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*NOT LICENSED IN NEW MEXICO

January 28, 2000

VIA FEDERAL EXPRESS

Patricia Rivera Wallace
Clerk, NM Court of Appeals
237 Don Gaspar
Santa Fe, NM 87501

Re: Branko, Inc., et al. v. The New Mexico Oil Conservation Commission, et al.; Ct. App. No. 21020
Appeal from the Fifth Judicial District Court of Lea County

Dear Ms. Wallace:

Please find enclosed herewith for filing in the above referenced matter Appellee Mitchell Energy Corporation's Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal. I have also enclose an extra copy of the Motion which I would appreciate your date stamping and returning to me in the self addressed stamped envelope provided. Thank you.

Very truly yours,

HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

James M. Hudson

James M. Hudson

JMH/tw
Enclosures

cc: Harold D. Stratton, Jr.
Marilyn S. Hebert

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 21020

BRANKO,INC., A NEW MEXICO CORP. ET AL.,

Plaintiffs-Appellants,

vs.

Lea County
CV 97-159 G

NEW MEXICO OIL CONSERVATION COMM'N, ET AL.,

Defendants-Appellees.

MANDATE TO DISTRICT COURT CLERK
(Applicable items are indicated by an "X" below.)

1. _x_ Attached is a true and correct copy of the original order entered in the above-entitled cause.

2. _x_ This order being now final, the cause is remanded to you for any further proceedings consistent with said order.

3. ___ Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision/order attached hereto.

4. ___ You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. ___ District Court Clerk's Record returned herewith:
___tapes; ___transcript; ___depositions; ___ other

6. ___ Exhibits filed herein shall be:
_____picked up at this Clerk's Office forthwith.
_____ returned by this Clerk's Office.

7. ___ Costs bill is assessed as follows:

8. ___ Attorney fees on appeal are granted as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this 7th day of August, 2000.
(SEAL)

Patricia R Wallace
Clerk of the Court of Appeals of the
State of New Mexico

cc: Counsel w/out attachments

ATTEST: A true copy.

Patricia R. Wallace
Clerk of the Court of Appeals
of the State of New Mexico

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini** **S. Ct. No. _____**
Plaintiffs-Petitioners,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Respondents.	§	

PETITION FOR WRIT OF CERTIORARI

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Stephen D. Ingram
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ATTORNEYS FOR PLAINTIFFS-PETITIONERS

I. DATE OF ENTRY OF DECISION

This Petition for Writ of Certiorari is brought pursuant to Rule 12-502, NMRA 2000. A copy of the May 4, 2000 Order of the Court of Appeals denying Petitioners' Petition for Writ of Certiorari, which was brought under Rule 12-505, NMRA 2000, is attached as Exhibit "A." The District Court Judgment from which Petitioners sought a writ of certiorari before the Court of Appeals was entered on December 17, 1999. Copies of the District Court Judgment and District Court's Decision are attached hereto as Exhibits "B" and "C," respectively.

II. QUESTIONS PRESENTED FOR REVIEW BY THE SUPREME COURT

1. Whether Petitioners had a protectable property interest entitling them to the due process protections of N.M. Const. art. II, § 18 and U.S. Const. amend. XIV as held in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P. 2d 721 (1991).

2. Whether the New Mexico Oil Conservation Division's own regulations and governing statutes required that known interestholders be given actual notice of pooling proceedings affecting their interests.

3. Whether the District Court was correct in finding that Petitioners did not have a property interest that entitled them to notice by Respondent Mitchell Energy Corporation ("Mitchell") or Respondent New Mexico Oil Conservation Commission ("Commission") of Mitchell's application for compulsory pooling of Petitioners' interests.

4. Whether the District Court was correct in finding that Petitioners had to have a

documented real property interest to entitle them to actual notice.

5. Whether the District Court correctly found that Mitchell did not have actual notice of Petitioners' interests, so that Petitioners were not entitled to the notice due them under *Uhden* and *Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, 127 N.M. 120 (1999).

6. Whether the District Court correctly found that the Commission properly determined that all parties entitled to notice of Mitchell's pooling application received proper notice and participated in the hearing on the application before the Commission.

7. Whether the District Court was correct in finding that Petitioners were investors in the Strata Production Company ("Strata") enterprise and that notice to Strata was notice to Petitioners.

8. Whether the District Court was correct in finding that there was no evidence in the record to indicate that the Commission acted fraudulently, arbitrarily or capriciously in conducting the hearings and rendering its decision; that the Commission's final decision was not supported by the evidence; or that the Commission did not act in accordance with the law.

9. Whether the District Court was correct in finding that there was no evidence in the record to support Petitioners' contention that they were denied due process of law.

10. Whether the District Court erred in affirming the Commission's Order No. R-10672-

III. FACTS MATERIAL TO QUESTIONS PRESENTED

On December 8, 1992, Mitchell filed an application with the New Mexico Oil Conservation Division ("Division") requesting an order pooling all mineral interests from the top of the Wolf Camp formation to the base of the Pennsylvanian formation underlying the western ½ of Sec. 28, Township 20 S, Range 33 E, N.M.P.M. ("Application"). Prior to filing its Application, Mitchell negotiated with Strata, a working interest owner. During the course of these negotiations, Strata's president, Mark Murphy, informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved who had an interest in the subject property. On January 13, 1993 Mr. Murphy sent a list of all working interest owners and their interests in the subject property to Mr. Smith. Of the working interest owners, *only Strata was notified* of the hearing on Mitchell's Application. A hearing was subsequently held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. Mitchell did not spud the subject well until May 18, 1993.

Despite the fact that Mitchell was aware of Petitioners' property interests and of the identity and addresses of Petitioners, and despite the fact that the operative statutes and regulations required that Petitioners be notified, Mitchell and the Commission willfully failed to notify Petitioners of the hearing of January 21, 1993. Petitioners' property interests have been affected as they now must pay the 200% penalty provided in Order No. R-9845 rather than participate in the subject well as working interest owners.

On January 29, 1996, Petitioners filed a motion with the Division to reopen Case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. Petitioners' motion to reopen the case was granted on October 2, 1996 by order of the Division. On October 30, 1996, Mitchell requested a *de novo* hearing which was granted by the Commission. The *de novo* hearing was held on January 16, 1997, which resulted in the issuance of Order No. R-10672-A in Case No. 11510. The Commission concluded that at the time Mitchell filed its Application in 1992, Petitioners were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and OCD Rule 1207, because their interests were not recorded. The Commission so held even though neither the cited statute nor the regulation limit the notice requirements contained therein to *recorded* interests.

Pursuant to NMSA 1978, § 70-2-25, Petitioners filed their petition for review of the Commission's decision in the District Court for the Fifth Judicial District of Lea County on April 25, 1997. On November 22, 1999, the District Court filed its Decision, finding, *inter alia*, that *Uhden* did not apply to this case, that Petitioners had no "written documentation" of a real property interest entitling them to notice as required by *Uhden*, that Petitioners had no property interest entitling them to notice, and that Mitchell did not have actual knowledge of Petitioners' property interests so as to require notice. Court's Decision, pp. 4-5. On December 17, 1999, the District Court rendered a Judgment affirming the Commission's Order No. R-10672-A.

IV. BASIS FOR GRANTING WRIT OF CERTIORARI

The District Court's Decision is in direct conflict with this Court's opinions on the due process protections afforded property interests and the Commission's order violates its own statutes and regulations under which it operates, as shown below:

A. Supreme Court and Court of Appeals Opinions with which the Decisions of the District Court and Court of Appeals are in Conflict.

Johnson v. New Mexico Oil Conservation Commission, 1999-NMSC-021, 127 N.M. 120, 125-26 (1999) (where Burlington had actual notice of interestholders and their whereabouts, Burlington and Commission were required to give actual notice to interestholders under Oil and Gas Act and Rule 1207.A(11)).

AA Oilfield Service v. New Mexico State Corporation Commission, 118 N.M. 273, 278, 881 P.2d 18, 23 (1994) (if the Corporation Commission enters an order without providing notice and hearing as required, such orders are *void* and subject to collateral attack).

Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991) (in New Mexico mineral royalty retained or reserved in a conveyance of land is real property worthy of constitutional protection).

("[I]f a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions *requires* the party who filed a spacing application to provide *notice* of the pending proceeding by personal service to such parties whose property rights may be affected as a result.") *Uhden*, 112 N.M. at 531 (emphasis added).

First National Bank of Belen v. Luce, 87 N.M. 94, 529 P.2d 760 (1974) (a person who purchased real estate in possession of another is bound to inquire of such possessor what right he has in the real estate; if he fails to make such inquiry, equity charges him with notice of all facts that such inquiry would disclose).

Cano v. Lovato, 105 N.M. 522, 529, 734 P.2d 762, 769 (Ct. App. 1986), *cert. denied*, 104 N.M. 246, 719 P.2d 1267, *cert. quashed*, 105 N.M. 438, 733 P.2d 1321 (1986) (New Mexico Recording Act protects title of subsequent innocent purchasers *without notice* of unrecorded deed).

B. Statutory Provisions and Agency Regulations with which the Decisions of the District Court and Court of Appeals are in Conflict.

NMSA 1978, § 70-2-17(C) (notice must be afforded to all owners of each tract or interest in pooling proceedings before the Oil Conservation Division).

NMSA 1978, § 70-2-18(A) (obligation of *operator*, where separately owned mineral interests, to obtain agreements pooling said interests or order of the Oil Conservation Division).

19 NMAC 15.N.1207.A.(1)(a) ("actual notice shall be given to each known individual owning an uncommitted leasehold interest, an unleased and uncommitted mineral interest, or royalty interest not subject to a pooling or unitization clause in the lands affected by such application which interest must be committed and has not been voluntarily committed to the area proposed to be pooled or unitized").[1]

C. Significant Questions of Law Under the Constitutions of New Mexico and the United States Involved in This Matter.

Whether Petitioners had a protectable property interest entitling them to the due process protections of N.M. Const. art. II, § 18 and U.S. Const. amend. XIV and whether such due process rights were violated by Respondents' failure to give actual notice to Petitioners of the January 21, 1993 Division hearing.

D. Issues of Substantial Public Interest that Should Be Determined by the Supreme Court.

Whether interestholders in real property are entitled to actual notice of administrative

---

1 The Division subsequently amended 19 NMAC 15.N.1207.A.1 in 1999 in reaction to this case to try to justify Respondents' failure to notify Petitioners of the hearing on Mitchell's Application to read as follows:

> 1207.A.(1)(a) Notice shall be given to any owner of an interest in the mineral estate *whose interest is evidenced by a written document* of conveyance either of record or known to the applicant at the time of filing the application ..." (emphasis added).

Not only is the amendment of this regulation in essence an admission of Respondents' violation of Rule 1207.A.(1)(a) as it existed at the time, the amended regulation is unconstitutional and in violation of *Uhden* and *Johnson*, *supra*, which make no requirement of a *recorded* or *documented* interest as being a prerequisite to constitutionally meaningful notice.

hearings affecting their property interests, regardless of the form such interests take, when their interests and identity are known.

V. ARGUMENT AND AUTHORITIES SUPPORTING REQUEST FOR WRIT OF CERTIORARI

It is imperative that this Court grant Petitioners' request for a writ of certiorari. To do otherwise would allow to stand a District Court decision that flies in the face of this Court's pronouncements in *Uhden* and *Johnson* protecting the due process rights of mineral interest holders in oil and gas administrative proceedings. The essential issue presented is simple and straightforward: Were Petitioners entitled to notice of Mitchell's application to the Division requesting an order pooling all mineral interests subject to the application? The operative statutes and regulations required it. NMSA 1978, § 70-2-17 provides that "all orders affecting such pooling shall be made after notice and hearing and shall be upon such terms and conditions that are just and reasonable and *will afford to the owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas . . ."* (emphasis added). Likewise, 19 NMAC 15.N.1207.A.(1)(a), as it existed at the time, required that in applications for compulsory pooling under NMSA 1978, § 70-2-17, *actual notice* be given to each individual owning a leasehold interest not subject to a pooling or unitization clause, *without limitation* as to how the interest was held. As held by this Court, the New Mexico and United States Constitutions also required such notice. *Uhden*, 112 N.M. at 531.

This Court, in its holding in *Uhden* in 1991 and subsequently in *Johnson* in 1999, recognized

the protections afforded interestholders such as Petitioners: *Uhden*, primarily from a constitutional standpoint; *Johnson*, primarily from a regulatory standpoint. The District Court's upholding of the Commission's order violated *both* holdings, and a writ of certiorari must be issued so that this injustice to protected property interests does not stand. *See* Petition for Writ of Certiorari filed with Court of Appeals, pp. 8-9.

The District Court found on p. 4 of its Decision that "Mitchell did not have actual notice of any interest purportedly held by Plaintiffs." The record is replete with evidence of Mitchell being informed of the existence and identity of Petitioners and the working interests and royalty interests they held. Regardless, Mitchell was under a duty to *inquire* as to such interests. *See Uhden*, 112 N.M. at 531. Remarkably, the District Court also found that "*Uhden* is not applicable to the facts of this case." Decision, p. 4. It is necessary to grant certiorari for this Court to protect the integrity of its opinion in *Uhden* as well as in *Johnson*. If *Uhden* does not apply to the facts of this case, it will have little efficacy in future pooling and other oil and gas administrative proceedings. Others' working and royalty interests will be in jeopardy if the Commission and operators appearing before it are not required to follow the Commission's own regulations and give constitutionally-required notice to such interest owners.

Petitioners had a protected property interest as a result of their interest in the subject oil and gas lease. Mitchell was aware of the names, addresses and even the nature and extent of Petitioners' interests prior to the 1993 hearing. Likewise, the Division was aware of this fact, however, it chose

to proceed in the absence of Petitioners. Whether such interests were documented is irrelevant, as neither the operative regulations or statutes or this Court's opinions impose such a condition on Petitioners' entitlement to due process protections. Respondents' actions constituted a deprivation of Petitioners' property without due process of law. A writ of certiorari to the Court of Appeals should issue from this Court.

VI. PRAYER FOR RELIEF

Petitioners request that a writ of certiorari issue to the Court of Appeals, that the District Court Judgment be reversed, that this Court enter an order vacating Orders No. R-9845 and R-10672-A, that this Court hold that the Division's Order No. R-9845 is void and unenforceable as to Petitioners, and that this case be remanded for further proceedings.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____

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CERTIFICATE OF MAILING

I CERTIFY that a true and correct copy of the foregoing pleading was served on the following on this the 22nd day of May, 2000 as follows:

Via Federal Express

Kathleen Jo Gibson
Chief Clerk
Supreme Court Bldg.
237 Don Gaspar Ave., Room 104
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Via Regular Mail

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRANKO, INC., A NEW MEXICO CORP., ET AL.,

Plaintiffs-Appellants,

vs.

No. 21,020
Lea County
CV-97-159-G

NEW MEXICO OIL CONSERVATION COMM'N, ET AL.,

Defendants-Appellees.

ORDER

The Petition for Writ of Certiorari is received and ordered filed herein, and due consideration having been had by the Court,

IT IS ORDERED that the petition be and the same is hereby **DENIED.**

RUDY S. APODACA, Judge

RICHARD C. BOSSON, Judge

T. GLENN ELLINGTON, Judge

FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,	§	
Appellants,	§	CV 97-159G
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Appellees.	§	

JUDGMENT

THIS MATTER CAME BEFORE THE COURT on the Plaintiffs' Petition For Review of The New Mexico Oil Conservation Commission's decision in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A, pursuant to NMSA 1978, §70-2-25 (1995). Having reviewed the record of the proceedings before the New Mexico Oil Conservation Commission and the evidence presented in those proceedings on file herein, the

EXHIBIT B

pleadings and briefs of the parties filed herein, and the arguments of counsel, and having considered the applicable law, the Court has previously entered and filed the Court's Decision setting forth it findings and conclusion. Based on the Court's Decision, this Judgment is entered in favor of the Defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that The New Mexico Oil Conservation Commission's Order No. R-10672-A in Case No. 11510 is, in all respects, affirmed.

Dated this _____ day of December, 1999.

R. W. Gallini

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED AND APPROVED BY:

KELLAHIN AND KELLAHIN

By: By: Approved telephonically on December 13, 1999
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APPROVED AS TO FORM:

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FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,

Plaintiffs,

vs. **NO. CV-97-159-G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

COURT'S DECISION

THIS MATTER HAVING COME BEFORE THE COURT on Plaintiffs' petition for review of The New Mexico Oil Conservation Commission's decisions in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A. This review was conducted pursuant to NMSA 1978, §70-2-25 (1995 Repl.). This Court entered its Order Establishing Briefing Schedule on September 24, 1997 and all parties complied with the Court's Order. Oral argument was presented to the Court on May 4, 1998 and the Court took its decision

under advisement in order to study the briefs, review the applicable law and oral argument presented by counsel.

