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

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

CASE NO. 11510
Order No. R-10672-A

APPLICATION OF BRANKO, INC. ET AL. TO REOPEN CASE NO. 10656 (ORDER NO R-9845) CAPTIONED "APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO.

APPLICATION FOR REHEARING

Movants, Branko, Inc. et al., pursuant to NMSA 1978, § 70-2-25 (1995 Repl.), hereby apply for rehearing of the above-order. Movants submit that the above-order is erroneous as follows:

1. The Oil Conservation Commission ("Commission") failed to find that all of the Movants' acquired and owned protected property interests in the S½ of the SW¼ of Section 28 as to all depths on or before April 1, 1990 and owned such interests on January 21, 1993, the date of the original Oil Conservation Division hearing in this matter.

2. The Commission erred in failing to find that Mitchell Energy Corporation ("Mitchell") was provided with and received actual notice of the Movants' interests in the S½ of the SW¼ of Section 28 a number of times prior to the January 13, 1993 hearing in this matter.

3. The Commission erred in failing to find that despite the property interests owned by the Movants and Mitchell's actual knowledge of such interests, the Movants were not given

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proper and constitutional notice of the January 21, 1993 hearing as provided by law and *Uhden v. New Mexico Oil Conservation Commission, et al.*, 122 N.M. 528, 817 P.2d 721 (1995).

4. The Commission erred in failing to find and conclude that the Movants were not properly offered an opportunity to be heard at the January 21, 1993 hearing.

5. The Commission erred in its failure to find that Mitchell and the Commission has not complied with the statutory pooling provisions of NMSA 1978, § 70-2-17(C) (1995 Repl.).

6. The Commission erred in failing to find that the failure to provide notice of the January 21, 1993 hearing in this case deprived the Movants of their property without due process of law in contravention of Article 2, § 18 of the New Mexico Constitution and the 14th Amendment to the United States Constitution.

7. The Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants of the cases resulting in Order R-9845.

8. The Commission's Finding of Fact No. 10 is not supported by the facts of the case.

9. The Commission's conclusion of law that the Movants were not interest owners in the subject property is not supported by the law or the facts of the case.

10. The Commission erred in failing to find that Commission Order No. R-9845 is void as to the Movants.

11. The Division erred in its failure to reopen the case and amend Order No. R-9845 to conform to the property rights of the Movants.

12. The Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable.

WHEREFORE, Movants request that Order No. R-10672-A be reversed and that Order No. R-9845 be vacated as to the Movants.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
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I hereby certify that a true and correct copies of the foregoing Application for a Rehearing were mailed this 7th day of April, 1997 to all counsel of record at the following addresses:

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

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

DE NOVO
CASE NO. 11510
Order No. R-10672-A

APPLICATION OF BRANKO, INC. ET AL. TO REOPEN CASE NO. 10656 (ORDER NO. R-9845) CAPTIONED "APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO."

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on January 16, 1997, at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the **"Commission"** on Mitchell Energy Corporation's **(Mitchell)** Request for a *De Novo* Hearing in Case No. 11510 (Division Order R-10672) filed with the Commission on October 30, 1996.

Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Branko, Inc. et al. was represented by Harold D. Stratton, Jr. of Stratton & Cavin, P.A. The New Mexico Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department **(OCD)** was represented by Rand Carroll.

Now, on this 19th day of March, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

A. Summary of Proceedings

The procedural history of this case is long and complicated so that a summary of the proceedings to date is necessary:

1) On December 8, 1992, Mitchell filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location **(1992 Application)** with the OCD pursuant to NMSA 1978, Section 70-2-17 and requested a hearing before a hearing examiner. The OCD assigned Case No. 10656 to this matter.

2) The 1992 Application was originally set for hearing by the OCD on January 7, 1993, and at Mitchell's request, the hearing was continued until January 21, 1993.

3) A hearing was held before Michael E. Stogner, an OCD hearing examiner, on January 21, 1993 **(1993 Hearing)**. Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company, a New Mexico corporation **(Strata)**, appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A.

4) On February 15, 1993, the OCD Division Director entered Order No. R-9845 in Case No. 10656 which pooled all the mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM, Lea County to form a proration unit to be dedicated to its Tomahawk "28" Federal Com Well No. 1 (**Tomahawk 28 Well**).

5) By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, Section 70-2-13.

