).

administrative orders which assert power to reopen a proceeding or modify an order have generally been held not to confer such power upon the agency where it does not exist in the absence of such a reservation. E.H. Schopler, Annotation, *Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority*, 73 ALR2d 939, 954 (1960). The New Mexico Oil Conservation Division and Commission were created by the legislature for the purpose of administering the Oil and Gas Act. They can only make orders as are within the powers conferred on them. Nothing in this statutory scheme authorizes the Commission or Division to reopen final orders and reconsider the issues decided therein. This limitation on agency review of issues it has determined by final order is essential for without it there would be no place in this administrative process where it would be definitely known that the agency review had ended. *See* Schopler, 73 A.L.R. 2d at 954.

The Oil Conservation Division is not authorized by the Oil and Gas Act to reconsider the issues previously determined in a final Division order. Absent this authorization from the legislature, it lacks power to reconsider the issues raised by the Hartman application in this case and it must be dismissed.

B. Issue Preclusion Doctrines Apply to NMOCD Proceedings

Once a party is given notice of a proceeding, and fails to appear at the proceeding or challenge the results, that party may not later question those results. The Tenth Circuit has

concluded that the "approval process of [the New Mexico Oil Conservation Commission] is entitled to preclusive effect." ***Amoco Production Co. v. Heimann***, 904 F.2d 1405, 1416 (10th Cir.), ***cert. denied***, 498 U.S. 942 (1990). Because of that preclusive effect, the Tenth Circuit held that the Heimanns, royalty owners of lands unitized by the NMOCD, were not allowed to use a federal court lawsuit to challenge the royalty allocation formula approved in the NMOCD's unitization order. ***Id.*** at 1417.

The Tenth Circuit's conclusion was based on the theory of collateral estoppel. "Collateral estoppel means that when an issue of ultimate fact has been decided by a valid judgment, that issue cannot be litigated again between the same parties." ***Phillips v. United Service Automobile Ass'n.***, 91 N.M. 325, 328, 573 P.2d 680, 683 (Ct. App. 1977). In the context of this case, it means that because the NMOCD has already decided the issues that Hartman raises pertaining to Order No. R-4680-A, in a proceeding in which both OXY and Hartman had a chance to raise those issues, they cannot be relitigated in this proceeding.

Hartman, like the Heimanns, already had the opportunity to raise his arguments about the validity of the 1994 Order. "New Mexico traditionally requires four elements to be present for collateral estoppel to be invoked: (1) the parties are the same or are privies of the original parties; (2) the cause of action is different; (3) the issue or fact was actually litigated; and (4) the issue was necessarily decided." ***International Paper Co. v. Roy E. Farrar***, 102

N.M. 739, 741-42, 700 P.2d 642, 645-46. The issues raised by Hartman in this proceeding satisfy all of the elements for collateral estoppel.

C. Hartman's Application is Collaterally Estopped.

First, there is no dispute that Hartman owned all of his interest in the MLMU at the time of the 1994 proceeding. Hartman was included among the parties who received notice of the 1994 proceeding. That notice included the facts that OXY was proposing an expansion of the enhanced oil recovery operations,[34] and that the proposed expanded MLMU Waterflood Project included a proposed maximum surface injection pressure of 1800 psi, which pressure limit only applied to the 16 new injection wells.[35]

Second, the case before the Division today is a separate and distinct case than was presented to the Division in Case No. 11168. The 1994 proceeding was concluded by a final Order from the Division, and was not appealed by Hartman or any other party. NMOCD

---

[34] Prior to filing the Application in Case No. 11168, OXY proposed to Hartman by AFE the expanded MLMU Waterflood Project. Prior to the hearing in Case No. 11168, OXY provided to Hartman notice of the hearing and a copy of the Application. The Title of the Application in Case No. 11168 was "Application of OXY USA Inc. for Approval of an Expansion of its Myers Langlie-Mattix Unit Waterflood Project and to Qualify Said Expansion for the Recovered Oil Tax Rate Pursuant to the 'New Mexico Enhanced Oil Recovery Act,' Lea County New Mexico. The text of the Application detailed that OXY was seeking an expansion of the MLMU Waterflood Project by means of a significant change in process used for the displacement of crude oil by a 20-acre infill drilling, reworking, establishment of water injection and initiation of 40-acre 5-spot injection well patterns. *See* OXY exhibits 9-11 and Exhibit 32, attached.