The Court having studied all briefs, the applicable law, and considering oral argument of counsel is now prepared to render its decision in this matter. Section 70-2-25 NMSA 1978 refers the Court to §39-3-1.1D NMSA 1978, which provides: "In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:

(1) the agency acted fraudulently, arbitrarily, or capriciously;

(2) the final decision was not supported by substantial evidence; or

(3) the agency did not act in accordance with law.

PLAINTIFFS' CLAIMS:

The main issue in this case is that the Plaintiffs claim they were working interest and/or overriding royalty interest owners in the S/2 SW/4 of Section 28, Township 20 South, Range 30 East, N.M.P.M., Lea County, New Mexico at the time that Defendant, Mitchell Energy Corporation, who was the operator of the Tomahawk "28" Federal Com No. 1 well, located at the 1980 FWL and 1650 FNL of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, filed its application with Defendant Oil Conservation Commission to pool all mineral interests from the top of the Wolf Camp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, to form a standard 320-acre spacing within said vertical extent, which included but was not necessarily limited to the Undesignated Halfway-Atoka Gas Pool and the Undesignated Salt Lake-Morrow Gas Pool, said unit being dedicated to Mitchell's Tomahawk Well to be drilled at an unorthodox gas well location. Plaintiffs claim they were never

given notice of the filing of the case by Mitchell or the Commission as required by law. Plaintiffs claim they did not learn of the existence of the entry of Order No. R-9845 or the existence of Case No. 10656 until sometime in 1995. Plaintiffs further claim that because they were not notified of the proceedings in Case No. 10656 and the entry of the Order No. R-9845, they were unable to make an election as to whether to participate in the Tomahawk Well in the period allowed by law and regulations and under the time frame provided in the Order which had expired by the time they became aware of its existence. The Plaintiffs claim that this failure to be notified and respond subjected them to a 200% risk factor penalty set forth in the Compulsory Pooling Order R-9845. Plaintiffs claim they were denied due process of law. Therefore, the agency did not act in accordance with the law. Therefore, the decisions and orders of the Oil Conservation Commission should be set aside and found to be void, invalid and unenforceable as to Plaintiffs.

DEFENDANTS' CLAIMS:

Defendants claim that Strata Production Company appeared at the hearing in opposition to the granting of Defendant Mitchell's application and claimed that Mitchell had failed to provide notification to Strata's "undisclosed partners" and it was Mitchell's duty to request Strata to disclose the names and addresses and then to provide those parties with an opportunity to join or compulsory pool each party. Defendants further claim that at all times during negotiations and at the time the application was filed and notice was given, Strata was the record title owner of the mineral interests in question and held 100% of both record title and operating rights title, which included the so-called "undisclosed partners" whose interests, if any at the time, did not appear of record. Defendants further claim that on November 7, 1995, some six years after the Strata partners claimed to have acquired an interest in the subject lease, more than 31 months after the entry of the compulsory

pooling order in this case, and after Mitchell had drilled the well, Strata finally signed written instruments conveying interests to its undisclosed partners which were then recorded in Lea County on November 8, 1995. Defendants further claim that notice to Strata was notice to the "undisclosed partners," the Plaintiffs herein, and Strata was obligated to tell them about the application and the hearing. Defendants contend that the Commission in entering its orders and decisions did not act fraudulently, arbitrarily or capriciously; that the final decision of the Commission was supported by substantial evidence and that the Commission acted in accordance with law. Therefore, the Plaintiffs' appeal should be dismissed with prejudice.

STANDARD OF REVIEW:

In reviewing an administrative order, this Court must determine whether, based on the record as a whole, the Commission's order is substantially supported by the evidence and by the applicable law. In reviewing the whole record, the Court must view the evidence in a light most favorable to upholding the agency determination. The Court must uphold the agency decision if the evidence in the record demonstrates the reasonableness of the decision.

DECISION OF THE COURT:

As a matter of Law, this Court finds and concludes as follows:

1. The Commission correctly found that all proper parties to Mitchell's application received proper notice and participated in the hearings conducted by the Oil Conservation Commission.

2. Mitchell did not have actual notice of Plaintiffs' interests such that Plaintiffs can receive the benefit of the New Mexico Supreme Court's decision in ***Uhden v. New Mexico Oil Conservation Commission*** because (a) ***Uhden*** is not applicable to the facts of this case. (b) Defendant Mitchell did not have actual notice of any interest purportedly held by Plaintiffs.

3. Plaintiffs are bound by and took their interests in the lease subject to the interest of Strata Production Company.

4. Plaintiffs are estopped to deny the partnership with Strata, and are bound by the notice given to Strata.

5. Strata Production Company adequately represented the interests now held by the Plaintiffs at the hearings.

6. Plaintiffs cannot use the administrative process in order to seek risk-free benefits after they have determined the subject well reached its payout.

7. At all times material thereto, the Plaintiffs did not have a property interest that entitled them to notice by Mitchell or the Commission of the Application for compulsory pooling.

8. The plaintiffs had no written documentation of a real property interest that would entitle them to notice as required by law and the holding of the Supreme Court of New Mexico in the ***Uhden case.***

9. At all times material thereto, the plaintiffs were, if anything, investors in the Strata enterprise and notice to Strata was notice to them. It was Strata's responsibility to provide its investors with the information they needed to protect their investment.

10. There is no evidence in the record to indicate that the New Mexico Oil Conservation Commission('s):

(A) acted fraudulently, arbitrarily or capriciously in conducting the hearings and rendering its decisions in this case;

(B) final decision was not supported by substantial evidence; or

(C) did not act in accordance with law.

11. There is no evidence in the record to support Plaintiffs' contention that they were denied due process of law.

12. The Commission's Order No. R-10672-A in Case No. 11510 should be affirmed.

Counsel for the defendants shall prepare the judgment in accordance with this decision and present to counsel for plaintiffs for review and approval as to form. Upon entry of the Judgment this matter shall be remanded to the New Mexico Oil Conservation Commission for any further proceedings in connection with this matter.

R. W. Gallini

R. W. Gallini, District Judge

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May 22, 2000

VIA FEDERAL EXPRESS

Kathleen Jo Gibson
Chief Clerk
Supreme Court of New Mexico
Supreme Court Building
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Santa Fe, NM 87501

Re: *Branko, Inc., et al., Petitioners v. New Mexico Oil Conservation Commission and Mitchell Energy Corporation, Respondents;* In the Supreme Court for the State of New Mexico; S. Ct. No. _____

Dear Ms. Gibson:

Enclosed for filing is an original and seven (7) copies of Petitioners' Petition for Writ of Certiorari in the referenced matter. Also enclosed is the $125.00 docket fee. Please return an endorsed copy of the enclosed Petition for Writ of Certiorari in the enclosed self-addressed stamped envelope to the undersigned. If you need any further information, or if there are any problems in the filing of this Petition for Writ of Certiorari, please contact the undersigned immediately. Thank you for your assistance.

Sincerely,

STRATTON & CAVIN, P.A.

By: _____
Stephen D. Ingram

SDI/kc
Enclosures as stated

cc: (w/enclosures)
Marilyn S. Hebert
Harold L. Hensley, Jr. and James M. Hudson
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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ON APPEAL FROM AN ORDER OF
THE THIRTEENTH JUDICIAL DISTRICT COURT
SANDOVAL COUNTY
NEW MEXICO
IN No. 97 D-1329-CV783

AGRONICS, INC.,
a New Mexico Corporation,
Appellant,

v. Court of Appeals No. _____

THE NEW MEXICO ENERGY, MINERALS &
NATURAL RESOURCES DEPARTMENT, THE
NEW MEXICO MINING COMMISSION, and
THE MINING AND MINERALS DIVISION,
Appellees.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The New Mexico Energy, Minerals and Natural Resources Department, the Mining and Minerals Division, and the New Mexico Mining Commission (collectively, the "Appellees") respectfully ask the Court of Appeals to dismiss Appellant Agronics, Inc. appeal for lack of jurisdiction. In support of this motion, the Appellees state:

1. The appellant, Agronics, Inc., appealed the rulings of the New Mexico Mining Commission in Mining Commission Appeals Nos. 96-7 and 97-2 to the District Court. The decisions and orders of the District Court in the appeal are governed by Rule 1-074 NMRA 1999.
2. The District Court rejected Agronics' appeal and entered its Decision and Order affirming the Findings and Conclusions and Orders of the Mining Commission on December 10, 1999.

3. Agronics filed a Notice of Appeal with the District Court and with the Court of Appeals on January 10, 2000. A copy of the District Court's Decision and Order was attached to the Notice.

4. Appeals from the decisions of the district courts reviewing administrative appeals are governed by Rule 12-505, NMRA 1999. Pursuant to Rule 12-505(C), petitions for a writ of certiorari shall be filed with the clerk of the Court of Appeals with in twenty (20) days after entry of the final action by the district court. The three (3) day mailing period allowed under Rule 12-308 does not apply. Consequently, under the applicable rule Agronics was required to file its (Petition for writ of certiorari in this Court by December 30, 1999. Agronics did not file its Notice until January 10, 2000, well after the allowed time period expired.

5. Agronics failure to make a timely filing of its writ of certiorari is jurisdictional and the appeal should be dismissed. Coachlight Las Cruces, Ltd. v. Mountain Bell Telephone Company, 99 N.M. 787, 664 P.2d 985 (1983) (petition for certiorari must be timely filed; failure to timely file is jurisdictional and requires that the appeal be dismissed).

WHEREFORE, the Appellees respectfully ask the Court to dismiss this appeal for lack of jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion to Dismiss Appeal for Lack of Jurisdiction was mailed to the following counsel of record on _____.

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notice, the attorneys candidly admitted that they either did not know where their Advance Service was or they did not routinely research in it for every procedure for every case that they have. While we cannot approve of such practice, we also consider the situation raised by the procedure in these cases to pose such unusual circumstances as to warrant the exercise of our discretion to grant extensions of time in which to file petitions for certiorari, where those extensions are sought because of confusion surrounding the enactment and publication of Rule 12-505.

CONCLUSION

{18} We conclude that the cases herein did not constitute "pending" cases within the contemplation of Article IV, Section 34 of our state constitution. Accordingly, certiorari is the proper procedure. We grant the petition for writ of certiorari in *Hyden v. New Mexico Human Services Department*, No. 20,508; that case will be calendared in due course. We grant the requested extension in *Alley v. Martinez*, No. 20,518, and allow twenty days from the filing of this opinion in which to file a proper petition for writ of certiorari. We grant Appellant in *C.F.T. Development, LLC v. Board of County Commissioners of Torrance County*, No. 20,548, an extension of time of twenty days from the date of this opinion in which to file both a motion for extension of time to file a petition for writ of certiorari and a proposed petition for writ of certiorari.

{19} **IT IS SO ORDERED.**

THOMAS A. DONNELLY, Judge

WE CONCUR:
LYNN PICKARD, Chief Judge
RICHARD C. BOSSON, Judge

FROM THE NEW MEXICO SUPREME COURT

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were appealed to the district courts, control the method of obtaining further appellate review by this Court. Additionally, we examine whether both the time requirements and method of seeking appellate review are governed by Section 39-3-1.1 and Rule 12-505.

{12} Interpretation of the applicability of Article IV, Section 34 of our state constitution to the comprehensive appeals legislation to the cases before us is a question of law, which we review de novo. *See In re U.S. West Communications*, 1999-NMSC-024, ¶ 15; *Pinnell v. Board of County Comm'rs*, 1999-NMCA-074, ¶ 17, 127 N.M. 452, 982 P.2d 503.

{13} In *In re U.S. West Communications*, our Supreme Court considered three orders that had been issued by the State Corporation Commission (SCC), which body was subsequently replaced by the new Public Regulation Commission (PRC) pursuant to a constitutional amendment. U.S. West argued that removal procedure was the proper method of obtaining judicial review. *See* 1999-NMSC-024, ¶ 8. The Attorney General and the PRC argued that NMSA 1978, § 63-7-1.1 (1998, effective Jan. 1, 1999), was the applicable method governing the method of appellate review of each of the orders in question. *See id.* ¶ 9. The Court held that the constitutional amendment did not constitute a legislative act within the meaning of Article IV, Section 34 of our state constitution so as to restrict the Legislature from modifying the method of appellate review. *See id.* ¶ 10. The Court also held that the proceedings contesting the validity of the orders were not "pending" cases within the meaning of Article IV, Section 34 of our state constitution, because a case is no longer considered pending after a final judgment of the court has been filed, unless the judgment entered by the court remains under its control or if a subsequent judicial proceeding can be traced to the court's instruction in a remand or in an opinion directing the filing of a new action. *See id.* ¶¶ 12-18. Thus, the Court concluded that because final orders had been entered by the SCC in such proceedings, and the proceedings were no longer pending before the SCC when the final orders were entered, the cases were not "pending" within the meaning of Article IV, Section 34 of our state constitution. *See id.* We reach a similar result in each of the three cases before us and conclude that because final orders of the respective district courts were entered after the effective dates of Section 39-3-1.1 and Rule 12-505, the cases before us were not "pending" cases within the meaning of Article IV, Section 34 of our state constitution when review in this Court was sought.

{14} We next examine whether, under the circumstances existing here, this Court can review the three cases herein. In *Hyden* there was a proper and timely filed petition for writ of certiorari. Thus, we should definitely review that case. In the other cases, however, Appellants filed notices of appeal from final orders of the district court entered after the effective date of both the statute and the rule. Appellants in those cases also failed to comply with the twenty-day time limit imposed by the rule for seeking review on certiorari.

{15} In *Govich*, 112 N.M. at 230, 814 P.2d at 98, responding to Justice Montgomery's dissent in *Lowe*, our Supreme Court, in lieu of using the term "jurisdictional" to refer to the requirements of time and place of filing the notice of appeal, held that those requirements should more appropriately be termed "mandatory precondition[s] to the exercise of jurisdiction" that could be excused under certain circumstances in the exercise of an appellate court's discretion. In *Trujillo*, 117 N.M. at 278, 871 P.2d at 374, for example, the Supreme Court exercised its discretion to excuse the late filing of a notice of appeal when unusual circumstances occasioned by judicial error caused the untimeliness. We believe the unusual circumstances shown in each of the cases filed as appeals before us also warrant this Court's exercise of its discretion to permit review on the merits.

{16} In *Chavez v. U-Haul Co.*, 1997-NMSC-051, ¶ 26, 124 N.M. 165, 947 P.2d 122, our Supreme Court reviewed appeals in two cases in which the notices of appeal had been untimely filed. After discussing the facts applicable of each case and its earlier decision in *Trujillo*, the Court stated:

> The discretion to hear an untimely appeal should not be exercised where there is no court-caused delay of the sort discussed in *Trujillo*, where there are no unusual circumstances such as in Chavez's case, and where a notice of appeal is filed thirty days late. If we were to allow Jones's appeal, the efficacy of Rule 12-201 would be severely undermined and weakened. On these facts, the need for efficient administration of justice outweighs the right to an appeal.

In view of our Supreme Court's long history of stating that rules will be construed liberally in order that cases on appeal may be heard on their merits, *see, e.g., Montgomery v. Cook*, 76 N.M. 199, 208, 413 P.2d 477, 484 (1966); *Baker v. Sojka*, 74 N.M. 587, 589, 396 P.2d 195, 196 (1964), we believe that it is appropriate for the reviewing court to give due consideration to all of the circumstances in the legal environment surrounding the untimeliness in a particular case.

{17} In contrast to the result in Jones's case, discussed in *Chavez*, 1997-NMSC-051, ¶ 16, in which the same notice-of-appeal rules had been in place and known to all for many years, the statute and rule governing the method of obtaining administrative review in the instant cases have been termed a "procedural morass" in the brief of one of the cases before us. Although the statute was enacted and effective in 1998, it expressly provided that certiorari procedure was to be governed by rules adopted by the Supreme Court. *See* § 39-3-1.1(G). A person looking for the appropriate rule to follow between September 1, 1998, and February 25, 1999, when the rule was published in the back of the bar bulletin "*nunc pro tunc*," would not have found the rule at all. Prior to the time the Michie 1999 supplements were published, at which time anyone researching the statutes and rules should have been able to easily find Rule 12-505, the appropriate rule was found only in the back of a bar bulletin and in the Advance Annotation and Rules Service. In both the *Alley* case and in another case on our docket of which we take judicial

Services Department, No. 20,508, and that case will be placed on an appropriate calendar in this Court. Because Appellants in *Alley v. Martinez*, No. 20,518, have explained the reasons in their brief in response to this Court's order indicating why they did not follow the provisions of Section 39-3-1.1 and Rule 12-505, because they sought an extension of time in which to file a petition for certiorari, and because we find the circumstances shown herein to be unusual, we grant their requested extension and allow them twenty days from the filing of this opinion in which to file a proper petition for writ of certiorari. Because Appellants in *C.F.T. Development, LLC v. Board of County Commissioners of Torrance County*, No. 20,548, have asked us to exercise our jurisdiction liberally to hear cases on their merits, and because the same circumstances which apply to the *Alley* case may also apply to it, we grant Appellant in that case an extension of time of twenty days from the date of this opinion in which to file both a motion for extension of time to file a petition for writ of certiorari and the proposed petition for writ of certiorari.