6) By fax on April 28, 1993, Strata withdrew its request for a *de novo* hearing of Case No. 10656 before the Commission. The Commission entered its order on April 29, 1993, dismissing the requested *de novo* hearing of Case No. 10656.

7) On January 31, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* **(Motion)** in Case No. 10656, Order No. R-9845 was filed with the OCD by Harold D. Stratton of Stratton and Cavin, P.A. on behalf of the following: Branko, Inc., a New Mexico corporation; Duane Brown; S.H. Cavin; Robert W. Eaton; Terry and Barb Kramer, husband and wife; Landwest, a Utah general partnership; Candace McClelland; Stephen T. Mitchell; Permian Hunter Corporation, a New Mexico corporation; George L. Scott, III; Scott Exploration, Inc., a New Mexico corporation; Charles I. Wellborn; Winn Investments, Inc., a New Mexico corporation; Lori Scott Worrall; and Xion Investments, a Utah general partnership **(Branko)**.

8) On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 **(Reply)**.

9) On May 2, 1996, a hearing **(1996 Hearing)** on the Motion to Reopen Case No. 10656 was held before OCD Hearing Examiner Stogner. The case was assigned a number, Case No. 11510. Branko was represented by Harold D. Stratton of Stratton & Cavin, P.A.; Mitchell was represented by Kellahin.

10) On October 2, 1996, the OCD Division Director entered Order No. R-10672 in Case No. 11510 which reopened Case No. 10656.

11) On October 30, 1996, Mitchell filed a Request for a Hearing *De Novo* of Case No. 11510, Order No. R-10672 before the Commission.

B. Summary of the Parties' Claims

1) Branko's claims as alleged in its Motion:

a) Mitchell failed to give proper notice to Branko, as required by law, of Mitchell's 1992 Application in Case No. 10656.

b) Mitchell failed to give proper notice as required by law of the OCD 1993 Hearing on Mitchell's 1992 Application.

c) Mitchell failed to provide Branko with an opportunity to participate in Mitchell's Tomahawk 28 Well located in what Branko refers to as the Strata North Gavilon Lease, a federal oil and gas lease **(Lease)**.

d) All of the entities referred to as "Branko" acquired and owned interests in the Lease on or before April 1, 1990, prior to the date Mitchell filed its 1992 Application with the OCD.

e) Branko's interests were made known to Mitchell by a letter dated January 13, 1993, and Mitchell otherwise had actual knowledge of Branko's interests.

f) Mitchell failed to comply with NMSA 1978, Section 70-2-17 (1995 Repl.)

g) OCD Order No. R-9845 in Case No. 10656 is void as to Branko as the OCD did not have jurisdiction over Branko because of Mitchell's failure to provide notice of the 1992 Application and notice of the 1993 Hearing.

Branko requests that the Commission:

a) reopen Case No. 10656 or, in the alternative grant Branko a hearing *de novo*; and

b) enjoin Mitchell from any operation on the Tomahawk 28 Well, including any workover, plug back or recompletion attempt which may adversely affect the interests of Branko in the well.

2) Mitchell's claims as alleged in its Reply:

a) Branko is not a party of record to OCD Case No. 10656, and Branko is not entitled to file for a *de novo* hearing in this case.

b) Branko's Motion to reopen OCD Case No. 10656 is a collateral attack on Order R-9845 and must be denied.

c) All the interests in the Lease have been pooled by Order R-9845 entered on February 15, 1993, and the time to appeal that order has run.

d) Branko did not have a protected property right in the Lease.

e) Branko is bound through Strata by OCD Order No. R-9845.

f) Mitchell requests the Commission deny Branko's Motion.

C. Findings of Fact from the January 16, 1997 hearing

1) Due public notice of this hearing was provided as required by law.

2) A quorum of the Commission was present for the hearing and has reviewed the evidence presented at the hearing.

3) Mitchell and Branko stipulated to the introduction of the evidence from the 1993 Hearing and the 1996 Hearing as well as exhibits introduced at the January 16, 1997 Commission hearing.

4) The parties did not present any testimony at the January 16, 1997 Commission hearing, but through counsel the parties made oral argument.

5) Branko was not a party of record to Case No. 10656.

6) Mitchell obtained a title opinion that showed that Strata was the owner of 100% of the record title and operating rights for the Lease, and Mark Murphy, president of Strata, confirmed that at the 1993 Hearing.