[35] A Division Form C-108, sent to Hartman on November 23, 1994 with a notice of Hearing, detailed that OXY was requesting approval for injection wells with a maximum surface injection pressure of 1800 psi, which pressure limit would only apply to the 16 new injection wells. See OXY Exhibit 9 and Exhibit Y to Hartman's Response to Motion to Dismiss.

Rule 1220 and NMSA 1978, Section 70-2-25, gave Hartman or any other adversely affected party the right to appeal that Order.[36] When Hartman chose not to appeal that Order, the Order became the final Order of the Division. The relief now sought by Hartman is a new Application and case before the Division.

Third, both the issues of expanding the MLMU Waterflood Project and the surface injection pressure for the new wells were actually litigated before the Division. In ***Heimann***, the court noted that the Division's duty to protect correlative rights, and its finding that the allocation formula in the Bravo Dome Unit participation plan mandated a conclusion that the fairness of the Bravo Dome Unit plan was "actually litigated." ***Heimann***, 904 F.2d at 1418. In Case No. 11168, the Division made findings and specific Orders on both issues raised by Hartman in this case.[37]

Finally, both the surface injection pressure and the expansion of the MLMU Waterflood Project were necessarily determined in Case No. 11168. The Waterflood Project expansion was the express subject of that case and the resulting Order. Furthermore, Division rules require that any water injection project, such as the one approved by Order

---

[36] Hartman was clearly a party affected by Order No. R-4680-A. Having been notified of the proposed expanded EOR project, and of OXY's pending application in Case No. 11168, Hartman informed OXY that he did not wish to participate in such a huge redevelopment program of the MLMU. *See* Hartman Exhibits D-E to Application and Exhibit S to Motion to Dismiss.

[37] *See* Hartman Exhibit H to Application: findings ¶ (5) (OXY sought expansion of MLMU Waterflood Project); and ¶ (22) (surface injection pressure of 1800 psi appropriate for the new injection wells); and Ordering ¶ (1) (OXY authorized to expand MLMU Waterflood Project); and (5) (surface injection pressure limited to 1800 psi on the new injection wells).

No. R-4680-A, must be approved by the Division.[38] Case No. 11168 involved new injection wells that had not previously been approved. Consequently, as a necessary prerequisite to the findings and Order in Order No. 4680-A, the Division was required to and did determine the propriety of the surface injection pressure for those new wells.

In ***Heimann***, because the Commission was required discharge its duty to protect correlative rights, the court found that it was essential that the Commission rule upon the fairness of a unit participation formula. Because the Commission had already ruled on the fairness of that formula, the court held that the Heimanns were not allowed to raise the issue in an unrelated federal court lawsuit. ***Id.*** at 1418-19.

The issue in this case is simple. OXY properly applied for and obtained Division approval of the expanded MLMU Waterflood Project after notice and hearing. Hartman had the opportunity to participate in the hearing and appeal the resulting Order. Hartman chose not to participate or appeal, and he may not now come before the Division and challenge the propriety of the Division's findings and mandates in Order No. R-4680-A.

D. Hartman's Application is not within the Division's Continuing Jurisdiction.

Hartman raises the issue that in Order No. R-4680-A, the Division retained jurisdiction over the subject matter in the 1994 Program, Case No. 11168. OXY does not dispute that the Division has continuing jurisdiction over the MLMU. In fact, Case No.

---

[38] NMOCD Rule No. 701 permits injection of water into any reservoir for the purpose of secondary or enhanced recovery only upon authority from the Division.

11168 itself was a request for an expansion of a Waterflood Project which the Division had initially approved in 1973. Upon proper application, the Division certainly has the authority to approve an amendment of the project approved in Order No. R-4680-A.