FACTS AND PROCEDURAL BACKGROUND

{5} In *Hyden v. New Mexico Human Services Department*, No. 20,508, Sarah Hyden, a Medicaid recipient, on April 16, 1998, sought a fair hearing before the Department. Hyden alleged that the medical treatment and services provided to her were inadequate and did not comply with federal law and the Department's own regulations. On August 19, 1998, a hearing officer dismissed Hyden's claim. Hyden then appealed to the district court of Santa Fe County. After a hearing, on June 2, 1999, the district court entered an order dismissing Hyden's appeal. Thereafter, on June 22, 1999, Hyden filed a petition for writ of certiorari with this Court.

{6} In *Alley v. Martinez*, No. 20,518, Appellants protested in 1998 the Santa Fe County Assessor's denial of the agricultural tax status of land owned by them. The Santa Fe County Tax Valuation Protests Board denied the protest on October 19, 1998, and on November 13, 1998, Appellants filed an appeal to this Court. Appellants subsequently dismissed their appeal to this Court and thereafter filed a notice of appeal to the Santa Fe District Court on November 18, 1998. Thereafter, the district court denied the appeal on April 27, 1999, and Appellants filed a notice of appeal with this Court on May 26, 1999.

{7} In *C.F.T. Development, LLC v. Board of County Commissioners of Torrance County*, No. 20,548, Appellant filed an application for approval of a subdivision on April 20, 1996. On March 26, 1997, the Board of County Commissioners denied the application. On April 22, 1997, Appellant appealed to the district court. On September 15, 1998, the district court remanded the case back to the Board for entry of specific findings of fact and conclusions of law. Appellant then requested the district court to reopen the case. The district court granted the request, but on May 7, 1999, entered an order denying Appellant's administrative appeal. Appellant filed a notice of appeal to this Court on June 3, 1999.

DISCUSSION

{8} The comprehensive administrative appeals legislation adopted by the Legislature sought to simplify and standardize the method for obtaining judicial review of final decisions of certain administrative agencies. Section 39-3-1.1(E), included therein, provides that after filing an appeal to the district court, a party "may seek review of the district court decision by filing a petition for *writ of certiorari* with the court of appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court."[1] (Emphasis added.)

{9} Rule 12-505, adopted by the Supreme Court, outlined the procedure for seeking further appellate review in such cases. The rule provides in pertinent part:

> A. **Scope of rule.** This rule governs review by the Court of Appeals of decisions of the district court:
>
> (1) from administrative appeals pursuant to Rule 1-074 NMRA and Section 39-3-1.1 NMSA 1978, and
>
> (2) from constitutional reviews of decisions and orders of administrative agencies pursuant to Rule 1-075 NMRA.
>
> B. **Scope of review.** A party aggrieved by the final order of the district court in any case described in Paragraph A of this rule *may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals,* which may exercise its discretion whether to grant the review.
>
> C. **Time.** *The petition for writ of certiorari shall be filed with the clerk of the Court of Appeals within twenty (20) days after entry of the final action by the district court.*[2]

(Emphasis added.)

{10} Analysis of the records in the three cases before us indicates that each case was filed with a board or administrative agency prior to the time that Section 39-1-1.1 and Rule 12-505 were adopted. The decisions of the administrative agencies were then appealed to the district courts, which entered their final orders after the effective date of Secton 39-3-1.1 and Rule 12-505. In each case, the aggrieved parties then sought further judicial review by this Court. The question thus arises whether these circumstances bring each of these cases within the prohibition imposed by Article IV, Section 34 of the New Mexico Constitution providing that "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." We also examine whether, under the facts applicable to each case, this Court has authority to exercise its power of judicial review.

APPLICABILITY OF CONSTITUTIONAL PROVISION

{11} We turn first to an examination of Article IV, Section 34 of our state constitution to determine whether such provision mandates that the statutory provisions existing at the time the three cases were initiated before the respective administrative agencies below, or

CONSOLIDATED WITH No. 20,518
JAMES B. ALLEY, JR. and ELISABETH W. ALLEY,
Protestants-Appellants,

versus

BENITO MARTINEZ, JR., Santa Fe County Assessor,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
ART ENCINIAS, District Judge

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ALLEY & ROUSE, P.C.
Santa Fe, New Mexico
for Appellants

BARBARA MULVANEY
Deputy County Attorney
Santa Fe, New Mexico
for Appellee

CONSOLIDATED WITH No. 20,548
C.F.T. DEVELOPMENT, LLC, a New Mexico Limited Liability Company,
Appellant,

versus

BOARD OF COUNTY COMMISSIONERS OF TORRANCE COUNTY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
NEIL P. MERTZ, District Judge

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SOMMER, FOX, UDALL, OTHMER
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for Appellant

ANTHONY B. JEFFRIES
Albuquerque, New Mexico
for Appellee

OPINION
THOMAS A. DONNELLY
Judge

{1} In each of the three cases before us, we are required to address issues arising from the enactment of new legislation and affecting this Court's authority to exercise judicial review of the final decision of certain administrative agencies under 1998 N.M. Laws, Chapter 55, Sections 1-95, governing appellate review from administrative agencies, and Supreme Court Rule, 12-505 NMRA 1999. On this Court's own motion, we have consolidated these cases in order to address the common questions therein.

{2} In 1998, the state Legislature enacted, and the governor signed into law, comprehensive administrative appeals legislation materially changing the method by which parties aggrieved by a final decision of certain administrative agencies could seek appellate review. *See* 1998 N.M. Laws, ch. 55, §§ 1-95. Section 1 of the 1998 Act, now denominated NMSA 1978, § 39-3-1.1 (1998), provides that an aggrieved party may appeal a final administrative decision to the district court, and thereafter, a party may seek further appellate review by petitioning this Court for the issuance of a writ of certiorari. The statute also provides that "[t]he procedures governing appeals and petitions for writ of certiorari that may be filed pursuant to the provisions of this section shall be set forth in rules adopted by the supreme court." Section 39-3-1.1(G). Although the effective date of such legislation was September 1, 1998, *see* 1998 N.M. Laws, ch. 55, § 95, Rule 12-505, specifying the procedure for obtaining such appellate review, was not adopted until January 27, 1999. The order adopting such rule, however, provided that the rule was adopted *nunc pro tunc*, effective September 1, 1998.

{3} Because the cases herein were originally initiated as administrative proceedings prior to the effective date of the enactment of Section 39-3.1.1 and the adoption of Rule 12-505, and neither the statute nor the rule expressly states whether the appellate rules and statutes in effect prior to September 1, 1998, or the newly adopted statute and rule govern the method of obtaining review in this Court in such cases, this Court directed the parties to brief the question of whether the prior law or current law governs the method of seeking review in this Court. The parties were also directed to brief the application, if any, to this issue of New Mexico Constitution Article IV, § 34; *In re U.S. West Communications, Inc.*, 1999-NMSC-024, ___ N.M. ___, 981 P.2d 789; *Trujillo v. Serrano*, 117 N.M. 273, 871 P.2d 369 (1994); *Govich v. North American System, Inc.*, 112 N.M. 226, 814 P.2d 94 (1991); *Lowe v. Bloom*, 110 N.M. 555, 798 P.2d 156 (1990); *Brown v. Board of Education*, 81 N.M. 460, 468 P.2d 431 (Ct. App. 1970).

{4} For the reasons discussed herein, we grant the petition for writ of certiorari in *Hyden v. New Mexico Human*

just natural. She stared off into space. God, I miss her. You heard from Laurie - Laci, I'm sorry, what they suffered, and the horror. Darlene going on, beating on Jim Cheverie's chest; then running around the yard until the neighbors came out. The grieving process is natural to any tragedy especially when young people are involved. Society, I submit to you, has the right to grieve also. I don't expect of you, nor should I ask of you, to feel what Sandra Phillips felt before she died, that terror; or what the Phillips family suffered after her death. But society has a right to grieve. It has a right to mourn. And it has a right to grieve and mourn by its verdict in this particular case. You have the right to express your indignation of this awful act by your verdict. There's nothing wrong with the carefully considered expression of community outrage. Indeed, community/society outrage in this case is so, so appropriate. Because that precious thing you saw in that video and that light in her eye can never be replaced. No, but a verdict of death will replace that. Nothing will bring Sandra back; but there is still justice, a verdict of guilty.

{145} Just reading the emotional testimony of Laci Minor is painful. The effect on the jury, who was present in the room when she spoke, is incalculable. The jury was not just a passive observer, it was being asked to do something about the family's pain: to return a death verdict. In my view, by the terms of the New Mexico Capital Sentencing Act, this inflammatory and emotionally compelling testimony was not admissible. *See* N.M. Const. art. II, §§ 13, 14, 18; U.S. Const. amends. V, VIII, XIV.

{146} The State's victim impact evidence was more than a passing glimpse of the victim's life and the sorrow of survivor. A "dramatic appeal to gut emotion has no place in the courtroom." *Hance v. Zant*, 696 F.2d 940, 952 (11th Cir. 1983), *overruled on other grounds by Brooks v. Kemp*, 762 F.2d 1383, 1399 (11th Cir. 1985). In my opinion, for the reasons set out above, the State's presentment of victim impact evidence requires a new sentencing hearing free of unnecessary passion certain to provoke unfair prejudice.

{147} The majority holding otherwise, I respectfully dissent from Section II(H) of the majority opinion.

GENE E. FRANCHINI

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Administrative Law and Procedure
Appeal and Error
Constitutional Law
Courts

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2000-NMCA-002

SARAH HYDEN,
Appellant-Petitioner,

versus

NEW MEXICO HUMAN SERVICES DEPARTMENT, INCOME SUPPORT DIVISION and ALEX VALDEZ, Secretary,
Appellees-Respondents.

No. 20,508 (filed October 13, 1999)

CERTIORARI TO THE DISTRICT COURT OF SANTA FE COUNTY
ART ENCINIAS, District Judge

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*NOT LICENSED IN NEW MEXICO

June 9, 2000

VIA HAND DELIVERY

Ms. Kathleen Jo Gibson
Chief Clerk
Supreme Court Building
237 Don Gaspar, Room 104
Santa Fe, New Mexico 87501

Re: Branko, Inc. et al. v. The New Mexico Oil Conservation Commission and Mitchell Energy Corporation; S. Ct. No. 26361

Dear Ms. Gibson:

Enclosed for filing in the referenced matter is an original and copies of Mitchell Energy Corporations' Response To Petition For Writ of Certiorari. Thank you for your attention to the filing of this pleading. With a copy of this letter, all counsel ar being served with the pleading as well.

Very truly yours,

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

James M. Hudson

JMH/s
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Mitchell Energy Corporation

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORP.,a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,

Plaintiffs-Petitioners,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, and MITCHELL ENERGY CORPORATION,

Defendants-Respondents.

Dist. Ct. No. CV 97-159 G
Fifth Judicial District
Lea County, New Mexico

S.Ct. No. 26361

RESPONSE OF MITCHELL ENERGY CORPORATION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners have come to this Court seeking discretionary review of a matter in which four tribunals have ruled against Petitioners on the merits. The case commenced with Mitchell's filing of a Compulsory Pooling Application in the New Mexico Oil Conservation Division, ("NMOCD"). Following a full hearing on the merits, the NMOCD granted Mitchell's application. Following a subsequent request by Petitioners, the NMOCD reopened the case for an apportionment of certain costs. Thereafter, at Mitchell's' request, the New Mexico Oil Conservation Commission ("NMOCC") reviewed the matter *de novo* and ruled in favor of Mitchell. Pursuant to NMSA 1978, §70-2-25 (Repl. Pamp.), Petitioners appealed the NMOCC orders to the District Court which reviewed and affirmed the orders in favor of Mitchell. The Court of Appeals denied the subsequently filed Petition for Writ of Certiorari on the merits,[1] and the instant Petition for Writ of Certiorari seeks review of that order of the Court of Appeals.

In the Petition filed in this Court, Petitioners attempt to transmogrify straight forward factual and legal determinations made by both administrative agencies and the District

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[1] Although all parties agree that Petitioners failed to timely file the Petition for Writ of Certiorari in the Court of Appeals, that Court accepted the Petition, denied Mitchell's Motion to Dismiss addressed to the timeliness issue, and determined the matter on the merits. Absent a directive from this Court that it wishes to consider the timeliness issue, Mitchell will confine its response to a discussion of the merits of the Petition for Writ of Certiorari.

Court into questions of "due process" raising issues of "public importance." In advancing the alleged constitutional arguments, Petitioners omit critical facts, important legal distinctions and any discussion of the proper standard of review.

On appeal from a final determination of an administrative agency, the aggrieved party has the burden to show that the agency's rulings, based on the record as a whole, are not supported by the evidence or are arbitrary, capricious, and/or contrary to law. *Viking Petroleum v. Oil Conservation Commission,* 100 N.M. 451, 672 P.2d 280 (1983). Further, certiorari is generally proper in two classes of actions: (1) where the inferior tribunal has exceeded its jurisdiction, or (2) where the inferior tribunal has proceeded illegally and no appeal is allowed or provided for reviewing the proceedings. *Albuquerque Nat'l. Bank v. Second Judicial Dist. Ct.*, 77 N.M. 603, 426 P.2d 204 (1967). Consideration of the omitted facts and the law will demonstrate that neither of those circumstances is present in the instant case, and that the district court did not err in affirming the orders of the NMOCC.

STATEMENT OF THE FACTS

Petitioners acquired from Strata Production Company ("Strata") a portion of Strata's interest in a federal oil and gas lease at issue herein. Petitioners assert that the interests acquired from Strata are not subject to the terms and conditions of a prior compulsory pooling order issued by the NMOCD granting Mitchell's application to involuntarily commit

all of Strata's interest. Prior to filing the application, Mitchell obtained a title opinion showing that Strata was the owner of 100% record title and operating rights for the lease. Mr. Mark Murphy, President of Strata, testified on January 21, 1992 that Strata owner 100% of the record title and operating rights for the lease.

Prior to the hearing on the application, Strata told Mitchell that Strata had certain undisclosed "partners," but it did not disclose that the partners claimed to have an interest in the lease until December 12, 1992. Strata further promised that it would defend itself and its partners' rights during any proceeding including a forced pooling proceeding. By letter dated December 30, 1992, Strata represented and warranted to Mitchell that Strata had the right, power and authority to sell 100% of the lease for the benefit of the undisclosed owners.

At the time Strata was served with the application, Strata was the only entity with a property interest in the lease whose identity was known or ascertainable to Mitchell. At that time, Strata held 100% of record title and the operating rights title. On January 13, 1993, one week before the hearing before the NMOCD, and in an effort to delay the proceedings, Strata disclosed the identity of its partners for the first time, claiming that there were 15 working interest owners and 3 overriding royalty owners. Nonetheless, Strata still held 100% both record title and operating rights title, and no documentation was ever disclosed to indicate any assignment of interest by Strata.

On February 15, 1993, the NMOCD granted Mitchell's application. Accordingly, Mitchell sent a letter to Strata requesting Strata to elect within thirty days whether to participate with its 25% working interest under the pooling order. Strata filed and then withdrew a request for a hearing *de novo* before the NMOCC, and further failed to timely elect to participate in the well.

After Mitchell incurred the expense and bore the risk of drilling and completing the well as a profitable producer, Strata informed its partners by letter dated November 6, 1995, that Mitchell's well had then produced sufficient gas to have paid for its costs and that they may have a claim against Mitchell to avoid having to pay the 200% risk factor penalty set forth in the compulsory pooling order. On November 7, 1995,[2] some six years after the Strata partners claimed to have acquired an interest in the lease, more than 31 months after the entry of the compulsory pooling order in this case, and after Mitchell had drilled the well, Strata signed assignments conveying interests to its undisclosed partners, which were then recorded in Lea County on November 8, 1995.

On January 29, 1995, those partners (Petitioners herein) filed in the NMOCC a Motion to Reopen case 10656, and on May 3, 1996, the NMOCD held a hearing and entered order R-10672. The NMOCD determined that because Mitchell had not sent

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The assignments are dated and notarized on November 7, 1995, while the letter transmitting copies to the undisclosed partners is dated November 6, 1995.

notice to Strata's partners affording them a post-order election, the matter should be reopened for a determination of apportionment of costs. Mitchell appealed this Order to the NMOCC, which entered its order finding in favor of Mitchell, concluding that notice of a compulsory pooling application is required only as to those working interest owners whose interest is evidenced by a valid and enforceable written instrument the existence of which is known to the applicant at the time the application is filed. On appeal, the District Court affirmed the orders of the NMOCC.

LEGAL ARGUMENT

1. The Case Law and Statutes Relied Upon by Petitioners Do Not Apply to This Case; Therefore Neither the Agency nor the District Court Abused its Discretion or Exceeded its Authority in Determining That Notice to Strata was Sufficient.