7) At the 1993 Hearing there was conflicting testimony regarding the nature of the interests, if any, obtained by the entities through Strata. Fifteen of these entities became the party "Branko" that moved to reopen Case No. 10656 in 1996.

a) Stephen J. Smith, Mitchell's landman, testified that Mark Murphy, president of Strata, "...always described them as silent partners...." (1993 Hearing Tr. p. 56). Smith also testified: "I understood that he [Murphy] was acting as a go-between, as I was." (1993 Hearing Tr. p 58). Smith also testified that Mitchell relied on the fact that Strata was the record title owner to 100 percent interest [of the tract in question], "...and his [Murphy's] representation to us that he spoke for these silent partners and was capable of binding them in an agreement." (1993 Hearing Tr. p. 61).

b) Mark Murphy testified that he informed Smith during a conversation on October 26, 1992, that Strata had other partners, and "...that until a deal, specific deal was negotiated that we [Strata] could recommend, that I couldn't represent those partners; that, however, historically, normally when we reached an agreement that we could recommend to our partners, they would, in most cases, go along with that deal, but I could not guarantee that." (1993 Hearing Tr. p. 122). He also testified that he never represented that he could bind the other parties until they approved the terms of the deal. (1993 Hearing Tr. p. 126).

On direct examination, Murphy was asked: "Who are these parties, as a general rule?" Murphy responded: "As a general rule, they're long-term investors of Strata." (1993 Hearing Tr. p. 127). Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17, were long-term partners of Strata. (1993 Hearing Tr. p. 129). Murphy also stated: "as a matter of fact, many times in leasehold situations like this, you don't immediately make assignments to all the parties until a well is drilled or some action taken. So if you do sell it, you only have to handle one assignment from Strata to whoever the purchaser is. If we [Strata] assign this out to all these parties, they would have

to gather up --we'd have to gather up 15 assignments into Mitchell or to whomever." (1993 Hearing Tr. p. 130). Murphy testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease. (1993 Hearing Tr. p. 141).

Murphy also acknowledged on cross-examination that as of the date of the title opinion Strata was the record title or leasehold holder and continued to be the owner of the federal lease record title and operating rights on the date of the January 1993 hearing. (1993 Hearing Tr. pp. 141, 142). However, Murphy testified that he never used the term "silent partners" in conversation with Mitchell; instead he recalled telling Mitchell that Strata had "partners in this lease." (1993 Hearing Tr. p. 142)

c) George L. Scott, Jr. testified that he owned some of the stock in Strata. He also stated that his organization, Scott Exploration, was "...involved with Strata in the sense that we (Scott Exploration) try to originate prospects, and Strata operates them." (1993 Hearing Tr. p. 153). Scott Exploration Inc., a New Mexico corporation, is one of the Branko group. Testimony from the 1993 Hearing does not reveal whether Scott meant that he, as an individual, owned shares of stock in Strata or whether his organization, Scott Exploration, owned the shares of stock in Strata.

8) The testimony from the 1996 Hearing as to the ownership interests of Branko contained the following:

a) On direct examination Mark Murphy stated that he called Mitchell's landman, Smith, and "...informed him that Strata would recommend to its partners that we sell...to Mitchell." (1996 Hearing Tr. p. 19) In responding to the question of what he meant by the word "partner," Murphy said, "...they're a leasehold owner, they own operating rights." (1996 Hearing Tr. p. 20) However, when asked whether Smith ever inquired as to who the partners were, Murphy said: "I think generically he did during the course of conversations, and I've described them as long-term investors of Strata's or people that we've been involved in." (1996 Hearing Tr. p. 23). Murphy stated that Strata was a New Mexico corporation. (1996 Hearing Tr. p. 27) Murphy testified that the arrangement between Strata and the partners was not a formal agreement, and there was no partnership agreement. (1996 Hearing Tr. p. 29) Murphy on several occasions testified that he felt comfortable negotiating for some of the partners without their specific approval. (1996 Hearing Tr. pp. 37 & 38, 57 & 58)

9) The documentary evidence from the hearings revealed the following regarding the property interest held by Branko:

a) Branko Exhibits No. 1 through 16 are affidavits of the entities comprising Branko. These affidavits state: each entity's undivided interest in the leasehold operating rights or overriding royalty interest in the Lease; all but one of the interests were acquired in 1989, with one affiant stating that its interest was acquired in 1990; and each interest owner states the amount paid for the interest.

b) Branko Exhibit No. 17 is the affidavit of Mark B. Murphy, president of Strata, dated January 17, 1996. The affidavit states that Strata bought the Lease at a federal lease sale in late 1989. Also in late 1989 Strata sold interests in the leasehold operating rights of the Lease to Branko subject to a 1.5% geologic override.