However, the case before the Division is not an Application to amend the MLMU's Unitization Orders R-6447 or R-4660. The Division has already provided that an expansion of a project within a Unit which was previously approved pursuant to the Statutory Unitization Act does not constitute the type of amendment which Hartman urges is required by Section 70-7-7(F).[39]

As this case is presently before the Division, it is similar to one cited by Hartman in opposition to OXY's Motion to Dismiss. In ***Wood Oil Co. v. Corporation Comm'n of Okla.***, 239 P.2d 1021 (Okla. 1950), the plaintiffs brought an application to the Corporation Commission of Oklahoma[40] to modify a previous Order which expanded the boundaries of an oil pool. The plaintiffs sought to have the pool expansion vacated or modified, in a way that separated their interests from the defendants. The Commission denied their application. ***Id.*** at 1022.

---

[39] *See* NMOCD Order R-6856-B, in which the NMOCD approved the application of Phillips Petroleum in Case No. 10779 to convert its waterflood a carbon-dioxide injection program ***without*** requiring amendment of the Statutory Unitization Order R-5871. (Order No. R-6856-B attached hereto as OXY Exhibit 35).

[40] The Corporation Commission in Oklahoma is the corollary to the NMOCD and NMOCC.

The ***Wood Oil*** court recognized that the Commission had continuing jurisdiction over the pool, and that it could modify the conditions of the pooling order if there were a "changed factual situation." However, the Court noted that the plaintiffs had been notified of the previous pooling application, had the opportunity to participate in the hearing in that manner, and had not appealed the resulting order. Particularly instructive to the situation in this case is the ***Wood Oil*** court's holding:

> The motion to vacate and modify order No. 19890 did not specify any substantial change of condition of the area nor did evidence reveal such change. The contentions urged in support of the motion were known and could have been urged at the hearing on which the original order was based. ***Plaintiffs now say that the order sought to be vacated was inequitable, unjust and unconscionable, but such complaints could properly have been urged only on appeal. Plaintiffs consented to the order and it has become final.***

Wood Oil, 239 P.2d at 1023 (emphasis added). Similarly, in this case, Hartman knew about OXY's proposed expansion of the MLMU Waterflood Project, and the underlying proposed surface injection pressures. He could have challenged the propriety of that expansion and surface injection pressure at the hearing or on appeal. He did neither and should be held to the consequences of his inaction. Hartman's attack on Order No. R-4680-A should be rejected and his Application should be dismissed.

II. HARTMAN'S ATTEMPT TO REWRITE THE OPERATING AGREEMENT IS AN IMPERMISSIBLE ATTACK ON ORDER NO. R-6447

The focus of Hartman's Application is the contention that the Statutory Unitization Act requires the incorporation of a non-consent provision into the private contract between the parties. Hartman bases this attack on Order No. R-6447 upon his position that NMSA 1978, Section 70-7-7(F) mandates that the Division may not approve a unitization unless the Operating Agreement contains a non-consent provision. However, Hartman's predecessors already had the opportunity to raise the issues discussed in his Application. Order No. R-6447 examined the MLMU Operating Agreement and found its terms to be just and reasonable, and did not require any additional terms to be written into that contract. Because the Division made that determination in 1980, and at that time Hartman's predecessors did not raise the issue of whether the MLMU Operating Agreement should contain the provision Hartman urges, he is now barred from making that claim.

Furthermore, an examination of the Division's application of Section 70-7-7(F), in this case and other statutory unitization cases, reveals that the statute merely requires that the Division find that approved unit agreements contain carrying provisions that are "just and reasonable." In Order No. R-6447, the Division properly found that provision just and reasonable, and Hartman is not entitled to anything more than the contract, the Order, or the statute provide.

A. Hartman's Attack on Order No. R-6447 is Barred by Collateral Estoppel.

In 1973, the parties, including Hartman's predecessors in interest, contractually obligated themselves to a method of payment in the MLMU Operating Agreement. In 1980, the Division examined that Agreement and found that it satisfied the basic framework for a fair, reasonable, and equitable Unit Operating Agreement. Following Division approval, Hartman's predecessors in interest ratified the Order, which specifically "approved and adopted and incorporated by reference" the MLMU Unit Agreement and Operating Agreement.[41] Now Hartman wishes to revisit that ratification and the Division's finding.