The foregoing recitation of the complete facts should more than adequately demonstrate that the determinations below were supported by the evidence. In addition, the rulings were clearly supported by the case law. Certainly, while the statutes and the regulations require notice of pooling proceedings to be given to all owners of each tract or interest in the lands which may be affected by a pooling order, nothing in the statutes or regulations require that an operator give notice to an undisclosed "partner" of an owner when the alleged "partner" is not an owner of record title or operating rights title, and when there is no documentation of any assignment to the alleged "partner." *See,* §§ 70-2-17(C), 70-2-18(A), NMSA 1978; 19 NMAC 15.N.1207.A(1)(a).

The cases cited by Petitioners are also notably distinguishable. Petitioners rely on *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991) and *Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, 127 N.M. 120, 978 P.2d 327 (1999). In *Uhden*, Amoco filed a petition to increase well spacing and failed to give actual notice to Uhden who was a royalty owner to whom Amoco had been mailing royalty checks. This Court held that under the circumstances in that case, Uhden was entitled to actual notice, and that notice by publication alone was insufficient. Likewise, the applicant in *Johnson* had actual knowledge of the identity of other working interest owners. In that case, the applicant did not provide personal notice to the other working interest owners with whom it had extensive dealings. Clearly, the circumstances of the cited cases are distinguishable from the facts of this case. Here, Mitchell gave written notice to the owner of 100% of the record title and operating rights, the identity of the alleged "partners" was belatedly disclosed but was inconsistent with the record ownership, and documents indicating an actual grant of an interest to such alleged "partners" were neither executed nor provided to Mitchell until long after the application was filed, the forced pooling order issued, and the well drilled.

2. *The Commission and the District Court Correctly Found that All Proper Parties to Mitchell's Application Received Notice and Participated in the Hearings.*

The Petition for Writ of Certiorari is premised on the notion that Petitioners owned an interest in the lease at the time the application was filed or when the hearing was held.

The substantial evidence supports a conclusion that Petitioners did not own such an interest at any material time. If they had owned such an interest, it would not have been necessary for them to wait until the assignments were finally executed in 1995 to challenge Mitchell's application. Petitioners' own actions are inconsistent with their claims.

Obviously, the property interest for which Petitioners seek protection was not created until November 6, 1995, some 32 months after the proceedings in this case were concluded. The instruments which purported to convey an interest to the Petitioners did not exist until Murphy signed them on November 7, 1995. An oil and gas lease and an overriding royalty interest in a mineral lease are interests in real property and must be recorded in the office of the county clerk of the county where the lands are situated. §70-1-1 NMSA 1978; *O'Kane v. Walker*, 561 F.2d 207(10th Cir.1977); *Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 879 P.2d 779(1994). For example, "...*no* assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or rights to such royalties of any purchaser or transferee in good faith, without knowledge of the *existence of such unrecorded instrument."* (emphasis added) §70-1-2, NMSA 1978; *Bolack v. Underwood,* 340 F.2d 816(10th Cir.1965).

Mitchell gave notice of its application to Strata, which at the time was the only entity of record with a property interest in the lease. Strata's representations that is had "partners," without more, was insufficient to create a protected property interest entitling

Petitioners to notice. The claim that payments were made to Strata does not change that. There must be an independent document, such as an assignment, creating the property interest which gives rise to the right to notice. Inasmuch as the assignments to Petitioners were not in existence until late 1995, Petitioners had no property interest in the lease at the time of the application. Petitioners failed to establish that they had a property interest sufficient to entitle them to notice of the application and the hearing.

3. *The Petition for Writ of Certiorari Constitutes an Improper Collateral Attack on a Valid Administrative Order Calculated to Avoid the Penalty Provisions of That Order and "Ride the Well Down."*

Petitioners are bound by the actions of Strata, their predecessor in interest. Strata was subject to and bound by the forced pooling order and its election not to participate in the well when it made the assignment. Likewise, Petitioners cannot now, by simply selecting an effective date that pre-dated Mitchell's application, avoid the binding effect of the order; nor can they avoid Strata's election not to participate in the Mitchell well. As successors in interest, Petitioners take subject to any limitations in Strata's right, title and interest, which includes the forced pooling order. Petitioners are as equally estopped as Strata to retroactively and collaterally attack the force pooling order and Strata's decision.

Alternatively, Strata's conduct bound the alleged "undisclosed partners." Strata promised it would defend itself and its partners rights during any force pooling hearing. Strata represented that it had the right, power and authority to sell 100% of the lease for

the benefit of the "undisclosed partners." Certainly, partnership property belongs to the partnership, and if there was a partnership, the partnership owned the property interest. In New Mexico, notice to one partner is notice to the partnership. §54-1-12, NMSA 1978. Similarly, service of process on a partnership by delivery to any general partner is effective service to the partnership. Rule 1-0-04(F)(2), NMRA 1977. If there was a partnership, notice to Strata was notice to the partnership.

Nonetheless, Petitioners continue to attempt to manipulate the administrative process to try yo bootstrap a constitutional claim. Petitioners' entire claim is predicated on a series of assignments made long after the fact but conveniently purporting to be effective before Mitchell even filed its application. The constitutional guarantees of due process are critical to the orderly administration of justice. But the administration of justice does not allow and the administrative process cannot be manipulated to bootstrap a constitutional claim where none existed. Petitioners would have this court impose an obligation to provide notice to potential parties based on assignments of interest that may or may not be made at some undefined time in the future. Alternatively, Petitioners seek a result that would render any force pooling order unenforceable, and which would subject all similar orders subject to collateral attack at any time in the future when an assignor makes an assignment effective prior to the application. Petitioners ask that this Court ignore the facts: Strata was the record title owner at all material times: Strata was properly served

with notice; Strata participated in the hearing; Strata received notice of its election to participate; Strata elected not to participate; Petitioners and Strata waited for Mitchell to drill, complete and produce the well until it had produced enough to pay for all the drilling and completion costs; and only after that did Strata make assignment to Petitioners. For these reasons it would patently unfair for Petitioners to manipulate the administrative process in order to make a claim that they were denied the guarantees of constitutional due process.

CONCLUSION

Mitchell respectfully requests that the Court deny the Petition for Writ of Certiorari, that it award Mitchell its costs incurred herein, and that it award such other and further relief as it may deem proper in the premises.

Respectfully submitted this 9th day of June, 2000.

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANT/APPELLANT MITCHELL ENERGY CORPORATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via United States Mail, first-class postage prepaid, and as otherwise noted, this 9TH day of June 2000, to the following:

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*NOT LICENSED IN NEW MEXICO

March 23, 2000

VIA FEDERAL EXPRESS

Patricia Rivera Wallace
Clerk, NM Court of Appeals
237 Don Gaspar
Santa Fe, NM 87501

Re: Branko, Inc., et al. v. The New Mexico Oil Conservation Commission, et al.; Ct. App. No. 21020
Appeal from the Fifth Judicial District Court of Lea County

Dear Ms. Wallace:

Please find enclosed herewith for filing in the above referenced matter Appellee Mitchell Energy Corporation's Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed. I have also enclose an extra copy of the Response which I would appreciate your date stamping and returning to me in the self addressed stamped envelope provided. Thank you.

Very truly yours,

HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

James M Hudson

James M. Hudson

JMH/tw
Enclosures

cc: Harold D. Stratton, Jr.
Marilyn S. Hebert
W. Thomas Kellahin

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,	§	Dist. Ct. No. 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R.W. Gallini
Plaintiffs-Appellants,	§	Ct. App. No. 21020
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

MITCHELL ENERGY CORPORATION'S RESPONSE TO APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

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ATTORNEYS FOR DEFENDANT-APPELLEE MITCHELL ENERGY CORPORATION

MITCHELL ENERGY CORPORATION'S RESPONSE TO APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

Pursuant to this Court's Order, Defendant/Appellee Mitchell Energy Corporation ("Mitchell") hereby responds to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed. Mitchell requests that the Petition for Writ of Certiorari be dismissed. This response is based upon the following memorandum of points and authorities.

FACTUAL AND PROCEDURAL HISTORY

The Petition for Writ of Certiorari filed in this case seeks review of the final judgment of the district court in an appeal from a decision of the New Mexico Oil Conservation Commission. Appeals from decisions of the NMOCC are governed by N.M.S.A. 1978 §70-2-25 (1999). In 1999, the legislature modified §70-2-25 so as to provide for an appeal as of right to the district court and subsequent discretionary review in this Court, pursuant to N.M.S.A. §39-3-1.1. The statutory change making § 39-3-1.1 applicable to appeals from decisions of the NMOCC was effective on July 1, 1999. By order dated January 27, 1999, effective nunc pro tunc September 1, 1998, the Supreme Court promulgated NMRA, Rule 12-505, establishing the time limits and procedures applicable to the instant case.

The district court entered final judgment in this case on December 17, 1999. Appellants filed the Petition for Writ of Certiorari on January 11, 2000. Appellants do not dispute that the Petition for Writ of Certiorari was untimely. Rather, Appellants assert that they are

constitutionally entitled to a direct appeal to the Supreme Court[1], and alternatively, that good cause exists for the failure to timely file the Petition for Writ of Certiorari because they did not know about the provisions of Rule 12-505 at the time they prepared to appeal the district court's judgment.

LEGAL ARGUMENT

A. Because The Final Order of the District Court Was Entered After the Effective Dates of N.M.S.A.§39-3-1.1 and NMRA Rule 12-505, the Instant Case was not "Pending" Within the Meaning of Article IV, Section 34, of the New Mexico Constitution When Review in This Court was Sought.

In an argument which constitutes an attack on the reasoning and conclusion of this Court's decision in *Hyden v. New Mexico Human Services Dep't.,* 2000-NMCA-002, 1999 WL 1289127, Vol. 39, No.3, SBB 35 (App.,1999). Appellants contend that NMRA, Rule 12-505, may not be constitutionally applied to the instant case because this case was pending prior to the effective date of the rule change. Additionally, Appellants request the entry of an order that they are entitled to a direct appeal to the Supreme Court, pursuant to the former provisions of N.M.S.A. §70-2-25. In their earlier pleadings in this Court, Appellants have requested findings

[1]Prior to the amendment of the statute, Appellants had a right to a non-discretionary appeal to the Supreme Court from a decision of a District Court in cases on review from decisions of the NMOCC. Following the statutory change, persons aggrieved by a decision of the district court on appeal from decisions of the NMOCC have a right to file a petition of writ of certiorari seeking discretionary review of this Court.

that the Petition for Writ of Certiorari was timely filed, but they have not previously requested the entry of an order allowing them the right of direct appeal to the Supreme Court.

In *Hyden,* this Court squarely addressed the issue, and rejected the argument asserted by Appellants, relying upon the New Mexico Supreme Court decision in *In re U.S.West Communications,* 1999-NMSC-024, ¶15. In *In re U.S. West Communications,* the Supreme Court reviewed three orders which had been issued by the Corporation Commission, and held that the former removal procedures were no longer applicable as the proper method of obtaining judicial review. Instead, the new statute, NMSA 1978, §63-7-1.1 (1998, effective January 1, 1999), was the applicable method of obtaining appellate review. As a basis for that holding, the Supreme Court held that the proceedings contesting the validity of the orders were not "pending" cases within the meaning of Article IV, Section 34 of the constitution, writing that a "case is no longer considered to be pending after a final judgment is filed." *In re U.S. West Communications,* supra,¶13.

Applying the reasoning of the Supreme Court in *In re U.S. West Communications*, this Court in *Hyden,* supra, ¶13, held that because the final orders of the district court were entered after the effective dates of NMSA §39-3-1.1 and Rule 12-505, the cases on review were not "pending" cases within the meaning of Article IV, Section 34 of the constitution when review was sought in this Court. This Court pointed out that a case is no longer considered "pending" "after a final judgment of the court has been filed, unless the judgment entered by the court

remains under its control or if a subsequent judicial proceeding can be traced to the court's instruction in a remand or in an opinion directing the filing of a new action." *Id.*, ¶ 13, citing *In re U.S.West Communications* ¶¶12-18.

Application of the reasoning *Hyden* and *In re U.S. West Communications* to the instant case compels the conclusion that the instant case was also not "pending" at the time the Petition for Writ of Certiorari was filed. The district court judgment issued on December 17, 1999, many months following the effective dates of the amendments to the rule and statute. Nonetheless, Appellants assert that because the district court retains control over its judgments for a period of 30 days, the case was "pending" for constitutional purposes at the time the Petition for Writ of Certiorari was filed.

Appellants misunderstand the significance of the "pending" analysis with regard to statutory or rule changes which determine the method of obtaining further review in the Court of Appeals or the Supreme Court. With regard to matters of appellate rights and procedures, the question of whether a case is "pending" arises in relation to the effective date of a statutory or rule change, and the status of the case at that time. In this case, the rule and statute determining appellate procedures in this Court were changed well prior to the entry of final judgment in the district court. The issue in this case is not whether the district court retained jurisdiction over the case for 30 days after judgment. Rather, the issue is whether this case was "pending" for purposes of application of changes affecting appellate procedures in this Court, when the statutory and rule

changes occurred months prior to the entry of final judgment in the district court. This Court has clearly held that when a final judgment of the trial court has been entered after the effective date of the statutory and rule changes relating to procedures for obtaining review in this Court, the case is not "pending" within the meaning of Article IV, Section 34 of the state constitution.

Therefore, pursuant to the authority of *Hyden* and *In re U.S. West Communications,* supra application of the amended statute and Rule 12-505 to this case do not implicate constitutional concerns. Appellants are not entitled to a direct appeal to the Supreme Court because his case was not "pending" when the district court's order was entered. Appellants are entitled to only one appeal as of right. They had that appeal in the district court. They are not constitutionally entitled to further review as of right.

B. Appellants have not Established Good Cause for Failing to Timely File the Petition for Writ of Certiorari

In the affidavit attached to the Brief, Appellants have set forth the facts regarding their review of the rules and statutes in preparation for appeal. Those facts show that Appellants failed to timely file the Petition for Writ of Certiorari because they simply did not inform themselves about the changes in the statute and rule at the time they commenced appellate proceedings. There is no indication that Appellants were prevented from doing so. The affidavit discloses that Appellants did not know about the changes in the statute and rule because they did not research the procedures applicable to obtain review of a district court's final Judgment after Judgment was

entered. The affidavit discloses that Appellants researched the appellate procedures at the time they filed their appeal in district court, and that they did not again ever revisit the applicable statutes or rules governing NMOCC appeals, notwithstanding the lapse of many months lapsed between the time they sought review in the district court and the time the district court entered its final Judgment.

Mitchell suggests that the facts supporting Appellants' position fall woefully short of the good cause required to excuse the failure to satisfy the mandatory preconditions to review, namely, the timely filing of a Petition for Writ of Certiorari seeking to invoke discretionary review by this Court. Appellants say that they did not review the appellate procedures applicable to this case after they filed the appeal in district court because they relied on the provisions of Article IV, Section 34 of the New Mexico Constitution, but they do not indicate that they researched that provision. Nor do they explain how they relied upon that section in light of the decision in *U.S.West Communications,* supra. A misplaced reliance on one's subjective interpretation of a constitutional provision is a tenuous basis on which to assert that the mandatory preconditions to review in this Court should be waived. Most important, that "reliance" does not constitute court induced confusion. Nor does it constitute confusion caused by publication lapses. It constitutes a failure to look at the rules, the statutes or the recent decisions to insure that the rules and statutes have not changed prior to seeking review in an entirely different court with its own set of rules. It would set a dangerous precedent for that type

of conduct to justify the failure to satisfy mandatory preconditions to review, and would undermine the force and effect of the statute and rules which have been enacted.

In *Hyden,* supra, ¶ 16, this Court wrote that in determining whether to accept the late filing of a petition for writ of certiorari pursuant to Rule 12-505, it was "appropriate for the reviewing court to give due consideration to all of the circumstances in the legal environment surrounding the untimeliness in a particular case." In this case, those circumstances show that at the time Appellants filed the Petition for Writ of Certiorari, the changes in the statute and NMRA, Rule 12-505 had been published in the Michie supplements. They were readily available to any person who looked in the supplement. Further, at the time Appellants filed the Petition for Writ of Certiorari, the decisions in *Hyden* and *In re U.S.West Communications, supra,* were available electronically, on Westlaw and Lexis. Anyone researching the new rules or the statutory change would have found those decisions through the use of a simple query referencing the statute or Rule 12-505.

The facts of this case are thus distinguishable from the facts of the three cases before the court in *Hyden.* In that case,anyone searching for the rule change would have found it only in the back of the bar bulletin and in the Advance Annotation and Rules Service. This Court allowed the late filing of the petitions because of the "confusion surrounding the enactment and publication of Rule 12-505." *Hyden,* supra, ¶17. In this case, there has been no showing of confusion, nor could there have been such confusion on the part of any party who researched the

matter at the time the district court entered its final judgment.

In *Hyden,* supra, ¶16, this court quoted *Chavez v. U-Haul Co.,* 1997-NMSC-051, ¶26, 124 N.M. 165, 947 P.2d 122 (1997) regarding untimely appeals as follows:

> The discretion to hear an untimely appeal should not be exercised where there is no court caused delay of the sort discussed in *Trujillo*, where there are no unusual circumstances such as in Chavez's case, and where a notice of appeal is filed thirty days late. If we were to allow Jones's appeal, the efficacy of Rule 12-201 would be severely undermined and weakened. On these facts, the need for efficient administration of justice outweighs the right to appeal.