In Paragraph 6 of the affidavit, Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove in Paragraph 5, **Strata retained all of the record title interest subject to the beneficial interest of the parties as described in Exhibit A hereto."** (Emphasis added.) Exhibit A is the January 13, 1993 letter from Strata to Mitchell that contains Strata's list of "leasehold partners and ownership" some of whom became Branko.

Exhibit B to the affidavit is the federal BLM form titled "Transfer of Operating Rights (Sublease) in a Lease for Oil and Gas or Geothermal Resources" executed by Murphy for Strata on November 7, 1995. It is the transfer of overriding royalty interests. On the first page of Exhibit B at the bottom of the form marked with an asterisk is the following statement: **"Strata owns 100% of the record title interest and leasehold operating rights.** Strata is conveying a 1.5% overriding royalty interest to the parties and in the percentages indicated at Exhibit A hereto. **Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed."** (Emphasis added.)

Exhibit C to the affidavit is the same federal BLM form also executed by Murphy for Strata on November 7, 1995, but this is the transfer of operating rights.

Both Exhibit B and Exhibit C state that the transfer "...shall be effective as of ...November 1, 1989." Neither Exhibit B nor Exhibit C is signed by the transferee.

c) Branko Exhibit No. 23 is a January 1993 letter from Strata to Mitchell. On page 3 of the letter is the statement: "Strata would defend itself and it's [sic] partners [sic] rights during any proceeding including a force pooling hearing."

10) No evidence was presented that Branko had a recordable interest in the Lease until the execution by Murphy for Strata of the BLM transfer forms on November 7, 1995.

D. Conclusions of Law

1) The Commission has jurisdiction over the parties and the subject matter.

2) NMSA 1978, Section 70-2-13 provides, in part, that "[t]he division [OCD] shall promulgate rules and regulations with regard to hearings to be conducted before examiners,...." This section also states that "[i]n the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing." The section concludes with the statement: "When any matter or proceeding is referred to an examiner and a decision is rendered thereon, **any party of record** adversely affected shall have the right to have the matter heard *de novo* before the commission **upon application filed with the division within thirty days from the time any such decision is rendered."** (Emphasis added.)

Rule 1220 of the OCD Rules and Regulations states: "When any order has been entered by the Division pursuant to any hearing held by an Examiner, **any party of record** adversely affected by such order shall have the right to have such matter or proceeding heard *de novo* before the Commission." (Emphasis added.)

NMSA 1978, Section 70-2-25 states, in part: "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...." (Emphasis added.)

Branko was not a party of record in Case No. 10656 and did not have standing to request the OCD reopen the case or to request the Commission grant Branko a *de novo* hearing pursuant to NMSA 1978, Section 70-2-13 or 70-2-25 or Rule 1220.

However, Rule 1203 of the OCD Rules and Regulations, provides, in part: **"The Division upon its own motion,** the Attorney General on behalf of the State, and any operator or producer, **or any other person having a property interest may institute proceedings for a hearing."** (Emphasis added.) The Commission concludes that the OCD provided Branko a hearing on May 2, 1996, pursuant to Rule 1203 to determine whether Branko had a property interest affected by Case No. 10656 and Order No. R-9845.

3) NMSA 1978, Section 70-1-1 states: "That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any land in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, shall be recorded in the office of the county clerk of the county where the lands are situated."

NMSA 1978, Section 70-1-2 states: "Such records shall be notice to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record, and no assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right of such royalties of any purchaser or transferee in good faith, without knowledge of the existence of such unrecorded instrument."

No evidence was presented that Branko's interests in the Lease were recorded prior to November 7, 1995; Strata was the record owner of the Lease at the time Mitchell filed the 1992 Application and at the time of the 1993 Hearing.

The Commission concludes that at the time the 1992 Application was filed with the OCD, Branko was not an interest owner entitled to notice pursuant to NMSA 1978, Section 70-2-17 and OCD Rule 1207.