Essentially, Hartman is arguing that the Division's finding that the MLMU Operating Agreement's payment terms are just and reasonable is only valid if an unqualified carried interest provision, with no recourse except to his share of remaining future production, is read into the Operating Agreement. That is not what the Division found in Order No. R-6447. Instead, Order No. R-6447 found that ***the terms already in the MLMU Operating Agreement*** were just and reasonable. Those terms include the carried interest provision, and also include a provision that the operator may foreclose on a delinquent working interest owner's interest in the unit. The Division found that those terms were just and reasonable. Hartman may not now argue that the finding was different, or that the Division ***should have***

---

[41] *See* Exhibits N and O to Hartman's Response to Motion to Dismiss.

found that the terms would only be just and reasonable if the provision sought by Hartman were present.

Hartman's predecessors in interest ratified and waived any objection to the terms and conditions of Order No. R-6447. The fairness of the payment provisions in the MLMU Operating Agreement were actually litigated and necessarily decided. As in ***Heimann***, the Division discharged its duties of preventing waste and protecting correlative rights in Order No. R-6447.[42] Furthermore, in a statutory unitization case, the Division is explicitly charged with examining an agreement's payment provisions and determining whether they are just and reasonable.[43] Hartman is attempting to revisit the same issue that was actually litigated and necessarily decided in Order No. R-6447. Under ***Heimann***, he cannot do so.

The original 1973 Unit Operating Agreement **without amendment** was incorporated into Order No. R-6447. That Operating Agreement contains a carried interest provision which the Division found to comply with NMSA 1978, § 70-7-7(F), and to be just and reasonable. Although the Operating Agreement does not contain the type of provision urged by Hartman, he is now collaterally estopped from arguing that the Division should have required any different provision in 1980. ***Heimann***, 904 F.2d at 1418. Hartman's Application should be dismissed.

---

42 NMSA 1978, § 70-2-11.

43 NMSA 1978, § 70-7-7(F).

B. The Division Allows Parties to Contractually Expand the Remedies Available to the Unit Operator.

Those parties, such as Hartman, whose interests were voluntarily committed to the unit, are bound by the terms of the Unit Agreement that they signed. Section 70-7-7(F) of the Statutory Unitization Act is meant to apply only to those interests that had not voluntarily committed their interests to the Unit. Thus, the only Working Interest Owners who could rely upon the provision in NMSA 1978, Section 70-7-7(F) are those who are being forced into the Unit. There were no such Working Interest Owners. In Hartman's case, his predecessors in interest voluntarily joined the Unit and thus ratified the Statutory Unitization Order, recognizing that their rights had not changed. Hartman is estopped from changing the contractual obligations his predecessors agreed to over twenty-four years ago and ratified over seventeen years ago. The Commission has recognized this fact in past statutory unitization cases.

1. Pelto's Twin Lakes Unit Case.

In NMOCD Order R-8557,[44] entered on December 2, 1987 in Case 9210, the Division approved Pelto Oil Company's application for statutory unitization of the Twin Lakes Unit and permitted Pelto to use a limited carried interest provision to be applied to only those working interest owners who fail to initially commit their interest to the unit. In so doing,

---

[44] *See* OXY Exhibit 36, attached.

the Division's Order found that the Twin Lakes Unit Operating Agreement contained a provision for carrying any working interest owner.[45] This Agreement contains a provision substantially similar to the one found in the MLMU Operating Agreement.[46]

The Pelto case was the first case in which the Division dealt with the application of a penalty provision to the interest of "any working interest owner" being carried. In so doing, the Division treated the "carrying provision" in the same manner it does in compulsory pooling cases and applied the statutory carrying provision only to those working interest owners who failed to initially commit their interest to the unit.[47]

At the request of Pelto, the Division interpreted Section 70-7-7(F) as a component of the basic framework for the operation of the unit, while recognizing that the parties who had voluntarily joined the unit had already agreed to contractual terms which satisfied the carried interest requirement:

> (19) Any working interest owners who has **not** agreed in writing to participate in the unit **prior to the date of this order** shall be deemed to have relinquished to the unit operator all of its operating rights and working interest in and to the unit until his share of the costs have been repaid, plus an additional 200 percent thereof as a non-consent penalty (Section 70-7-7.F NMSA 1978).

---

45 *See* OXY Exhibit 36 at ¶ 18(d).

46 *See* OXY Exhibit 37, attached.