In the instant case, there is no court-caused confusion. There are no unusual circumstances which could not have been resolved by a prompt and timely review of the Michie supplements which had been published and which were available at the time the district court entered final judgment on appeal. There are no special circumstances justifying a waiver of the mandatory precondition to review. This is not a case in which the Court is required to weigh the right to appeal against the efficacy of rule. Appellants have enjoyed their appeal as of right in the district court. Appellants are now entitled to no more than the right to timely file a Petition for Writ of Certiorari seeking discretionary review in this Court. They failed to seek review in a timely manner. If review were granted in this case, the efficacy of Rule 12-505 would be severely undermined in the absence of a showing of good cause for waiver of the time limits of the rule.

For the foregoing reasons, Mitchell respectfully requests that this Court set aside its prior order accepting the Petition for Writ of Certiorari as Timely Filed, and for such other and further relief as the Court deems proper in the premises.

Respectfully submitted this 23rd day of March, 2000.

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

By: _____

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I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 23rd day of March, 2000, to the following counsel of record:

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James M. Hudson

MITCHELL\ShowCauseResponse

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ATTORNEYS & COUNSELORS AT LAW

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*ALSO ADMITTED IN OKLAHOMA
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March 17, 2000

VIA FEDERAL EXPRESS

Patricia C. Rivera Wallace
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New Mexico Court of Appeals
Supreme Court Building
P.O. Box 2008
Santa Fe, New Mexico 87504-2008

Re: *Branko, Inc. et al. v. The New Mexico Oil Conservation Commission and Mitchell Energy Corporation;* In the Court of Appeals for the State of New Mexico; No. 21,020

Dear Ms. Rivera Wallace:

Please find enclosed an original and one copy of Appellants' Response to Appellee Mitchell Energy Corporation's Motion for Leave to File Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed in the above-captioned cause, along with a pre-addressed, stamped envelope for your convenience in returning an endorsed copy to me.

Your attention to this matter is greatly appreciated. Please do not hesitate to call if there are any questions.

Sincerely,

STRATTON & CAVIN, P.A.

By: _____
Stephen D. Ingram

SDI/jrc
Enclosures as stated

cc: (w/enclosures)
Marilyn S. Hebert
Harold L. Hensley, Jr. and James M. Hudson
W. Thomas Kellahin

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R. W. Gallini**
	§	**Ct. App. No. 21,020**
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

APPELLANTS' RESPONSE TO APPELLEE MITCHELL ENERGY CORPORATION'S MOTION FOR LEAVE TO FILE RESPONSE TO APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

Appellants oppose Appellee Mitchell Energy Corporation's ("Mitchell") Motion for Leave to File Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed, and in support thereof would show as follows:

1. On March 8, 2000, Appellants filed their Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed in accordance with this Court's February 24, 2000 Order to

Show Cause, which directed Appellants to make a showing as to why Appellees' motions to dismiss appeal should not be granted and Appellants' Petition for Writ of Certiorari denied as untimely. The Court's order did not provide for briefing by Appellees, and there are no grounds for Mitchell being granted leave to file a response to Appellants' Brief.

2. Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed does not exceed the scope of the Court's Order to Show Cause. The Court requested Appellants to make a showing of unusual circumstances to allow this Court's acceptance of Appellants' Petition for Writ of Certiorari as being timely filed. In order to do so, Appellants provided the full circumstances surrounding the filing of their Petition for Writ of Certiorari. No new issues were raised in Appellants' Brief. Appellants raised in their previous motions and responses filed with this Court the fact that they were relying on the statutes and rules applicable to this case as they existed at the time Appellants initiated their appeal to the district court, and the fact that this was believed to be a "pending case"and that Appellants' substantive appellate rights could not thereafter be changed. In their Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed, Appellants fully discussed the law concerning the constitutional application of NMRA, 12-505 to this case. Additionally, Appellants fully discussed the facts surrounding their reliance on this constitutional principle in light of the circumstances of this case, all of which occurred prior to publication of this Court's decision in *Hyden v. New Mexico Human Services*

Department, 2000-NMCA-002, 1999 WL 1289127, Vol. 39, No. 3, SBB 35. These issues were previously raised, and Mitchell has previously had the opportunity to address them.

3. The Court did not appear to contemplate additional briefing upon issuance of its February 24, 2000 Order to Show Cause. Appellants have complied with the Court's Order to Show Cause, and no additional briefing from Mitchell or from the New Mexico Oil Conservation Commission is necessary or appropriate.

WHEREFORE, Appellants request that the Court deny Mitchell's Motion for Leave to File Response to Appellants' Brief in Support of Acceptance of Petition For Writ of Certiorari as Timely Filed.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____

Harold D. Stratton, Jr.
Stephen D. Ingram
Attorneys for Plaintiffs-Appellants
Post Office Box 1216
Albuquerque, New Mexico 87103
(505) 243-5400

CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 17th day of March, 2000.

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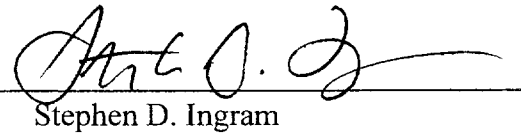
By: 
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Attorneys for Plaintiffs-Appellants

ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORP.,a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,

Plaintiffs-Appellants,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, and MITCHELL ENERGY CORPORATION,

Defendants-Appellees.

MAR 13 2000

Dist. Ct. No. CV 97-159 G
Fifth Judicial District
Lea County, New Mexico

No. 21020

APPELLEE MITCHELL ENERGY'S MOTION FOR LEAVE TO FILE RESPONSE TO APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

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ATTORNEYS FOR DEFENDANT-APPELLEE
MITCHELL ENERGY CORPORATION

Extension granted to March 24, 2000 for Appellee to file response.

3-14-00

January 31, 2000

Litigation Update

Branko Inc. V. OCC, No CV 97-1596, Fifth Judicial District, Lea County –

Plaintiff has appealed the District Court finding that it had no property interest that entitled it to notice. That appeal was filed six days after the due date. We have filed a Motion to Reconsider Acceptance of the Appeal. We have also filed a Reply to Plaintiffs' Petition for Writ of Certiorari. No hearing has been scheduled.

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°NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES - OIL AND GAS LAW

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RECEIVED
FEB 2 2000
OIL CONSERVATION DIVISION

February 1, 2000

VIA FEDERAL EXPRESS

Patricia C. Rivera Wallace
Attorney Clerk
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Supreme Court Building
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Santa Fe, New Mexico 87504-2008

Re: *Branko, Inc. et al. v. The New Mexico Oil Conservation Commission and Mitchell Energy Corporation;* Fifth Judicial District Court; Cause No. CV 97-159G

Dear Ms. Rivera Wallace:

Please find enclosed an original and two copies Appellants' Response to Appellees' Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal in the above-captioned cause, along with a pre-addressed, stamped envelope for your convenience in returning an endorsed copy to me.

Your attention to this matter is greatly appreciated. Please do not hesitate to call if there are any questions.

Sincerely,

STRATTON & CAVIN, P.A.

By: Brian J. Pezzillo
Brian J. Pezzillo

BJP/rd
Enclosures
cc: (w/enclosure)
Marilyn S. Hebert
Harold L. Hensley, Jr. and James M. Hudson
W. Thomas Kellahin

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRANKO, INC., ET AL.,

Plaintiffs-Appellants,

vs.

No. 21,020

OIL CONSERVATION COMM'N OF THE STATE OF N.M., ET AL.,

Defendants-Appellee.

_____/

ORDER

Pursuant to Rule 12-505 NMRA 2000, it is **ORDERED** that, in the above-entitled case, the failure to act upon the Petition for Writ of Certiorari within thirty (30) days after filing of the Petition shall not result in the Petition being deemed denied. This Court shall review the case and act upon it.

RUDY S. APODACA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRANKO, INC., a NEW MEXICO CORP., ET AL.,

Plaintiffs-Appellants,

vs.

No. 21,020
Lea County
CV-97-159-G

NEW MEXICO OIL CONSERVATION COMM'N, ET AL.,

Defendants-Appellees.

_____/

ORDER TO SHOW CAUSE

This matter comes before the Court on Defendants' Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal, and it appears as follows:

1. Plaintiffs filed their Petition for Writ of Certiorari in an untimely manner. In response to Defendants' Motion, they argue that their case was pending before the district court when the applicable appellate rules changed, and that the prior rules (not the new rules) therefore apply. Under the prior rules, Plaintiffs would have had thirty days, not twenty, to file their petition for writ of certiorari, although the writ would have been filed with the Supreme Court and not this Court.

2. Under Hyden v. New Mexico Human Servs. Dep't, 2000-NMCA-002, 1999 WL 1289127, Vol. 39, No. 3, SBB 35, the applicable appellate rules are the new rules, not the prior rules. Where a case is pending before the district court when appellate rules or statutes are changed, the new rules apply to the case once a final judgment is entered and an appeal taken. Id.

3. Hyden does allow parties an opportunity to show that, due to unusual circumstances, they should be given an extension of time in which to file their petition for certiorari. Therefore, we will afford Plaintiffs an opportunity to make such a showing.

IT IS THEREFORE ORDERED that Plaintiffs shall show cause in writing, on or before Wednesday, March 8, 2000, why Defendants' Motion should not be granted and the petition be denied as untimely.

LYNN PICKARD, Chief Judge

RUDY S. APODACA, Judge

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R. W. Gallini**
Plaintiffs-Appellants,	§	**Ct. App. No. 21,020**
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

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APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

Pursuant to the Court's February 24, 2000 Order to Show Cause, Appellants submit this brief in support of acceptance of their Petition for Writ of Certiorari as being timely filed.

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This case arises from Appellee Mitchell Energy Corporation's ("Mitchell") filing of a request to pool certain mineral interests with the New Mexico Oil Conservation Division ("Division") without notifying Appellants, all of whom were working interest and overriding royalty interest owners in property affected by the pooling request. The Division granted Mitchell's pooling request despite such lack of notice. As a result, Appellants were deprived of their due process rights to notice and were damaged by being denied the ability to participate in production on the subject property.

B. Course of Proceedings

Appellants filed a motion with the Division on January 29, 1996 to reopen this case due to the fact that Mitchell failed to give them notice in connection with its pooling application to the Division. A *de novo* hearing was subsequently held before the New Mexico Oil Conservation Commission ("Commission") on January 16, 1997. The Commission concluded that Appellants were not interest owners entitled to notice at the time Mitchell filed its application.

Appellants filed their Petition for Review of the Commission's decision in the District Court for the Fifth Judicial District of Lea County, New Mexico on April 25, 1997. This Petition for Review was filed pursuant to NMSA 1978, § 70-2-25, which governs appeals from Commission decisions. After briefing and oral argument, the Honorable R. W. Gallini, District Judge, took the case under advisement on May 4, 1998. The case remained under advisement before Judge Gallini until he issued the Court's Decision on November 22, 1999 and subsequently entered judgment on December 17, 1999 upholding the findings and conclusions of the Commission.

Appellants were thereafter preparing for an appeal to the New Mexico Supreme Court in accordance with NMSA 1978, § 70-2-25 as it existed when they began the appeal process in this matter. Appellants' counsel was notified on January 10, 2000 by the New Mexico Supreme Court that it would not accept such an appeal and that Appellants had to file a petition for writ of certiorari with the Court of Appeals. *See* Affidavit of Brian J. Pezzillo attached to this brief. On January 11, 2000, Appellants filed their Petition for Writ of Certiorari with this Court, along with a motion to accept the Petition for Writ of Certiorari as timely filed. Appellants were subsequently notified that this Court granted Appellants' motion on January 12, 2000.

Appellee The New Mexico Oil Conservation Commission filed a Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal on January 21, 2000, to which Appellants filed a response on February 2, 2000. On January 31, 2000, Mitchell filed a Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to

Dismiss Appeal, to which Appellants filed a response on February 7, 2000. On February 15, 2000, this Court entered an order providing that the Court's failure to act upon Appellants' Petition for Writ of Certiorari within the 30-day time limit of NMRA, 12-505 shall not result in the Petition being deemed denied. On February 24, 2000, this Court entered an Order to Show Cause ordering Appellants to show cause by March 8, 2000 why Appellees' motions should not be granted and Appellants' Petition for Writ of Certiorari should not be denied as untimely. This brief is submitted on behalf of Appellants pursuant to the Order to Show Cause.

C. Summary of Facts

The facts relevant to the issue before this Court are the procedural facts set out in the Course of Proceedings above. The facts specific to the Petition for Writ of Certiorari before this Court are set out in the Statement of Facts in said Petition.

II. ARGUMENT

A. The Adoption of NMRA, 12-505 Should Not Apply to This Case, Which was Docketed and Pending Prior to the Effective Date of This Rule and Enactment of the Amended Statutes Affecting Appellants' Right of Appeal.

At the time Appellants filed their Petition for Review with the district court on April 25, 1997, NMSA 1978, § 70-2-25(B) provided in pertinent part that "*appeals* may be taken from the judgment or decision of the district court to the *supreme court* in the same manner as provided for appeals from any other final judgment entered by a district court in this state." (emphasis added). At such time, NMSA 1978, § 70-2-25(D) provided that the applicable rules of practice and procedure

in civil cases shall govern "proceedings for review and any appeal therefrom to the supreme court of the state to the extent such rules are consistent with provisions of the Oil and Gas Act." Accordingly, Appellants, at the time they initiated their appeal to the district court from the order of the Commission, and at the time said appeal was docketed and became a pending case before the district court, were statutorily entitled to a non-discretionary appeal to the New Mexico Supreme Court from a decision of the district court.

While Appellants awaited a judgment from the district court, NMSA 1978, § 70-2-25 was amended effective July 1, 1999, to direct parties seeking to appeal from a decision of the Commission to the procedures set forth in NMSA 1978, § 39-3-1.1, which was enacted effective September 1, 1998. NMSA 1978, § 39-3-1.1(E) abolishes a party's previous right to appeal from the district court to the Supreme Court and instead provides for discretionary review by the Court of Appeals through a petition for writ of certiorari. NMSA 1978, § 39-3-1.1(G) provides that the procedures governing appeals and petitions for writ of certiorari filed pursuant to this section shall be set forth in rules adopted by the Supreme Court. NMRA, 12-505, which sets forth the procedure for Court of Appeals review of district court appeals of administrative decisions pursuant to NMSA 1978, § 39-3-1.1, was enacted pursuant to a court order dated January 27, 1999, and made effective September 1, 1998 *nunc pro tunc*. All of these changes in the referenced statutes and rules undisputedly occurred after the time that this appeal was docketed with the district court and before the district court entered its judgment on December 17, 1999.

N.M. Const. art. IV, § 34 provides that:

> No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

The intent of N.M. Const. art. IV, § 34 is to prevent legislative interference with matters of evidence and procedure in cases that are in the course of litigation in the various courts of the state and which have not been concluded by a final judgment. *Stockard v. Hamilton*, 25 N.M. 240, 245 (1919). As was held by this Court in *Brown v. Board of Education*, 81 N.M. 460, 468 P.2d 431 (Ct. App. 1970), once a case is instituted, it is a "pending case" for the purposes of N.M. Const. art. IV, § 34. *Brown*, 81 N.M. at 481. There, a change in an administrative statute while the case was pending which changed the place of appeal from the district court to the Court of Appeals was held to be ineffective to change the plaintiff's appellate rights. *Id.* A case is still a "pending case" for the purposes of N.M. Const. art. IV, § 34 to the extent that a judgment of a district court remains under its control for a period of thirty days after entry. *Marquez v. Wylie*, 78 N.M. 544, 546, 434 P.2d 69, 71 (1967) (rule changing time for filing motion for new trial ineffective to change deadline for such motion in pending case). In the case at bar, Judge Gallini's judgment was technically still under his control until January 17, 2000. *See also Hillelson v. Republic Insurance Co.*, 96 N.M. 36, 38, 627 P.2d 878, 880 (1981) (N.M. Const. art. IV, § 34 prevented new interest rate from applying to case pending before enactment of new interest rate statute); *State ex rel. Barela v. New Mexico State Board of Education*, 80 N.M. 220, 223, 453 P.2d 583, 586 (1969) (new statute could not operate to

moot appeal, as "there can be no question that the legislation could in no way alter rights as they existed when the action was commenced.").