IT IS THEREFORE ORDERED THAT:

(1) Branko's Motion be, and hereby is, denied.

(2) The OCD Order R-9845 issued February 15, 1993, is in full force and effect.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, Member

WILLIAM W. WEISS, Member

WILLIAM J. LEMAY, Chairman

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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. 11510
Order No. R-10672

APPLICATION OF BRANKO, INC. ET AL., TO REOPEN CASE NO. 10656 (ORDER NO. R-9845) CAPTIONED "APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO."

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on May 2, 1996, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 2nd day of October, 1996, the Division Director, having considered the record and recommendations of the Examiner, and being fully advised in the premises,

FINDS THAT:

(1) Due public notice having been given as required by law, the Division has jurisdiction of this cause and the subject thereof.

(2) On December 7, 1992, Mitchell Energy Corporation (Mitchell) filed its application for compulsory pooling and an unorthodox gas well location. Case No. 10656 was heard on January 21, 1993, after which Order No. R-9845 was issued on February 15, 1993.

(3) Strata Production Company ("Strata") was served with the application on December 9, 1992, and appeared at that hearing in opposition to the granting of Mitchell Energy Corporation's (Mitchell) application, particularly Mitchell's proposed W/2 orientation of the 320-acre spacing unit, the well location, and the overhead charges. In addition, Strata contended that Mitchell failed to provide notification to Strata's "undisclosed partners" as identified on Mitchell Exhibit No. 17 in that case.

(4) Strata was the owner of record of a federal lease covering 80 acres (25%) of the 320 acres sought to be pooled by Mitchell (the "Strata lease").

(5) Evidence was introduced by applicants in this case, Branko, Inc. et al., (the "undisclosed partners" hereafter referred to just as "partners") purporting to show that they owned working interests in the acreage being force pooled by Mitchell (a total of 81.5% of the Strata lease with Strata owning the remaining 18.5%) at the times the application in Case No. 10656 was filed, the case was heard and the order was issued. Evidence was also introduced by applicants Branko et al. indicating they were not provided notice by Mitchell pursuant to Division Rule 1207.

(6) Up until a January 12, 1996, letter from Mark Murphy (Murphy), President of Strata, to Mitchell, Strata represented to Mitchell that Strata could act for and bind its "partners" in selling the Strata lease to Mitchell and that "Strata would defend itself and it's [sic] partners rights during any proceeding including a forced pooling hearing." The January 12, 1993, letter from Strata to Mitchell was the first written communication to Mitchell from Strata that the Strata "partners" should be notified directly.

(7) The nature of the interests owned by Strata's "partners" is not disclosed in writing until the January 13, 1993 letter from Strata to Mitchell. Whether in fact there was a formal limited or general partnership (with a written partnership agreement) or another type of business relationship whether formalized (e.g., stockholders in Strata) or informal (e.g., these "partners" were mere investors with the option to participate in Strata's activities) is unclear up to that point. The Division is aware in a general business sense of the term "silent partner" which term indicates that the principal does have a partner/investor but that partner/investor desires not to have its identity disclosed.

(8) The record shows that Mitchell provided only Strata, and not the previously "undisclosed" partners of Strata, with the election to participate in the subject well pursuant to the pooling order by letter dated February 17, 1993.

(9) The duty of Mitchell to inquire as to the nature of these "partners"' interests and to notify these "partners" of the force pooling case is unclear when Strata (I) is the only owner of public record, (ii) does not disclose the nature of these "partners"' interests and (iii) Strata represents that it can bind its "partners" in the sale of the lease and that it will "defend itself and it's [sic] partners rights during any proceeding including a forced pooling proceeding". Strata did in fact appear at the hearing and did defend its rights. Presumably, Strata's positions in the hearing regarding its 18.5% interest in the Strata lease would equally apply to those of its "partners"' 81.5% interest.

(10) It would circumvent the purposes of the New Mexico Oil and Gas Act to allow a record owner of a working interest in the spacing unit at the time said party was served with a compulsory pooling application to avoid or delay having that entire percentage interest pooled by (I) assigning, conveying, selling or otherwise burdening or reducing that interest; or (ii) disclosing previously undisclosed partners or other interest owners who obtained their ownership through the record owner and who are not of public record; after the application and notice of hearing are filed with the Division and served on the party. Taken to the extreme, Strata could have disclosed, one at a time, each of its "partners" each week before a hearing date to delay the hearing 15 times.