47 *See* Transcript of Hearing, NMOCD Case No. 9210 and 9211, Sept. 9, 1987 (attached hereto in relevant part as OXY exhibit 38).

There was no need for the Division to apply the carried interest provision to the working interest owners who had voluntarily committed to the unit--those parties had contractually detailed their carried interest rights. As in this case, in addition to the carried interest provision, the unit agreement provided other remedies to the unit operator if a working interest owner refused to bear its proportionate share of costs.

Hartman's argument is that Section 70-7-7(F) automatically created a non-consent right without penalty, notwithstanding Hartman's contractual obligations. If this were the case, there would have been no reason for the Division to make the finding quoted above. The only rational explanation for the Division's 19th finding in the Pelto case is that the statute does not create the right Hartman seeks. He is bound by his contractual obligations.

2. OXY's Corbin Queen Unit Case.

On September 5, 1990, the Division heard NMOCD Case 10062 on the Application of OXY USA Inc. to statutorily unitize the working interest of Santa Fe Exploration Company, who had refused to voluntarily participate in the unit. At the hearing, OXY requested the entry of an order which permitted a working interest owner who did not agree to initially participate in the unit to be carried on a limited basis without any penalty.

On October 29, 1990, the Division entered Order R-9336[48] which is patterned after the Order in the Pelto case. The Division found that the Corbin Queen Unit Operating

---

[48] *See* OXY Exhibit 39, attached.

Agreement contains "a provision for carrying any working interest owner . . ."[49] Again, the Corbin Queen Unit Operating Agreement's carrying provision is substantially similar to the one in this case.[50] As in the Pelto case, the Division recognized that the working interest owners who had voluntarily committed to the unit had already provided for a carrying provision, and the Division limited the application of Section 70-7-7(F) to the working interest owners who had not agreed in writing to participate in the unit.[51]

In Corbin Queen, the result was the same as in the Pelto case. The Division specifically limited the statutory carrying provision so that it did not apply to any working interest owner who had voluntarily committed its interest to the unit. Because the voluntarily committed owners had already agreed to a carrying provision, there was no need to apply the statutory provision to them. This precluded any consenting working interest owners from later claiming they could be a permanent and unqualified carried interest on subsequent AFEs for costs of operations under circumstances where the amount of production remaining might not be sufficient to repay those carried costs.

3. Marathon's Tamano Unit Case

On June 27, 1991, the Division heard NMOCD Case No. 10341, on the application of Marathon Oil Company to statutorily unitize both working interests and royalty interests

---

49 OXY Exhibit 39 at ¶ 18(d).

50 *See* Corbin Queen Unit Operating Agreement, at ¶¶ 11.5 to 11.6 (attached hereto in relevant part as OXY Exhibit 40).

51 *See* OXY Exhibit 39 at ¶ 19.

who refused to voluntarily participate in the unit. At the hearing, Marathon requested the application of Section 70-7-7(F) only to working interest owners who did not agree to initially participate in the unit.

In Order R-9548, entered July 22, 1991, the Division found that the Tamano Unit Operating Agreement contained the carried interest provision.[52] Once again, as in this case, the Agreement contained a provision allowing the unit operator to carry the interest of a working interest owner who did not pay its proportionate share of costs, and also provided other remedies to the unit operator.[53] At the hearing the Division attorney discussed the various remedies available to the unit operator should a voluntarily committed working interest owner fail to pay its proportionate share of costs.[54]

The Division approved the Tamano Unit Operating Agreement with the same finding at issue in this case. Because the voluntarily committed working interest owners had already agreed to the unit operator's various remedies, the Division specifically limited the application of Section 70-7-7(F) to those working interest owners who had not agreed in writing to participate in the unit prior to the date of the order.[55]

---

[52] *See* OXY Exhibit 41, attached, at ¶ 18d.

[53] *See* Tamano Unit Operating Agreement at Article 11 (attached hereto in relevant part as OXY Exhibit 42).

[54] *See* Transcript of Hearing, NMOCD Cases No. 10341 and 10342, June 27, 1991, at 88-89 (attached hereto in relevant part as OXY Exhibit 43).

[55] *See* OXY Exhibit 41 at 5, ¶ 19 and 20.

