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. 6987
CASE NO. 11792

AMENDED APPLICATION OF DOYLE HARTMAN TO GIVE FULL FORCE AND EFFECT TO COMMISSION ORDER R-6447, TO REVOKE OR MODIFY ORDER 4-4680-A, TO 2 ALTERNATIVELY TERMINATE THE MYERS LANGLIE-MATTIX UNIT, LEA COUNTY, NEW MEXICO.

OXY'S RESPONSE TO HARTMAN'S MOTION TO DISQUALIFY COUNSEL

INTRODUCTION

The Applicant, Doyle Hartman ("Hartman"), has moved to disqualify William F. Carr, Esq. as counsel for Oxy USA, Inc. ("Oxy") in this proceeding. Hartman contends that Mr. Carr should be disqualified under Rule 16-307 of the Rules of Professional Conduct. According to Hartman, Mr. Carr may not represent Oxy in this matter because he "will be a necessary witness" in the case.

Hartman's motion is frivolous. Hartman's motion fails to cite, let alone discuss, a 1996 New Mexico Supreme Court decision, ***Chappell v. Cosgrove***, 916 P.2d 836 (N.M. 1996), which is controlling authority and which requires denial of Hartman's motion.

In ***Chappell***, the Supreme Court expressly recognized that a party, like Oxy, has a legally protected right to be represented by counsel of its choice. ***Id.*** at 838. In ***Chappell***, the Supreme Court also recognized that litigants, like Hartman, abuse the "lawyer-as-witness" disqualification rule "'to disrupt an opposing party's preparation for trial,'" and to "'elbow opposing counsel out of the litigation for tactical reasons.'" ***Id.*** at 839 (citations omitted). To protect the right of every party to be represented by counsel of its choice, and to put a halt to Hartman's tawdry tactics, the Supreme Court in ***Chappell*** strictly limited lawyer-as-witness disqualification motions. In ***Chappell*** the Court adopted the following rule of law:

> We hold that an attorney may not be disqualified under Rule 16-307 absent a showing by the party seeking disqualification that the attorney's testimony is material to an issue in the case, that the evidence to be elicited from the attorney's testimony is not available from another source, and that the attorney's testimony is potentially prejudicial to his client's case.

Id. at 840. Hartman, of course, has made *no showing* of any kind on any issue required by ***Chappell***.

I. Factual Background

Hartman's application arises out of a dispute over Oxy's rights and remedies for Hartman's failure to pay his share of unit expenses, incurred by Oxy as the operator of the Myers Langlie-Mattix Unit ("the MLMU"), in which Hartman owns a working interest. In 1973 Skelly Oil Company ("Skelly") formed the MLMU for secondary oil recovery from the Langlie-Mattix Field in Lea County, New Mexico. The MLMU was formed by written agreement among Skelly, as the unit operator, and other working interest and royalty interest owners in the field. Hartman's predecessors-in-interest were among the working interest owners who voluntarily committed their interests to the MLMU. Hartman's predecessors-in-interest were parties to the MLMU Agreement and the MLMU Operating Agreement. The New Mexico Oil Conservation Commission approved the MLMU and both agreements in 1973 in Order Nos. R-4660 and R-4680.

The MLMU Operating Agreement gives the unit operator broad rights and cumulative remedies in the event a working interest owner subject to the agreement, like Hartman, defaults in the payment of his share of unit expenses. Oxy has invoked its rights and remedies under the agreement and sued Hartman in New Mexico District Court for failing to pay his share of the unit expenses. To avoid the scope of Oxy's remedies, Hartman has filed the present application seeking administrative relief. As part of this doomed strategy, Hartman now seeks to deprive Oxy of representation by Mr. Carr.

Hartman's disqualification motion arises out of the following facts. In 1975 New Mexico passed the Statutory Unitization Act ("the Act"). N.M. Stat. Ann. § 70-701 et seq. (1978). In 1977 Getty Oil Company ("Getty") succeeded Skelly as operator of the MLMU. In 1980, in Case No. 6987, Getty filed an application with the Commission under the Act pertaining to the MLMU. Mr. Carr represented Getty before the Commission in that case. At the conclusion of case No. 6987, the Commission entered Order R-6447. The order provides in part as follows:

> That the Myers Langlie-Mattix Unit Agreement and the Myers Langlie-Mattix Unit Operating Agreement provide for unitization and operation of the Myers Langlie-Mattix Unit Area upon terms and condition that are *fair, reasonable and equitable*.