(11) A cutoff date for notification of affected interest owners is necessary. If not, an applicant seeking to pool interests in a drilling and spacing unit would be required to daily check county records and verify with record owners that no other owners exist from the day of application until the pooling order is issued. This was never the intent of the pooling statute. Absence of a cutoff date would also permit adverse parties to the pooling application to defeat it by transferring their property to another at or about the time the pooling hearing was held and/or to stand by and, if the well be a producer, elect to participate.

(12) A party seeking a compulsory pooling order from the Division is required to attempt to obtain voluntary joinder of all owners of interests in that unit prior to filing a compulsory pooling application. It is incumbent upon any record owner of interest in that unit to disclose to the party seeking commitment of that interest to that unit the nature and extent of interests not of public record which have been obtained through that record owner in order that a party may attempt to obtain voluntary commitment of those interests to the unit or to notify those owners of a compulsory pooling action. Otherwise, the party seeking compulsory pooling has no notice that these owners exist.

(13) To require the party seeking compulsory pooling to obtain an affidavit from each owner of record certifying that there are no other owners not of record who obtained their title through him or listing all such owners is unduly burdensome and the Division will not impose such a burden. Presumably, if any such owner was listed, then affidavits would need to be obtained from that owner and so on and so on. The record owner may also not be forthcoming with that information. Any such owner can readily protect his interest by filing it of record, which is the purpose of filing a record of ownership.

(14) There are a number of peculiarities in this proceeding that are troubling to the Division and are worth noting:

(A) The geology witness for Strata at the hearing in this case was a Mr. George L. Scott, Jr. who testified that he owned some of the stock of Strata and that Scott Exploration was his organization. He and Scott Exploration were thus on actual notice of the

pooling proceeding. Affidavits have been received from Scott Exploration, Inc., signed by Charles Warren Scott; George L. Scott III and Lori Scott Worrall, who both list the same address as Scott Exploration and which address is in the same building as Strata; and Susan Scott Murphy for Winn Investments, Inc. These affidavits state that until November 1995, they were unaware of the subject well and the compulsory pooling case. Stephen T. Mitchell, with the same address and owning the same overriding royalty interest as George L. Scott III and Scott Exploration, Inc., states in his affidavit that he became aware of the subject well in May, 1993 and of the pooling case in May, 1993, so he somehow had actual notice of the pooling proceeding also. The extent of the stock ownership in Strata and in Scott Exploration, Inc. of the above named persons as well as Mark Murphy and the other partners may need to be examined as well as the personal relationships among all these parties in determining whether actual notice was received.

(B) Two of the "partners", Arrowhead Oil Corporation of Artesia, NM and Warren, Inc. of Albuquerque, NM, failed to join the applicants in this action to reopen this case, although John M. Warren signed an affidavit on behalf of Warren, Inc. stating that he first became aware of the subject well and pooling case on November 6, 1995. Why two of the "partners" (owning 6.25% and 5.0% of the Strata lease and according to Strata's November 6, 1995 letter to the "partners" would be entitled to $45,500 and $37,500 risk free) would not join in an action to reopen a case and be allowed, after the risk has passed, to avoid a risk penalty on a successful well is bewildering. The Division is open to subpoenaing these witnesses to learn the extent of their knowledge of what transpired.

(C) The Division notes the possibility of a conflict of interest on the part of counsel for applicants in this case based upon counsel's representation of Strata during the years in issue here, 1992 and 1993, where Strata failed to advise its "partners" of the compulsory pooling proceeding even though Strata was acting as agent (the extent of such agency is undetermined) for these "partners" during negotiations with Mitchell regarding the acreage that was pooled, and then counsel's subsequent representation of applicants in this case where their claim is based upon not being notified of that same compulsory pooling proceeding.

(D) One of the partners, S.H. Cavin of Roswell, NM, is the father of counsel for the applicants.

(E) In his January 13, 1996, correspondence to Mitchell, Murphy of Strata stated that "Strata has or is in the process of making a direct assignment of each partners [sic] proportionate ownership". In fact, the transfers were not carried out until November, 1995 (which was after the well proved profitable), which occurred in conjunction with the notification to the "partners" by Strata that the "partners" may have a good claim against Mitchell for recoupment of their 200% risk penalty.