When this appeal was docketed with the district court, NMSA 1978, § 70-2-25 granted Appellants the substantive right of a non-discretionary appeal to the Supreme Court from a decision of the district court. N.M. Const. art. IV, § 34 should operate to prevent any changes that occurred to NMSA 1978, § 70-2-25 and any other relevant statutes or rules after that time to take away this important substantive right of Appellants. More than just a procedure was changed. Appellants were entitled by statute to rely on the fact that the appellate process that began with their filing of a petition for review with the district court in 1997 would receive substantive review by the Supreme Court, if necessary. This Court's opinion in *Hyden v. New Mexico Human Services Department*, 2000-NMCA-002, 1999 WL 1289127, Vol. 39, No. 3, SBB 35, was published in the January 20, 2000 Bar Bulletin, ***after*** Appellants filed their Petition for Writ of Certiorari and motion to allow the filing of such petition on January 11, 2000. This Court's Order to Show Cause cites *Hyden* for the proposition that "where a case is pending before the district court when appellate rules or statutes are changed, the new rules apply to the case once a final judgment is entered and an appeal taken." Order to Show Cause, ¶ 2. However, the appellate process in this matter was begun by Appellants' filing of their Petition for Review with the district court in 1997. It was *after* this appellate process had been initiated that the Legislature and the Supreme Court chose to change the administrative appeal procedures. But these should not apply, per N.M. Const. art. IV, § 34, to then existing and

"pending" cases such as the case at bar. To hold otherwise would allow piecemeal changes in appellate procedure which could become effective after each phase of an appeal was completed.

Appellants were granted a substantive right by statute to a non-discretionary appeal to the Supreme Court. Appellants docketed their appeal to the district court on April 25, 1997 pursuant to the then-existing version of NMSA 1978, § 70-2-25, well before the enactment of NMSA 1978, § 39-3-1.1, and well before the Supreme Court's adoption of NMRA, 12-505, dealing with appeals filed pursuant to NMSA 1978, § 39-3-1.1. Appellants initiated their appeal to the district court pursuant to NMSA 1978, § 70-2-25, not NMSA 1978, § 39-3-1.1. Neither NMSA 1978, § 39-3-1.1 nor NMRA, 12-505 should operate to deprive Appellants of their statutory right to appeal to the Supreme Court.

B. Unusual Circumstances Clearly Exist for the Allowance of the Late Filing of Appellants' Petition for Writ of Certiorari.

Notwithstanding the above, if this Court determines that NMRA, 12-505 applies to this appeal, Appellants do not dispute that their Petition for Writ of Certiorari was filed more than twenty days after the judgment was entered. However, *Hyden*, as well as prior authorities, allow Appellants to show unusual circumstances that would justify the Court's exercise of its discretion to grant an extension of time for Appellants' filing of their Petition for Writ of Certiorari. In this case, the unusual circumstances arise from the confusion surround the changes in administrative appeal procedures while Appellants awaited a district court judgment. In determining whether to exercise such discretion, this Court should also consider that there is absolutely no prejudice occurring to

Appellees as a result of the timing of the filing of Appellants' Petition and that an important due process issue is presented by way of Appellants' Petition.

In *Trujillo v. Serrano*, 117 N.M. 273, 871 P.2d 369 (1994), the New Mexico Supreme Court discussed the standard for accepting untimely filed notices of appeal as follows:

> The New Mexico Constitution mandates that "an aggrieved party shall have an absolute right to one appeal." N.M. Const. art. VI, § 2. The courts must ensure that the procedural rules expedite rather than hinder this right. *Govich v. North Am. Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) . . . "[i]t is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits, where it can be done without impeding or confusing administration or perpetrating injustice." [cites omitted]. Procedural formalities should not outweigh basic rights where the facts present a marginal case which does not lend itself to a bright-line interpretation. *See Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993). "Where . . . there are two possible interpretations relating to the rights to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored." [cite omitted].

Trujillo, 117 N.M. at 276. The courts have outlined those situations constituting "unusual circumstances" under which an untimely notice of appeal could be considered. In *Trujillo*, the delay was a result of judicial error as to the judge's announcement of a decision. *Id.* at 117. In *Matter of Estate of Newalla*, 114 N.M. 290, 296, 837 P.2d 1373, 1379 (Ct. App. 1992), this Court held that such circumstances possibly include reasonable reliance on a precedent indicating that the order not timely appealed was not a final appealable order. In *Chavez v. U-Haul Co. of New Mexico, Inc.*, 1997-NMSC-051, 124 N.M. 165 (1997), a late-filed notice of appeal was allowed due to the fact that

the untimeliness itself was "marginal" (notice filed 58 minutes late) and unusual circumstances were present because the notice of appeal was filed *pro se* while the appellant was obtaining other counsel. *Chavez*, 124 N.M. at 170-71. *See also Guess v. Gulf Insurance Co.*, 94 N.M. 139, 143, 607 P.2d 1157, 1161 (1980) (trial court held to have abused discretion in denying appellant an extension to file notice of appeal because "extenuating and unique circumstances" present, including circumstances beyond appellant's control where confusion surrounding date of entry of order).[1]

This Court has recognized another basis for showing unusual circumstances, in this case with regard to the exercise of the Court's discretion to grant extensions of time in which to file petitions for writs of certiorari. As set forth in this Court's opinion in *Hyden*, this is where those extensions are sought because of confusion surrounding the enactment and publication of NMRA, 12-505. That is exactly Appellants' situation. As set forth in the attached affidavit of Brian J. Pezzillo, Appellants acted in reliance on the then-existing version of NMSA 1978, § 70-2-25, and in reliance on the prohibitive effect of N.M. Const. art. IV, § 34 that the appellate procedure of NMSA 1978, § 70-2-25 could not later be changed, in instituting their appeal to the district court and thereafter in preparing for appeal to the Supreme Court. Until notification on January 10, 2000 by the Clerk of the Supreme

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[1] Federal cases construing the "excusable neglect" standard under Fed. R. App. P. 4(a) for extending the time to appeal may also be instructive. In *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Co.*, 539 F.2d 1107, 1109 (7th Cir. 1976), the court held that an attorney's mistake based on conflicting provisions of a statute versus a rule constituted excusable neglect allowing a late-filed appeal. In *Wansor v. George Hantscho Co., Inc.*, 570 F.2d 1202, 1206-07 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), an attorney's misunderstanding of the effect of a post-judgment motion, under the facts of that case, was held to be sufficient to excuse the late filing of a notice of appeal under Fed. R. App. P. 4(a).

Court that it would not accept such appeal and that Appellants were now to file a petition for writ of certiorari with the Court of Appeals, Appellants were acting in reasonable and good faith reliance on the fact that their substantive rights could not have been changed during the time this case was pending, and therefore that the appellate procedure provided under the version of NMSA 1978, § 70-2-25 as it existed in 1997 would govern this appeal. Such notification, and the subsequent filing of Appellants' Petition, occurred before publication of this Court's opinion in *Hyden*. This is not a situation in which there were a definite set of unchanged appellate procedures in place for a long period of time. Clearly, the subject statutes and rules have been in a state of flux over the last few years, all while Appellants' case was pending before the district court. Through January 10, 2000, Appellants reasonably believed that their proper mode of appeal was by non-discretionary appeal to the Supreme Court. Appellants did not believe, and still do not believe, that their substantive right of appeal could constitutionally be changed while their case was pending. Appellants are here before the Court of Appeals because they have been directed to do so, and have acted to preserve Appellants' rights by filing a Petition for Writ of Certiorari. Appellants submit that the untimeliness herein was marginal (5 days late), that there was no bright-line interpretation available (and certainly not before this Court's publication of its opinion in *Hyden*), and that Appellants acted in reasonable reliance on precedent supporting their right to a non-discretionary appeal. The fact that Appellants' Petition was not timely filed, under the unusual circumstances of this case, should not serve to bar said Petition from being considered by this Court.

Another factor to be considered is the seriousness of this case. This case presents an important due process issue. In *Guess v. Gulf Insurance Co., supra*, the Supreme Court of New Mexico held that the seriousness of the case is to be considered in determining excusable neglect for a late-filed appeal. *Guess*, 94 N.M. at 143. The district court's opinion herein is directly contrary to the Supreme Court's holding in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1995), which confirms a property interest owner's right to receive due process protection in these circumstances. The Commission takes the position that written documentation of a real property interest is required before Appellants are entitled to constitutionally-meaningful notice, disregarding Mitchell's actual notice of Appellants' interests at the time. The Supreme Court, in *Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, 127 N.M. 120, 125-26, held that the Oil Conservation Division had violated its own rules when it failed to provide actual notice to all interest owners. The efficacy of the holdings in *Uhden* and *Johnson* will be undermined, and the due process protections to be afforded property interest owners will be jeopardized, if this Court does not hear this appeal and rectify the errors made by the Division in denying Appellants their constitutionally protected rights to notice of action affecting their property interests.

Further, in *Russell v. University of New Mexico Hospital / Bernalillo County Medical Center*, 106 N.M. 190, 194, 740 P.2d 1174, 1178 (Ct. App. 1987), this Court excused a party's failure to timely serve a notice of appeal in a situation where the case was a serious one *and* there was *no*

prejudice to the opponent. There is no prejudice or surprise that would occur to Appellees by virtue of this Court's acceptance of Appellants' Petition for Writ of Certiorari as timely filed. Neither Mitchell nor the Commission allege any prejudice in their respective motions. All of the counsel in this case routinely discussed the fact that the losing party in the district court judgment would appeal the judgment. Appellees are well aware of the issues presented in Appellants' Petition, and the five-day delay in the filing of same has occasioned no prejudice to them.

New Mexico public policy strongly supports allowing a party a right to appeal. *Executive Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-008, 125 N.M. 78, 80 (1998). Appellate rules are construed liberally to the end that causes on appeal may be determined on their merits. *Montgomery v. Cook*, 78 N.M. 199, 208, 413 P.2d 477, 486 (1966). In *C.F.T. Development, LLC v. Board of County Commissioners of Torrance County*, No. 20,548, one of the three cases consolidated into *Hyden*, this Court granted the appellant an extension of time in which to file a petition for writ of certiorari based on facts much similar to the case at bar. The appellant there did not suffer dismissal of its appeal due to its failure to timely file a petition for writ of certiorari under the unique circumstances created by the full-scale revisions of the procedural statutes and rules enacted while the case was pending. Similarly, in this case, Appellants should not have their right to appeal jeopardized by the unique circumstances of this case, especially due to the important due process issue presented and the fact that no prejudice will occur to Appellees.

III. CONCLUSION

Because this case was pending well before enactment of NMSA 1978, § 39-3-1.1, the amendment of NMSA 1978, § 70-2-25, and the promulgation of NMRA, 12-505, none of the changes made therein should operate to deprive Appellants of their substantive right to appeal. However, if this Court believes that such changes were effective to require Appellants to file a petition for writ of certiorari under the time limit established by NMRA, 12-505, then clearly unusual circumstances are present in this case which warrant this Court's exercise of its discretion to grant an extension of time in which to allow Appellants' Petition for Writ of Certiorari to be filed. Accordingly, Appellants request the Court to deem Appellants' Petition for Writ of Certiorari filed on January 11, 2000 as timely filed in accordance with its January 12, 2000 ruling, deny both the Commission's Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal and Mitchell's Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal, and grant Appellants such other and further relief to which they are entitled.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
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Stephen D. Ingram
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(505) 243-5400

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 7th day of March, 2000:

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By: _____
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Attorneys for Plaintiffs-Appellants

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist. Ct. No. CV 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R. W. Gallini**
Plaintiffs-Appellants,	§	**Ct. App. No. 21020**
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

AFFIDAVIT OF BRIAN J. PEZZILLO

STATE OF NEVADA §
§ ss.
COUNTY OF CLARK §

BEFORE ME, the undersigned authority, on this day personally appeared Brian J. Pezzillo, who, after being sworn, deposed and stated as follows:

1. My name is Brian J. Pezzillo. I am over 18 years of age, am fully competent to make this affidavit, and have personal knowledge of all facts stated herein.

2. At all times material hereto, I was an associate attorney with the law firm of

Stratton & Cavin, P.A., attorneys for Appellants, and conducted the research and preparation of court documents filed on behalf of Appellants in this case.

3. This case originated before the New Mexico Oil Conservation Commission. Appellants appealed from the Commission's decision, and the appeal was filed in the Fifth Judicial District Court of New Mexico on April 25, 1997. The statute pursuant to which Appellants filed this appeal was NMSA 1978, § 70-2-25. At that time, § 70-2-25 provided that appeals could from the Commission's decision were to be taken to the district court, and appeals from the district court decision were to be taken to the New Mexico Supreme Court.

4. At the district court, this case was briefed before the Honorable R. W. Gallini, District Judge, who heard oral argument on May 4, 1998. The case was taken under advisement by Judge Gallini on that date.

5. This case remained under advisement under Judge Gallini for approximately 20 months. An opinion was finally issued by Judge Gallini on December 17, 1999. The district court judgment upheld the findings and conclusions entered by the Commission. Appellants then chose to appeal this district court judgment.

6. At the time Judge Gallini took the case under advisement, I reviewed NMSA 1978, § 70-2-25, the statute in force and effect at the time, and confirmed Appellants' right to take a direct appeal from the district court to the New Mexico Supreme Court in the event we were dissatisfied with the district court decision. The attorneys in this case also discussed the fact that whoever lost under the district court judgment would appeal the decision. I also reviewed relevant case law in New Mexico at the time, including the case of *Uhden v. New Mexico Oil Conservation Commission*, to confirm that the proper procedure was to file a notice of appeal with the Supreme Court.

7. In reliance on the above, and in reliance on N.M. Const. art. IV § 34, which

prohibits a legislative change in a party's rights or remedies while a case is pending, it was determined that the version of § 70-2-25 in effect at the time of the filing of the district court action determined the substantive rights of Appellants, and since such substantive rights could not be changed during the pendency of this action, this was the statute that was followed in determining the proper procedure for appeal from the district court.

8. Having determined that the proper statute to follow was the statute under which Appellants took their appeal to the district court, I was unaware of the substantive change in Appellants' right to a non-discretionary appeal, which purportedly took place during the pendency of the district court action. I did not consult the pocket part of § 70-2-25 prior to the December 17, 1999 judgment being entered as would normally be the procedure, nor did I review the newly published NMSA 1978, § 39-3-1.1 and Rule 12-505, due to the fact that I was operating under the belief that § 70-2-25, as it existed at the time of the filing of the district court action, governed Appellants' rights and the procedure to be followed for further appeal.

9. It was not until I contacted the Supreme Court on January 10, 2000 to confirm arrangements for filing Appellants' notice of appeal that I was notified by the clerk that the Supreme Court would not accept such filing, that the procedure to be followed for this case was now a petition for writ of certiorari, and that such petition must be filed with the New Mexico Court of Appeals. Upon such notification, I reviewed the amended version of § 70-2-25, NMSA 1978, § 39-3-1.1 and Rule 12-505, which were made effective while we awaited a judgment by the district court. These indicated that Appellants no longer had a right to a non-discretionary appeal to the Supreme Court, and that we were to file a petition for writ of certiorari with the Court of Appeals. I also discovered in such review that the deadline for filing such petition for writ of certiorari was twenty (20) days from the date of judgment, which would fall on January 6, 2000, and not the thirty (30) days previously provided.

10. Our office immediately modified the appellate brief to the Supreme Court that was being prepared by our office into a petition for writ of certiorari to the Court of Appeals, and filed it, along with a motion to accept the petition for writ of certiorari as timely filed, on January 11, 2000 with the Court of Appeals. We were later notified that the Clerk of the Court of Appeals on January 12, 2000 had granted Appellants' motion to accept the petition for writ of certiorari as timely filed.

FURTHER AFFIANT SAYETH NOT.

BRIAN J. PEZZILLO

SUBSCRIBED AND SWORN before me by Brian J. Pezzillo on the 2 day of March, 2000.

Notary Public

Notary Public - State of Nevada
County of Clark
LOREN E. HEINIGER
My Appointment Expires
April 7, 2002
No: 98-1641-1

My Commission Expires:

April 7, 2002

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*ALSO ADMITTED IN OKLAHOMA
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COPY

March 7, 2000

VIA FEDERAL EXPRESS
Patricia C. Rivera Wallace
Attorney Clerk
New Mexico Court of Appeals
Supreme Court Building
P. O. Box 2008
Santa Fe, New Mexico 87504-2008

Re: *Branko, Inc. et al. v. The New Mexico Oil Conservation Commission and Mitchell Energy Corporation;* In the Court of Appeals for the State of New Mexico; No. 21,020

Dear Ms. Rivera Wallace:

Please find enclosed an original and one copy of Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed in the above-captioned cause, along with a pre-addressed, stamped envelope for your convenience in returning an endorsed copy to me.

Your attention to this matter is greatly appreciated. Please do not hesitate to call if there are any questions.

Sincerely,

STRATTON & CAVIN, P.A.

By: _____
Stephen D. Ingram

SDI/rd
Enclosures

cc: (w/enclosures)
Marilyn S. Hebert
Harold L. Hensley, Jr. and James M. Hudson
W. Thomas Kellahin

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, June 16, 2000

NO. 26,361

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE, McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL, and XION, a Utah general partnership,

Plaintiffs-Petitioners,

vs.