4. Hanson's Shugart Unit Case.

On March 18, 1993, the Division heard NMOCD Case No. 10685 on application of Hanson Operating Company, Inc. to statutorily unitize the working interest and royalty interest owners who refused to voluntarily participate in the unit. At the hearing, Hanson advised the Division that it had provided, ***in addition to any other remedy***, a carrying provision in the Unit Operating Agreement.[56]

The Division entered Order No. R-9894 which found that the Unit Operating Agreement contained a carried interest provision which was fair and reasonable but inadvertently deleted the 200% penalty portion in Ordering Paragraph (8). Thereafter, the Division entered Order R-9894, *nunc pro tunc*, and specifically decreed: ". . . Further, a non-consent penalty of 200 percent ***and the unit agreement provision providing for recovery of such a penalty*** is approved."[57] This carried interest provision is found in the lien paragraph 11.5 of the Hanson Operating Agreement where it is declared to be a ***non-exclusive remedy which the Division approved as a non-exclusive remedy***. The subject provision in the Shugart Unit Operating Agreement, with the exception of the 200% penalty, is virtually identical to that found in this case.[58]

---

56 *See* Transcript of Hearing, NMOCD Case No. 10685.

57 *See* OXY Exhibit 44, attached.

58 See Unit Operating Agreement, Shugart Waterflood Unit, at ¶ 11.5 (attached hereto in relevant part as OXY Exhibit 45).

The predecessors in interest to OXY and Hartman voluntarily committed to the terms of the MLMU Operating Agreement. Those terms contain a carrying provision ***in addition to other remedies***. The carrying provision and other remedies found in the Agreement are consistent with Section 70-7-7(F), and have been found by the Division to be just and reasonable. ***Hadson*** and the Division's own statutory unitization cases recognize that parties may voluntarily commit to terms including and in addition to the statutory carrying provision. If Hartman's predecessors in interest found those terms to be unreasonable, they should have raised that concern at the time the MLMU Operating Agreement was executed, at the time the Division considered the justness and fairness of the Operating Agreement, and at the time they ratified the Division's approval of the Agreement. Having failed to do so, Hartman's predecessors have now barred from raising that objection.

C. Hartman is Bound by the Terms of the Unit Operating Agreement and May Not Seek a Revision of the Agreement From the Division.

Hartman is not satisfied with the payment provisions contained in the MLMU Operating Agreement and found just and reasonable by the Division. From Hartman's perspective, what the MLMU Operating Agreement is missing is a provision that allows him to take advantage of projects which are successful but also to avoid the risks associated with unit projects. Hartman wants the right to wait seventeen years after Hartman's predecessors' ratifications of the terms of the 1973 Agreements and recognition that they were not altered by the 1980 Order, and three years after a project commences and see whether it is successful

to then make a decision whether to pay the costs of that project. In short, Hartman wants the Division to find that the MLMU Unit Operating Agreement contains a different payment provision than it does. Such a request is simply not within the Division's jurisdiction. Hartman's seventeen "years of inaction have allowed the sands in his geologic hourglass to run out. For [seventeen] years, the other parties involved have relied upon [Order No. R-6447], with no challenge from [Hartman]." ***Adkins v. Board of Oil, Gas & Mining***, 926 P.2d 880 (Utah 1996).

In ***Hadson Petroleum Corp. v. Jack Grynberg & Associates***, 763 P.2d 87 (Okla. 1988), Grynberg made a similar request to the Oklahoma Corporation Commission. The Commission rejected that request because parties who voluntarily contract to share drilling and operating costs may agree to terms different than those mandated by the Commission. ***Id.*** at 88. In ***Hadson***, the parties executed a private contract which provided a method for allocation of drilling and operating costs. Subsequently, the Commission designated Hadson the operator of the well and gave the other interest owners three options regarding the payment of costs. One of those options was to participate in the unit well and pay the proportionate share of the actual costs of drilling the well. ***Id.***

Hadson drilled the well and sought to recover its costs from the other interest owners, including Grynberg. The formula provided in the private contract resulted in Grynberg owing more than its proportionate share of the actual costs of developing the well. Grynberg

sought refuge under the Commission order, paid its proportionate share of the actual costs of the well, and sought relief from the Commission when Hadson sued to recover the balance. As in this case, Grynberg claimed that it was only bound by the Commission order, and the terms of the contract between it and Hadson had to yield to that order.