(F) Strata takes the position that it was under no duty to its "partners" to inform them of the compulsory pooling case which would allow Mitchell to pool their leasehold interests to drill the subject well. Yet Strata apparently felt it had a duty to them to provide their names to Mitchell in early 1993 so Mitchell could notify them of the hearing. The distinction drawn is very fine. Strata also felt it had a duty to keep them informed as to the sale of their leasehold interests to Mitchell so Mitchell could drill the well. Murphy had numerous discussions with Strata's "partners" during the time period from October 1992 and May 1993 regarding their leasehold interests and Mitchell's desire to drill a well which included their interests. With the apparently large discretion given Strata to negotiate and sell the Strata lease to Mitchell by the "partners", it seems unlikely to the Division that the agency granted to Strata by the "partners" would not encompass the duty to inform the principals ("partners") of any action taken by Mitchell regarding their acreage interests in attempting to drill its well. The Division is curious as to what reports or other communications were made to the "partners" by Strata both before and after the negotiations with Mitchell for sale of the Strata lease had failed.

(G) The duty to inform Strata's "partners" of the pooling case and the subject well, apparently sprang into being in November, 1995 when Strata wrote its partners informing them of the pooling order, the status of the well and that they "may have the right to join in the Mitchell well without application of the 200% risk penalty". Long before then, Strata had dismissed its De Novo appeal of the pooling order in which appeal it could have contested the "all or none" election option given Strata by Mitchell as to payment for well costs for the entire 25% interest represented by the Strata lease. Strata had also acknowledged that "Strata's 18.5% interest is subject to the Order" in a May 11, 1993 letter from its attorney to the attorney for Mitchell. By such actions, Strata apparently waived its rights to assert that it too could join in the Mitchell well without a risk penalty. Nevertheless, Strata apparently felt a "compulsion" in November 1995 to finally inform its "partners" of the pooling order, the Mitchell well, and their rights as to joining in the well risk free as well as aid the "partners" in this proceeding by providing testimony.

(H) No evidence, in the form of written instruments, canceled checks, or otherwise, has shown exactly how and when the "partners" acquired their interests, when they paid for such interests and what interests were actually acquired. The documentation for the transfers was not prepared until late 1995.

(15) The Division believes that the issue of actual notice is important under the circumstances of this case. If the applicants knew of the force pooling hearing and/or the drilling of the subject well and made no attempt to inquire as to their interest in such hearing or inquire as to their respective obligations to pay their proportionate shares of the well expenses until the well became profitable, then even if applicants had been entitled to participate in the well at their election, they may have waited too long to voice their decision.

(16) The Division is concerned with the equity of allowing parties, with knowledge of the facts, and without risk to themselves, to stand by an unreasonable amount of time and see another assume all the risks of drilling a well in which such parties might have shared, and, after success of the well, seek to share in the benefits thereof. The injustice of such a situation is obvious: of permitting ones holding the right to assert ownership in such property to voluntarily await the event determining success or failure, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. If the Division is unable to fashion an equitable solution based upon the facts in this case, the Division is hopeful a court can do so.

(17) Regardless of whether the "partners" should have been notified pursuant to Division Rule 1207 prior to the compulsory pooling hearing, the Division is reopening this case for the reason stated below.

(18) Ordering Paragraphs (4) and (5) of Order No. R-9845 provide that "each known working interest owner" shall be furnished an itemized schedule of estimated well costs and that such working interest owner shall have a right to participate in the well by paying his share of estimated well costs.

(19) Based on the absence of any notice sent by Mitchell to applicants in this case informing them of their election rights to participate in the subject well under Division Order No. R-9845 issued on February 15, 1993, in view of the fact that Mitchell prior to that time (on January 13, 1993) had been given a list of such working interest owners and had also been notified at that same time that those interest owners should be contacted directly regarding the compulsory pooling case, **Case No. 10656 should be reopened** to examine the share of costs that should be apportioned to each interest owner in the subject well as well as determine how future operations should be conducted for such well.

IT IS THEREFORE ORDERED THAT:

(1) **Case No. 10656 is hereby reopened** with the date for hearing to be set no later than the second Division hearing in December 1996. Mitchell shall provide notice to all known interest owners of the hearing.

(2) Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

WILLIAM J. LEMAY
Director

SEAL