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants-Respondents.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Pamela M. Minzner, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeal number **21020.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By _____
Chief Deputy

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

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*NOT LICENSED IN NEW MEXICO

March 10, 2000

VIA FEDERAL EXPRESS

Patricia Rivera Wallace
Clerk, NM Court of Appeals
237 Don Gaspar
Santa Fe, NM 87501

Re: Branko, Inc., et al. v. The New Mexico Oil Conservation Commission, et al.; Ct. App. No. 21020
Appeal from the Fifth Judicial District Court of Lea County

Dear Ms. Wallace:

Please find enclosed herewith for filing in the above referenced matter Appellee Mitchell Energy Corporation's Motion for Leave to File Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed. I have also enclose an extra copy of the Motion which I would appreciate your date stamping and returning to me in the self addressed stamped envelope provided. Thank you.

Very truly yours,

HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

James M Hudson

James M. Hudson

JMH/tw
Enclosures

cc: Harold D. Stratton, Jr.
Marilyn S. Hebert
W. Thomas Kellahin

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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORP.,a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,

Plaintiffs-Appellants,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, and MITCHELL ENERGY CORPORATION,

Defendants-Appellees.

Dist. Ct. No. CV 97-159 G
Fifth Judicial District
Lea County, New Mexico

No. 21020

APPELLEE MITCHELL ENERGY'S MOTION FOR LEAVE TO FILE RESPONSE TO APPELLANTS' BRIEF IN SUPPORT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED

HINKLE, HENSLEY, SHANOR & MARTIN L.L.P.
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ATTORNEYS FOR DEFENDANT-APPELLEE
MITCHELL ENERGY CORPORATION

Defendant/Appellee Mitchell Energy Corporation ("Mitchell") respectfully moves for an order allowing it to file a Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed. This motion is based upon the following procedural history.

1. On December 17, 1999, Judge Gallini entered a final judgment in Appellants' appeal from a decision of the New Mexico Oil Conservation Commission.

2. On January 11, 2000, Appellants filed a Petition for Writ of Certiorari seeking discretionary review in this Court. Appellants do not dispute that the Petition for Writ of Certiorari was untimely. In fact, the Petition was filed 5 days late. Appellants accompanied the Petition with a Motion to Accept Petition for Writ of Certiorari as Timely Filed, which motion purported to address the untimeliness of the filing and the issue of whether good cause exists for waiver by this Court of the mandatory preconditions to review.

3. The next day, January 12, 2000, the Court granted Appellants' Motion to Accept the Petition as Timely Filed, and accepted the Petition

4. On January 21, 2000, the New Mexico Oil Conservation Commission filed a Motion to Reconsider the Court's Order of January 12, 2000. Appellants responded to that Motion on February 2, 2000, addressing for a second time the untimeliness of the filing and the question of whether good cause exists for waiver by this Court of the mandatory preconditions to review.

5. On January 31, 2000, Mitchell filed a Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal. Appellants filed a response to that motion on February 7, 2000, addressing for a third time the untimeliness of the filing and the question of whether good cause exists for the waiver of

the mandatory preconditions to review by this Court.

6. On February 24, 2000, this Court issued an Order to Show Cause directing Appellants to show cause by March 8, 2000 why Appellees' Motions should not be granted and Appellants' Petition for Writ of Certiorari denied as untimely.

7. On March 7, 2000, appellants served their Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed, addressing for the fourth time the untimeliness of the filing and the question of whether good cause exists for waiver by this Court of the mandatory preconditions to review.

8. Although the Court directed the Appellants to show cause why the Petition should not be dismissed, the Brief filed by Appellants goes significantly beyond the scope of the Court's Order to Show Cause, and constitutes an attack on the reasoning and conclusion of the Court's decision in *Hyden v. New Mexico Human Services Dep't.,* 2000-NMCA-002, 1999 WL 1289127, Vol. 39, No.3, SBB 35 (App.,1999). Approximately one-half of the Brief is devoted to a discussion of the constitutionality of the application of NMRA, Rule 12-505 to the instant case and urges that the rule may not be constitutionally applied to this case. In *Hyden,* this Court squarely addressed the issue, and rejected the argument asserted by Appellants. In the course of these proceedings, Mitchell has not briefed the constitutionality of the application of Rule 12-505 to this case precisely because this Court so clearly rejected such a claim in *Hyden.* Inasmuch as Appellants have now raised the argument, Mitchell seeks an opportunity to respond.

9. In the affidavit attached to the Brief, Appellants have asserted facts regarding their review of the rules and statutes in preparation for appeal which they have never previously provided to the parties or the Court. Mitchell asserts that the facts supporting

Appellants' position fall woefully short of the good cause required for the waiver of a timely filing of a Petition for Writ of Certiorari seeking to invoke discretionary review by this Court. Mitchell seeks an opportunity to respond to the "good cause" argument which has been presented for the first time in the Brief filed pursuant to the Court's Order to Show Cause.

10. Counsel for Appellants objects to this motion. Counsel for the New Mexico Oil Conservation Commission supports this motion.

Based upon the foregoing, Mitchell respectfully requests that this Court enter its Order granting Mitchell leave to file Response to Appellants' Brief in Support of Acceptance of Petition for Writ of Certiorari as Timely Filed. Pursuant to the provisions of NMRA, Rules 12-308 and 12-309, Mitchell would request that such Response be due on or before March 24, 2000.

Respectfully submitted this 10th day of March, 2000.

HINKLE, HENSLEY, SHANOR & MARTIN, L.L.P.

By: _____

Harold L. Hensley, Jr.
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ATTORNEYS FOR DEFENDANTS/APPELLEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via United States Mail, first-class postage prepaid, and as otherwise noted, this 10th day of March, 2000, to the following:

Harold D. Stratton, Jr.
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40 First Place, Suite 610
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Special Assistant Attorney General
New Mexico Oil Conservation Commission
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W. Thomas Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504-2265

James M. Hudson

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRANKO, INC., A NEW MEXICO CORP., ET AL.,

Plaintiffs-Appellants,

vs.

No. 21,020
Lea County
CV-97-159-G

NEW MEXICO OIL CONSERVATION COMM'N, ET AL.,

Defendants-Appellees.

/

FILED
00 MAY -4 PM 3:33
COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

ORDER

The Petition for Writ of Certiorari is received and ordered filed herein, and due consideration having been had by the Court,

IT IS ORDERED that the petition be and the same is hereby **DENIED.**

RUDY S. APODACA, Judge

RICHARD C. BOSSON, Judge

T. GLENN ELLINGTON, Judge

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini** **Ct. App. No. 21020**
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

APPELLANTS' REPLY TO THE NEW MEXICO OIL CONSERVATION COMMISSION'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Appellants submit the following reply to the Response to Petition for Writ of Certiorari filed by the Oil Conservation Commission of the State of New Mexico ("Commission") on January 27, 2000:[1]

---

[1] On February 1, 2000, Appellants filed a response to the Commission's request for reconsideration of this Court's granting of Appellants' Motion to Accept Petition for Writ of Certiorari as Timely Filed. Appellants are also filing a response to Appellee Mitchell Energy Corporation's Motion to Reconsider the Order Granting Appellants' Motion to Accept Petition for Writ as Timely Filed.

Appellants offer this Reply to the Commission's Response to correct and highlight factual disputes present in this matter as well as to supplement relevant legal authority on the issue of parties who are entitled to notice of hearings before the Oil Conservation Division ("OCD").

The Commission fails to bring to the Court's attention that the Commission rules in effect at the time of the hearing of which Appellants did not receive notice required that "all interest owners" be provided notice. *See* OCD Rule 1207.A. The rule did not restrict the right to such notice to a specific type of ownership interest, but rather, encompassed all ownership interests. Appellees admit that Appellants had an interest in the subject property. Therefore Appellants should have been accorded due process of law and provided actual notice of the January 21, 1993 OCD hearing.

I. ARGUMENT AND AUTHORITIES

A. The District Court's Decision in this Matter is in Conflict with Supreme Court and Court of Appeals Opinions.

The Commission, quoting the district court, states that there was no written documentation of a real property interest which would entitle Appellants to notice as required by *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). This statement is incorrect for two reasons. As later admitted on page 3 of the Commission's Response, the Commission recognizes that affidavits of each individual Plaintiff were offered at the administration hearing to prove that each of the Appellants held a protected property interest. What Appellees failed to bring to the Court's attention is the fact that such affidavits were uncontroverted. No evidence was offered by either the Commission or Mitchell which suggested that the affidavits were

incorrect. *Uhden* does not require written documentation in order for a property interest to receive due process protection, and Appellees did not controvert Appellants' proof of such protected property interest.[2]

Further refuting Appellee's argument is the fact that property, within constitutional protection, denotes a group of rights adhering a citizen's relation to a physical thing, a right to possess, use and dispose of. *Cereghino v. State by and through the State Highway Commission*, 370 P.2d 694, 697 (Ore. 1962), *citing United States v. General Motors*, 323 U.S. 373, 377-78 (1945). Property interests subject to protection under the 14th Amendment are not limited to a few, rigid technical forms, but rather, refer to a broad range of interests. *Chavez v. City of Santa Fe Housing Authority*, 606 F.2d 282, 294 (10th Cir. 1979). In light of such authority, Appellee's argument that only those property interests reduced to a writing are entitled to due process protection fails. Appellee may not attempt to restrict the right which Appellants enjoy as property owners simply by attempting to limit the reach of both the United States and New Mexico Constitutions to a specific type of property interest.

The second erroneous argument made by the Commission is that despite the fact that the

---

[2] It is worth noting that the Oil Conservation Commission has amended its regulations in what Appellants believe to be an unconstitutional manner in that its rule regarding notice now states that "notice shall be given to any owner of an interest in the mineral estate whose interest is evidenced by a written document of conveyance, either of record or known to the applicant at the time of filing the application...". *See* 19 NMAC 15.N.1207.A(1). Therefore, it is plainly seen in this amendment that the Commission has taken the view that if a party has a real property interest but does not hold a piece of paper evidencing such interest, that party is not entitled to due process notice.

Commission claims Appellants had no protectable property interest, they admit that Appellants had a right of action against Strata, the party from whom Appellants received their interest. *Id.* at 3-4. The Commission's argument is inherently contradictory. The Commission argues that Appellants had no property interest in the subject property yet simultaneously argues that Appellants had a right of action against Strata based upon an interest which they held in the subject property. The Commission implicitly admits that Appellants had a property interest, as a party may only have a cause of action if it in fact has a protectable interest. Under its own rules, the OCD had a duty to provide notice to all known interest owners, which includes Appellants. *See* OCD Rule 1207.A. Appellee further neglects to bring to the Court's attention the case of *Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, 127 N.M. 120, 125-126, in which the Supreme Court held that the Oil Conservation Division had violated its own rules when it failed to provide actual notice to all interest owners. In light of this case, Appellee's argument that they have not acted in contradiction of any New Mexico Supreme Court or Court of Appeals case is clearly false.

In an attempt to bolster its argument, the Commission makes the error of focusing solely on the actions of non-parties to this action, Strata Production Company and its president, Mark Murphy. The Commission bases this argument on a statement made by Mr. Murphy to the effect that Strata was retaining record title to the subject property. This fact, however, is irrelevant in light of the fact that Mr. Murphy informed a representative of Appellee Mitchell Energy Corporation ("Mitchell")

that the Appellants had also received a property interest. Appellants' Statement of Appellate Issues at 3, 9. The Commission ignores the significance of this fact. Once Mitchell was placed on notice that other parties may in fact have a property interest in the subject property, it was Mitchell's duty to exercise due diligence in determining the identities of such parties. *See Uhden v. Oil Conservation Commission*, 112 N.M. 528, 531, 817 P.2d 721, 724 (1995); *First National Bank v. Luce*, 87 N.M. 94, 95, 529 P.2d 760, 761 (1974).

The remainder of the Commission's argument is comprised of rhetorical questions as to the purpose behind Appellants' waiting to bring their claim and attempting to analogize the Appellants in this matter to shareholders in a corporation. This is irrelevant to the determination of the notice issue, which is what is to be determined by this Court. The issue is whether Mitchell had a duty to exercise due diligence in determining Appellants' identities and chose not to. The Commission fails to inform the Court that this case would never had been brought had Mitchell simply asked Strata or Mr. Murphy to identify the interest owners. It is Mitchell's failure to ask one simple question which has resulted in several years' of administrative hearings and litigation resulting in this appeal. Appellants had a protected property interest and were not accorded due process when they did not receive notice of the 1993 OCD hearing.

II. CONCLUSION

Based upon the foregoing, Appellants request that the Court grant Appellants' Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____

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Brian J. Pezzillo
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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 4th day of February, 2000.

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By: _____
Brian J. Pezzillo
Stratton & Cavin, P.A.
Attorneys for Plaintiffs-Appellants

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini** **Ct. App. No. 21020**
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

APPELLANTS' RESPONSE TO MITCHELL ENERGY CORPORATION'S MOTION TO SET ASIDE ORDER ACCEPTING PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED AND MOTION TO DISMISS APPEAL

Appellants respond to Appellee Mitchell Energy Corporation's Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal ("Motion") as follows:

I. INTRODUCTION

On January 11, 2000 Appellants filed a Petition for Writ of Certiorari and a motion to accept

such Petition as timely filed. This appeal is taken from the final order entered by the Fifth Judicial District Court on December 17, 1999 affirming an order of the New Mexico Oil Conservation Commission. This matter had been under advisement before the district court since May 4, 1998. During that time, NMSA 1978, § 71-2-25, governing the rights, remedies and procedures of Appellants in this matter, was amended in a material fashion. The result of such amendments was that Appellants, who previously were entitled to a right of appeal to the Supreme Court, must now file a discretionary appeal with the Court of Appeals.

On January 12, 2000, this Court granted Appellants' motion to accept the Petition for Writ of Certiorari as being timely filed. Appellee has failed to set forth any facts indicating why the Court was in error in granting this motion, and the Court's order should be upheld.

II. ARGUMENT AND AUTHORITIES

Appellee argues that the Court should not have granted Appellants' motion to accept as timely filed its Petition for Writ of Certiorari ("Petition"). In doing so, Appellee cites only to this Court's recent decision in *Hyden v. New Mexico Human Services Department*, 2000-NMCA-002, Vol. 39, No. 3, SBB 35 (Ct. App. Nos. 20508, 20518, 20548, 1999). In citing this case, Appellee has failed to state that it is the New Mexico Supreme Court's long-standing opinion that Appellate Rules of Procedure should be construed liberally in order for cases on appeal to be heard on their merits. *Id.* at p. 16, *citing Montgomery v. Cook*, 76 N.M. 199, 208, 413 P.2d 477, 484 (1966); *Baker v. Fojka*, 74 N.M. 587, 589, 396 P.2d 195, 196 (1964). It is appropriate to give due consideration

to all circumstances in the legal environment surrounding the untimeliness of a particular case. *Hyden, supra.*

As stated above, this matter originated from an appeal from the Oil Conservation Commission to the Fifth Judicial District Court. The district court accepted briefing on the issues and heard oral argument on May 4, 1998. On that date, the court took the case under advisement. Since that time, the case was pending until the court issued a final judgment on December 17, 1999. In the intervening twenty months, NMSA 1978, § 71-2-25 was substantively amended. The statute in force and effect when Appellants filed their appeal to the district court stated that a party may appeal the district court decision directly to the New Mexico Supreme Court as a matter of right. The statute was changed while Appellants' case was pending in the district court, and now references the new administrative framework established by NMSA 1978, § 39-3-1.1. Appellee argues that Appellants' case was not in fact "pending" during this rule change. While Appellee cites *Hyden* for support, it has ignored all previous rulings of the New Mexico Supreme Court and Court of Appeals on this issue. Appellants' case should be considered pending under the circumstances presented by this case. The Supreme Court has stated:

> the word 'pending' according to Websters and Century Dictionaries means 'the pending,' 'remaining undecided,' 'not terminated,' and this meaning of the word should be adopted in this connection. The evident intention of the Constitution is to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of this state, and which have not been concluded, finished or determined by a final judgment.

Stockard v. Hamilton, 25 N.M. 240, 245 (1919). Likewise, the Supreme Court of New Mexico has held that "it can hardly be said that a case has ceased to be a pending case as long as the judgment remains under the control of the court." *Marquez v. Wylie*, 78 N.M. 544, 546, 434 P.2d 69, 72 (1967). As seen, under the circumstances of this case, Appellants' case was in fact "pending" at the time that the statute at issue was amended altering Appellants' rights.

Further, Appellee fails to identify a fact that distinguishes the present case from that in *Hyden.* Here, more than just the procedure of appealing has been amended. Previously Appellants had a right, as a matter of law, to seek review of the district court decision in the New Mexico Supreme Court. This substantive right was taken away while Appellants' case was pending in the district court. Appellants had no notice that such an amendment would take place at the time their case was docketed in the Fifth Judicial District Court and relied upon the rights established by this statute in filing their appeal in the district court.