The ***Hadson*** court held that:

> a forced pooling order lays a basic foundation with respect to the relative rights and obligations of parties holding an interest in affected mineral rights in the unit covered by the pooling order. The various interest-holding entities may expand on the basic framework of the pooling order by private agreement to further delineate their rights and obligations under the pooling order . . . . The amount to be paid for the drilling of a well approved by the Commission is surely no more a public issue than who is to pay for the drilling . . . [c]larifying the identity of a party responsible for paying costs is a private concern properly cognizable before the district court.

Hadson, 763 P.2d at 88-89. Similarly, in this case, the Statutory Unitization Act lays a basic framework for the parties to use in determining their relationships. Order No. R-6447, issued under that Act, found that the parties used that framework. Additional remedies to which the parties agreed, and which the Division found to be fair, are not inconsistent with that finding, and are a matter of private contract. Once Hartman's predecessors contractually gave the MLMU operator more options of recouping costs, Hartman became bound by those remedies.

D. Order No. R-6447 Complied with NMSA 1978, Section 70-7-7(F)

At a minimum, Hartman's case depends on an interpretation of NMSA 1978, Section 70-7-7(F) which requires statutory unitization plans to include a carried interest provision.[59] When this provision is contained in a Operating Agreement, it gives the Unit Operator the right to collect any non-paying interest owner's indebtedness from production, and requires the delinquent working interest owner to surrender all of its operating rights and working interest until the debt is paid. Hartman urges an interpretation that the Act mandates one specific type of carried interest as the only remedy provided to the Unit when an interest owner fails to pay its proportionate share of Unit costs.

---

[59] NMSA 1978, Section 70-7-7 provides that statutory unitization plans shall be approved if they contain, among other provisions:

> F. a provision for carrying any working interest owner on a limited, carried or net-profits basis, payable out of production, upon such terms and conditions determined by the division to be just and reasonable and allowing an appropriate charge for interest for such service payable out of the owner's share of production; provided that any nonconsenting working interest owner being so carried shall be deemed to have relinquished to the unit operator all of its operating rights and working interest in and to the unit until his share of the costs are repaid, plus an amount not to exceed two hundred percent of such costs as a nonconsent penalty, with maximum penalty amount in each case to be determined by the division.

The language following "in and to the unit until" was not in the statute at the time that Order No. R-6447 was entered. That language was added by the legislature in 1986.

Consistent with the statutory requirement, in Order No. R-6447, the Division found that the MLMU Operating Agreement contained a carried interest provision.[60] In considering the Division's actions, it is imperative to remember the background that all working interest owners had contractually committed their interests to the Unit. Thus, no working interests owners were being forced by the Division to pay the costs since they had already agreed to do so. The Division cannot resolve a contract dispute between OXY and Hartman.

In turn, consistent with the Division's finding, the MLMU Operating Agreement contains a provision for carrying the interest of a party who has not paid its proportionate share of the costs of a project.[61] When a working interest owner is delinquent in paying its

---

[60] The Division found that the MLMU Unit Agreement contains terms that are fair, reasonable, and equitable, and which include:

> (d) a provision for carrying any working interest owner on a limited, carried, or net-profits basis, payable out of production, upon such terms and conditions which are just and reasonable, and which allow an appropriate charge for interest for such service payable out of production, upon such terms and conditions determined by the Commission to be just and reasonable, and allowing an appropriate charge for interest for such service payable out of such owner's share of production, providing that any nonconsenting working interest owner being so carried shall be deemed to have relinquished to the Unit Operator all of his operating rights and working interests in and to the unit until his share of the costs, service charge, and interest are repaid to the Unit Operator.

Exhibit L to Hartman's Response to Motion to Dismiss at 5.