Following the entry of Order R-6447, Hartman's predecessors-in-interest, who had previously entered into both the MLMU Agreement and the MLMU Operating Agreement, expressly ratified those agreements:

> ...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....*

In 1984 Texaco acquired Getty and became the MLMU Operator. In 1992 Oxy acquired significant working interests in the MLMU, and in 1993 Oxy acquired Texaco's interests. Following its acquisition of Texaco's working interests, Oxy became unit operator

of the MLMU effective January 1, 1994. Hartman acquired his working interests in the MLMU in 1986.

After becoming the unit operator in 1994, Oxy initiated a secondary recovery program from the MLMU. Although the project was approved by the necessary percentage of working interest owners as required by the MLMU Agreement and the MLMU Operating Agreement, Hartman contends that he chose not to participate. In July 1994 Hartman stopped paying unit expenses, his unpaid share of which now exceeds $700,000. Despite refusing to pay any unit expenses, Hartman nevertheless continued to take and market the unit production attributable to his working interests. Thus, since July 1994 Hartman has received as his share of unit production nearly 17,000 barrels of oil. By 1997 Oxy had had enough and filed suit. Not surprisingly, Hartman is now looking for a way to minimize his liability for unpaid unit expenses and hopes to get relief from the Division.

In his application Hartman asks the Division to find that under the Statutory Unitization Act and Order R-6447, Oxy's exclusive remedy for Hartman's non-payment of unit expenses is to carry Hartman's working interests, as provided in Section 7-70-7 of the Act, until Hartman's share of the unpaid costs are repaid. Hartman's application ignores the fact that the MLMU Agreement and the MLMU Operating Agreement expressly grant the unit operator, Oxy, specific rights and cumulative remedies in the event a working interest owner like Hartman defaults in the payment of unit expenses. Hartman's application also

ignores existing case law which holds that the working interest owners in a unit may *expand* the framework of rights and remedies provided in a commission unitization order, by agreement in either the unit agreement or the unit operating agreement. ***Hadson Petroleum Corp. v. Grynberg***, 763 P.2d 87, 88 (Okl. 1988), ***Leede Oil & Gas v. Corporation Commission***, 747 P.2d 294 (Okl. 1987). Thus, Hartman maintains that this is "an adjudicatory proceeding wherein the NMOCD will be called upon to decide, *inter alia*, whether Oxy has violated the New Mexico Statutory Unitization Act and Order R-6447," by invoking contractual rights and remedies expressly provided in the MLMU Agreement and Unit Operating Agreement. Even more astonishing, according to Hartman, it is *necessary* that Mr. Carr assist him in his proof by testifying on the following *material* issues:

> (a) Getty's application for statutory unitization in 1980, and the evidence it presented at the hearing on such application;
>
> (b) several other Division cases in which Mr. Carr has participated as counsel for proponents or opponents of statutory unitization in which positions have been advanced contrary to those advanced by Oxy in this case;
>
> (c) the drafting and presentation to the New Mexico legislature of the Statutory Unitization Act and policy of the Division and Commission regarding enactment and implementation of that law.

Hartman's disqualification motion is sharp practice. It gives lawyers a bad name and makes the practice of law intolerable. As its first order of business, the Division should deny

Hartman's motion, and it should hold Hartman's and his lawyers' abuse of the Code of Professional Responsibility against them.

II. Mr. Carr's Testimony Is Not Material to any Issue Before the Commission.

The *material* issues before the Division on which Mr. Carr purportedly must testify are whether Oxy has violated (I) the Statutory Unitization Act and (ii) Order R-6447 by suing Hartman in district court pursuant to rights and remedies granted Oxy in the MLMU Agreement and Unit Operating Agreement. Hartman apparently hopes to elicit testimony from Mr. Carr tending to show that both the Act and Order R-6447 limit Oxy's rights and remedies for Hartman's refusal to pay his share of unit expenses to the carrying provision specified in Section 7-70-7 of the Act. To accomplish this objective, Hartman apparently hopes that Mr. Carr will provide testimony prejudicial to Oxy's case on the meaning of the Act, on Division and Commission policy respecting implementation of the Act, on Getty's application in 1980 under the Act, on evidence presented at the hearing on Getty's 1980 application, and on positions purportedly taken by Mr. Carr respecting the Act in other cases before the Commission on behalf of other parties. As a matter of law, any and all such evidence is immaterial as to whether Oxy has violated either the Statutory Unitization Act or Order R-6447.