[61] Section 11.5 of the MLMU Operating Agreement provides remedies to the Operator if a party to the Agreement fails to pay its share of the costs of a project. Among those remedies is the provision that "[U]pon default by any Working Interest Owner in the payment of its share of Unit expense, Unit Operator, without prejudice to other existing remedies, shall have the right to collect from the purchaser the proceeds from the sale of such Working Interest Owner's share of Unitized Substances until the amount owned by such Working Interest Owner, plus interest as aforesaid, has been paid." *See* OXY Exhibit 21.

costs, the provision at issue allows the unit operator to "carry" that working interest owner. Even though the statute does not require, the Agreement does not provide, and the Division did not find, a provision that requires the unit operator to carry the owner indefinitely, Hartman now seeks to read that provision into the Agreement. Instead, the Statutory Unitization Act allows parties to a unit agreement to contract to share costs under just and reasonable terms. In this case, those terms include the requisite carrying provision, and also include a provision allowing the unit operator to recoup the costs incurred by the unit if a project is not commercially successful. The Statutory Unitization Act required that the MLMU Unit Agreement contain a carried interest provision that was just and reasonable. The MLMU Unit Agreement contains a carried interest provision. The Division found that the carried interest provision was just and reasonable. Hartman's Application is an attempt to amend that finding three years after Hartman should have appealed the finding.

CONCLUSION

The issues in this case are simple. OXY properly applied for and obtained Division approval of the expanded waterflood project after notice and hearing. Hartman had notice of the issues to be decided, had the opportunity to participate in the hearing and appeal the resulting Order. Hartman chose not to participate or appeal, and he may not now come before the Division and challenge the propriety of the Division's findings and mandates in that Order. Once a party is given notice of a proceeding, and fails to appear at the proceeding or fails to timely challenge the results, that party may not later question those results.

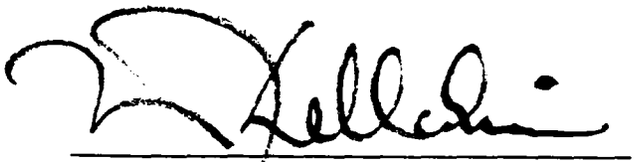
The focus of Hartman's application is the contention that the Statutory Unitization Act requires the incorporation of a special type of non-consent provision into the private contracts between the parties. Hartman is not satisfied with the payment provision of the Operating Agreement which were found just and reasonable by the Division in 1980. From Hartman's perspective, what the Operating Agreement is missing is a provision that allows him to take advantage of projects that are successful but also to avoid the risks associated with other projects in the Unit. Hartman wants the right to wait for three years to see if a project will be successful and refuse to pay the costs of those projects which do not satisfy his expectations. In short, Hartman wants the Division to find that the Unit Operating

Agreement contains a different payment provision than it does. Such a request is simply not within the Division's jurisdiction.

Hartman and his predecessors agreed to the terms of the Operating Agreement. The Division found those terms just and reasonable. Hartman now seeks to reopen and rewrite those terms twenty-four years after his predecessors agreed to the terms, seventeen years after the Division passed on those terms and his predecessors ratified them, and three years after Hartman passed on the opportunity to question the Waterflood Project. The Division must not reward Hartman's lack of diligence. Hartman's Application must be dismissed.

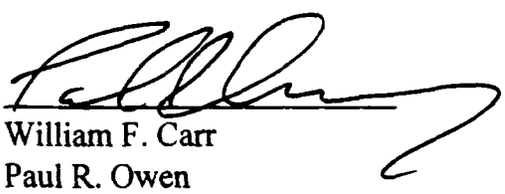
Respectfully submitted,

KELLAHIN & KELLAHIN



W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

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

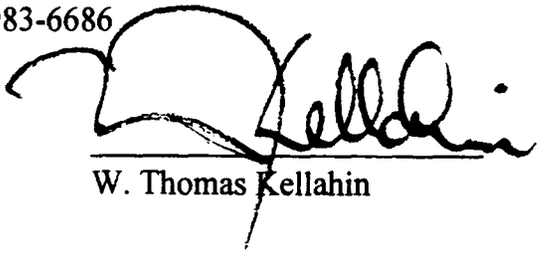


William F. Carr
Paul R. Owen
P. O. Box 2208
Santa Fe, New Mexico 87504
(505) 988-4421

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was hand delivered this 30th day of June, 1997 to:

Michael J. Condon, Esq.
Gallegos Law Firm
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686



W. Thomas Kellahin