To prove that Oxy is in violation of the Act and Order R-6447, Hartman seeks to reexamine issues that were the subject of Getty's 1980 application. Mr. Carr's testimony is

immaterial to any such inquiry because the Division has no authority to reopen or reconsider or reexamine Order R-6447, issued some seventeen years ago. First, the record speaks for itself. Moreover, under New Mexico law, *no* state administrative agency has any inherent or implied authority to reopen, reconsider or reexamine a final administrative decision and order. ***Armijo v. Save 'N Gain***, 771 P.2d 989, 994 (N.M. Ct. App. 1989). Under New Mexico law, "the power of any 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." ***Id.*** (citations omitted). Thus, the Division's authority to reconsider, reexamine or rehear any matter covered by its Order R-6447 is governed by statute. *See* N.M. Stat. Ann. § 70-2-25 (1978) (1995 Repl. Pamp.). And under Section 70-2-25, the time for filing any such application respecting Order R-6447 ran out long, long ago. ***Id.*** As a matter of law, the Division cannot now, some seventeen years after the fact, rehear, reconsider or reexamine Getty's 1980 application for statutory unitization or any evidence presented at that hearing. ***Railroad Commission of Texas v. McKnight***, 619 S.W.2d 255, 260 (Tex. Ct. App. 1981) (Commission is without power to set aside and reopen administratively final order after fourteen year period). Mr. Carr's testimony is immaterial as a matter of law.

III. Hartman Has Made No Showing That Mr. Carr Is a Necessary Witness.

Before the Commission may entertain Hartman's disqualification motion, ***Chappell*** requires *proof* that "the evidence to be elicited from [Mr. Carr's] testimony is not available from another source." ***Chappell***, 916 P.2d at 840. Hartman has offered no such evidence with his motion. Hartman's "showing" consists solely of a self-serving statement that "Getty is no longer in business, and Hartman is unaware of the present location of any former Getty employee with personal knowledge regarding the 1980 Application in Case No. 6987 which lead to the entry of Order R-6447." Hartman's statement proves nothing. Yet, Hartman has presented no evidence of any kind that any information he hopes to obtain from Mr. Carr is not available from the files of Oxy, Hartman, or the Division.

That Hartman does not know the whereabouts of any Getty employees with knowledge of its 1980 application under the Act is equally meaningless. The 1980 Commission hearing is available and in fact Hartman has produced the transcript as an exhibit to these proceedings. The transcript contains the testimony of Getty's witnesses. Should it prove necessary, which Oxy denies as set forth in its Motion to Dismiss, no doubt Hartman can read the transcript, identify the individuals in question, and locate them.

IV. Hartman Has Made No Showing that Mr. Carr's Testimony Will Be Prejudicial to Oxy.

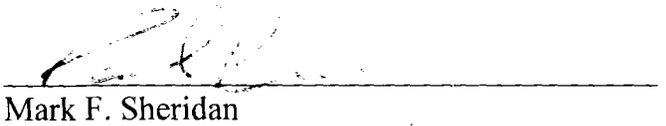
Hartman's failure to support his disqualification motion with any evidence, whether in the form of affidavits or documents, requires that it be summarily denied. Neither Mr.

Carr nor any ethical lawyer would take lightly an assertion, supported by facts, that the attorney's necessary sworn testimony in a case will be potentially prejudicial to his client. Yet, despite the Supreme Court's rule in ***Chappell***, 916 P.2d at 840, which requires that such motions be supported by a showing of cold hard facts, Hartman impugns Mr. Carr's integrity without any. Hartman offers not one fact from which anyone could conclude that, if required to testify, Mr. Carr's testimony would be prejudicial to Oxy's case. Hartman's unsubstantiated motion thus scurrilously implies that Bill Carr would prejudice his client's case, but fails to provide any basis for Mr. Carr to consider or respond to that allegation. The necessary conclusion is that Hartman's motion is baseless and intended solely to disrupt preparation of Oxy's case and deprive Oxy of representation by counsel of its choice.

For the foregoing reasons, Oxy respectfully requests that Hartman's motion to disqualify Mr. Carr be denied.

Respectfully submitted,

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



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ATTORNEYS FOR OXY USA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Oxy's Response to Hartman's Motion to Disqualify Counsel was mailed to J.E. Gallegos, Esq. and Michael J. Condon, Esq., 460 St. Michaels Drive, #300, Santa Fe, NM 87505-7602 this 30 day of June, 1997.

Paul R. Owen