Appellee also attempts to argue that Appellants in this case had notice of the *Hyden* decision and the substantive rule changes and that this fact should prevent their appeal from being considered timely. As this Court has held, notice of enactment of a law is irrelevant under Art. IV, Sec. 34 of the New Mexico Constitution; it is the effective date which is the determining factor. *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 539, 807 P.2d 234, 237 (Ct. App. 1991). "Since our constitution forbids an act of the legislature from affecting a right or remedy such as the one involved here, it follows that the statute *in effect* when this became a pending case is applicable." *Hillelson*

v. Republic Insurance Co., 96 N.M. 36, 38, 627 P.2d 878, 880 (1981) (emphasis in original). Thus, Appellants could not have their substantive right of appeal taken away by an act of the legislature while their case was pending in the district court. Appellee argues that the court should focus on the time period in which the case became pending in the appellate court. However, the term "pending case" refers to a suit which is pending on ***some court's docket***. *DiMatteo v. County of Dona Ana*, 109 N.M. 374, 377, 785 P.2d 285, 288 (Ct. App. 1989) (emphasis added).

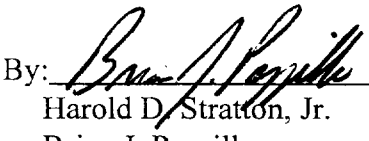
Appellants had the right to rely upon NMSA 1978, § 70-2-25 and the right to the remedies and procedures it set forth at the time Appellants filed their case in the Fifth Judicial District. Appellee's argument would effectively render the statutes in force and effect at the time a suit is filed meaningless, as the rights afforded by said statute could be changed without notice to any party. This is precisely the effect which Art. IV, Sec. 34 of the New Mexico Constitution is designed to prevent. Given the liberality with which the Supreme Court provides that procedural matters should be determined so that cases are heard on their merits and in due consideration of all circumstances, the Court was correct in granting Appellants' Motion to Accept Petition for Writ of Certiorari as Being Timely Filed. Appellee has cited no new factual issues which would warrant otherwise. The *Hyden* case was not published in the New Mexico Bar Bulletin until January 20, 2000, nine days after Appellants had filed their motion with the Court of Appeals. Appellee implicitly argues that the Court was somehow not aware of its own opinion when it granted Appellants' motion. The Court was undoubtedly aware of its own holding in granting Appellants' motion, and Appellee's

arguments provide it no basis for relief.

WHEREFORE, Appellants request the Court to deny Appellee Mitchell Energy Corporation's Motion to Set Aside Order Accepting Petition for Writ of Certiorari as Timely Filed and Motion to Dismiss Appeal.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: 

Harold D. Stratton, Jr.
Brian J. Pezzillo
Post Office Box 1216
Albuquerque, New Mexico 87103
(505) 243-5400
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 4th day of February, 2000.

Marilyn S. Hebert
Special Assistant Attorney General
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Santa Fe, New Mexico 87505

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Santa Fe, New Mexico 87504-2265

By: Brian J. Pezzillo
Brian J. Pezzillo
Stratton & Cavin, P.A.
Attorneys for Plaintiffs-Appellants

COPY

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R. W. Gallini**
Plaintiffs-Appellants,	§	**Ct. App. No. 21020**
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

APPELLANTS' RESPONSE TO APPELLEES' MOTION TO RECONSIDER GRANT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS APPEAL

Appellants respond to Appellee New Mexico Oil Conservation Commission's ("Commission") Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal as follows:

1. On January 21, 2000, Appellee filed a motion with this Court to reconsider its order of January 12, 2000 granting Appellants' request to accept their Petition for Writ of Certiorari as

being timely filed. In doing so, Appellee has done nothing more than recite the facts presented in Appellants' Motion to Accept Petition for Writ of Certiorari as Timely Filed. No new issues or facts are raised in Appellees' Motion, and no basis is presented for this Court to reverse its ruling allowing the filing of Appellants' Petition for Writ of Certiorari. Therefore, Appellees' Motion should be denied.

2. Appellee has neglected to bring to light the material fact that NMSA 1978, § 70-2-25 was amended during the pendency of this matter in such a way as to deprive Appellants of the substantive right of appeal. As set forth in Appellants' motion, NMSA 1978, § 70-2-25 previously allowed for a direct appeal as a matter of right to the Supreme Court of New Mexico. The amendment to NMSA 1978, § 70-2-25 now restricts Appellants to a discretionary appeal to the New Mexico Court of Appeals. This has also had the effect of changing the time in which the appeal must be filed from 30 days to 20 days. This statute's amendment therefore created a new administrative framework regarding appeals. As confirmed in *Hyden v. New Mexico Human Services Department*, 2000-NMCA-002, Vol. 39, No. 3, SBB (January 20, 2000), Art. IV., Sec. 34 of the New Mexico Constitution provides that no act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case. *Id.* at ¶ 10. Therefore to protect the rights of Appellants, this Court's order accepting Appellants' Petition for Writ of Certiorari should be upheld.

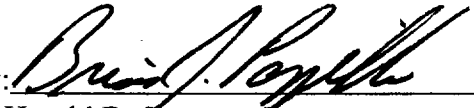
3. Appellees have failed to set forth any facts demonstrating that it was error for the

Court of Appeals to enter its Order of January 22, 2000, granting Appellants' Motion to Accept Petition for Writ of Certiorari as Timely Filed. Having failed to allege any error in the Court's granting of Appellants' Motion, Appellees' motion for reconsideration should be denied.

WHEREFORE, Appellants request that Appellees' Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal be denied in its entirety.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: 

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CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 1st day of February, 2000.

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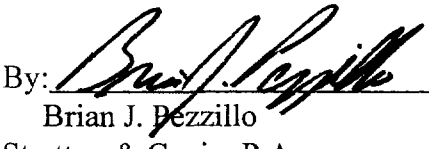
By: 
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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,	§	Dist. Ct. No. 97-159G Fifth Judicial District County of Lea, New Mexico Honorable R.W. Gallini
Plaintiffs-Appellants,	§	Ct. App. No. 21020
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

MITCHELL ENERGY CORPORATION'S
MOTION TO SET ASIDE ORDER ACCEPTING PETITION FOR WRIT OF CERTIORARI AS TIMELY FILED,
and MOTION TO DISMISS APPEAL

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MITCHELL ENERGY CORPORATION'S
MOTION TO SET ASIDE ORDER ACCEPTING PETITION
FOR WRIT OF CERTIORARI AS TIMELY FILED,
and MOTION TO DISMISS APPEAL

Defendant-Appellee Mitchell Energy Corporation ("Mitchell"), respectfully moves for an order setting aside this Court's granting of Plaintiffs-Appellants' ("Appellants") Motion to Accept Writ of Certiorari as Timely Filed. Simultaneously, Mitchell moves to dismiss the Petition for Writ of Certiorari as untimely filed pursuant to Rule 12-505(C) NMRA. This motion is based upon all papers and pleadings on file herein, and the following facts and arguments:

On January 11, 2000, Appellants filed a Petition for Writ of Certiorari pursuant to Rule 12-505 NMRA, seeking review of the a Judgment of the Fifth Judicial District Court entered December 17, 1999, affirming an Order of the New Mexico Oil Conservation Commission ("NMOCC") dated March 19, 1997, in an appeal to district court pursuant to N.M.S.A 1978 §39-3-1.1 (1978), Rule 1-074, NMRA,and NMSA 1978 §71-2-25 (1999 Cum Supp.). The Petition for Writ of Certiorari was required to be filed on January 6, 2000, within 20 days from the district court's final order. NMRA 12-505(C). Appellants filed the Petition for Writ of Certiorari on January 11, 2000, five (5) days late.

Pursuant to the decision in *Hyden v. New Mexico Human Services Dept.*, 2000-NMCA-002, Vol. 39, No. 3, SBB 35, 1999 WL 1289127 (Ct. App. Nos. 20,508, 20,518, 20,548, 1999), the timely filing of a Petition for a Writ of Certiorari is a mandatory precondition to review by this Court, except in very narrowly defined circumstances. In that case, this Court

addressed the mandatory precondition aspect of the filing of a Petition for Writ of Certiorari pursuant to the provisions of Rule 12-505 NMRA and NMSA 1978 §39-3-1.1, as the rule and statute applied to the three cases which were consolidated for review.

Addressing first the constitutionality of the 1998 legislative enactments (§39-3.1-1) and Rule 12-505 NMRA, this Court concluded that the *Hyden* cases were not "pending" within the meaning of Article IV, Section 34 of the New Mexico Constitution because the final orders of the district courts which were on review in *Hyden* were not entered in those courts until after the effective date of the statute and rule. Likewise, in this case, the district court's decision issued after the effective dates of the amendments to the rule and statute, and application of the rule and statute to the facts of this case would not implicate the constitutional provisions.

Appellants seem to assert, without citation to authority, that they should have the right to direct appeal to the Supreme Court filed within 30 days after the entry of the district court's order, because the statute in effect at the time they appealed to the district court, that right was in effect. *See, Appellants' Motion to Accept Writ of Certiorari as Timely Filed, page 3, ¶3.* The *Hyden* analysis disposes of that argument. The statute and rule in effect at the time the district court entered its final order changed the procedure, and eliminated such direct appeals. Appellants did not cite *Hyden* even though this Court issued its decision in *Hyden* well before Appellants filed the Petition for Writ of Certiorari. Indeed, the *Hyden* opinion was issued and available on line before the district court entered its order affirming the action of the NMOCC in

this case.

The second issue addressed by this Court in *Hyden* was whether the late filing of a Petition for Writ of Certiorari may be excused. The Court held that the late filing may be excused in certain limited circumstances which are not applicable to this case. In *Hyden,* this Court cited the Supreme Court's decision in *Govich v. North American System, Inc.,* 112 N.M. 226, 814 P.2d 156 (1990), which held that the time and place of filing requirements for a notice of appeal were more appropriately termed "mandatory precondition[s] to the exercise of jurisdiction" which could be excused in the exercise of an appellate court's discretion. In *Trujillo v. Serrano*, 117 N.M. 273, 871 P.2d 94 (1991), the Supreme Court excused a late filing of a notice of appeal when a magistrate judge had told the parties that no decision would be rendered until the parties were recalled to court, and the magistrate entered a decision without notice to the parties. The appellant therein received notice of the decision after the time for filing the notice of appeal had lapsed. In those circumstances, the court stated that, "[o]nly the most unusual circumstances beyond the control of the parties - such as error on the part of the court - will warrant overlooking procedural defects" such as the untimely filing of a notice of appeal. ¶ 18, 117 N.M. at 278, 871 P.2d at 374.

In *Hyden*, this Court relied on the two cited cases to conclude that "unusual circumstances" in the cases before it warranted the exercise of the Court's discretion to permit review of the matters on the merits. This Court also cited *Chaves v. U-Haul*, 1997-NMSC-051,

¶ 26, 124 N.M. 165, 947 P.2d 122, to the effect that the discretion to hear an untimely appeal should not be exercised where there is no court-caused delay or other unusual circumstances, and where the notice of appeal is filed 30 days late.

The unusual circumstances which were present in *Hyden* to excuse the late filings of notices of appeals (rather than Petitions for Writs of Certiorari) were described as the "procedural morass" surrounding the changes in the statute and rules governing such appeals in 1998 and early 1999. While the statute was enacted in 1998, it provided that the certiorari procedures provided by the statute would be governed by rules promulgated by the Supreme Court, and prior to February 25, 1999, a person looking for the rule would not have found it at all. On that date, the rule was adopted and made effective *nunc pro tunc*, and was published in the New Mexico Bar Bulletin. Thereafter, until the Michie supplements were published, "at which time anyone researching the statutes and rules should have been able to easily find Rule 12-505," the only place the rule could be found was in the back of the afore-mentioned Bar Bulletin and the Advance Annotation and Rules Service. Id. ¶17.

The attorneys involved in the *Hyden* appeals stated that they did not know where their Advance Service was, and they did not routinely research it for every procedure for every case. This Court found that the failure to timely file a Petition for Writ of Certiorari should be excused because the cases posed circumstances of an unusual nature due to the confusion surrounding the enactment and publication of Rule 12-505 NMRA.

In this case, the final order of the district court was entered December 17, 1999, well after the final quarterly Michie publication of a CD-ROM, and after the last publication of supplements to the statutes and rules. Unlike *Hyden*, Appellants do not contend that did not have notice. Rather they make a somewhat feeble and irrelevant assertion that their case was commenced under the old statute and rules. This Court specifically rejected those grounds as constituting a valid justification for delay in filing a Petition For Writ of Certiorari in its decision in *Hyden.*

Appellants provide no excuse or justification for the late filing. They do not assert that the publication of the rule change *nunc pro tunc* was misleading or confusing to them. It is evident that they were aware of the rule when they filed the Petition for Writ of Certiorari five days late, because their Motion to Accept Petition for Writ of Certiorari as Timely Filed implicitly acknowledges that it was filed late. The time limits are located in the provisions Rule 12-505 NMRA, and Appellants were necessarily aware of them when they filed their Motion. Rather than providing a justification for the late filing, Appellants simply assert that under the former procedure, they would have had a right to a direct appeal to the Supreme Court, and 30 days within which to file such an appeal, and that therefore, Mitchell would not be prejudiced by the late filing. Appellants do not state why they filed the Petition late. Clearly, they were on notice of the promulgation of the rule, as well as the promulgation of NMSA 1978 §39-3-1.1. They do not assert that they received the Judgment from the district court after the

time for filing the Petition had lapsed. They do not cite any court-caused delay or other unusual circumstances justifying the late filing.

Mitchell respectfully urges that the *Hyden* decision must not extend so far as to excuse the late filing of a Petition for Writ of Certiorari when Appellants have established no cause whatsoever for their failure to follow the rules as to the mandatory precondition to review by this Court. Mitchell further respectfully suggests that *Hyden* must be limited to those Petitions that were filed in the Court of Appeals prior to the publication of the Michie supplements containing the new Rule 12-505 (a situation not present in this case), and prior to the issuance of this Court's decision in *Hyden.* In this case, Appellants have presented none of the circumstances or facts to justify a late filing of a Petition for Writ of Certiorari which were present in *Hyden.* To extend *Hyden* to accept the late Petition in this case would be tantamount to finding that a party may file a late Petition for no reason other than that the law which was formerly applicable would have given more time for filing. Mitchell respectfully asserts that the Petition must be dismissed.

Mr. Stratton, attorney for Appellants, indicated that he intended to oppose the this Motion to Dismiss, and the NMOCC does not object to this Motion to Dismiss.

WHEREFORE, Appellee Mitchell Energy Corporation respectfully requests that this Court enter its order vacating the granting of Appellants' Motion to Accept the Petition for Writ

of Certiorari as Timely Filed, and to further enter its order dismissing the Petition for Writ of Certiorari as untimely filed.

Respectfully submitted this 28th day of January, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 28th day of January, 2000, to the following counsel of record:

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James M. Hudson

MITCHELL\MotionDismiss

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H.CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORP., a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,

Plaintiffs-Appellants,

vs. **No. 21020**

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, and MITCHELL ENERGY CORPORATION,

Defendants-Appellees.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The issue in this case is simply whether the Plaintiffs had a property interest that entitled them to notice of a hearing before the New Mexico Oil Conservation Division ("OCD") in 1993. Three years after the 1993 hearing, the Plaintiffs asked the OCD to reopen the 1993 case because the Plaintiffs claimed they were entitled to notice and did not receive it. The OCD held a hearing on the issue and determined that the Plaintiffs did not have such an interest. The Plaintiffs appealed that decision to the Oil Conservation Commission (Commission) that also held a hearing on the issue and determined Plaintiffs did not have an interest that entitled them to notice. The Plaintiffs appealed to the District Court. After considering the parties' briefs, oral argument and the whole record

of the administrative proceedings, the District Court affirmed the Commission's decision that the Plaintiffs did not have an interest that entitled them to notice of the 1993 OCD hearing.

SUMMARY OF FACTS

On December 8, 1992, Mitchell Energy Corporation ("Mitchell") filed an application for compulsory pooling and unorthodox gas well location with the OCD. On January 21, 1993, a hearing on the application was held by an OCD hearing examiner. The application was opposed by Strata Production Company ("Strata"). Strata appeared and presented evidence at the 1993 hearing.

After the hearing the OCD issued a pooling order that included a 200% penalty for those interest owners who chose not to pay the cost of the well. Strata chose not to pay its share of the well cost and suffered the penalty when the well proved to be successful. Three years later the Plaintiffs, investors in Strata, sought to have the OCD order with the penalty set aside as to them to avoid the penalty; as the basis for the relief sought, the Plaintiffs claimed they were entitled to notice of the 1993 OCD hearing.

The District Court Decision in not in conflict with Supreme Court or Court of Appeals Opinions

The District Court concluded that the Plaintiffs had no written documentation of a real property interest that would entitle them to notice as required by *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). The District Court also concluded that at the relevant time the Plaintiffs were, if anything, simply investors in the Strata enterprise so that notice to Strata was notice to Plaintiffs. *See,* Court's Decision, Exhibit B to the Petition for Writ of Certiorari, page 7.

Strata received notice of the 1993 hearing. Strata appeared and presented evidence and argument at the 1993 hearing. Proper notice of the 1993 hearing was given to Strata, owner of the legal interest of the leases in 1993.

A. The Plaintiffs Had No Written Documentation of a Real Property Interest

What property interest did the Plaintiffs have at the time the 1993 Hearing? The Plaintiffs had the burden of proving they had a cognizable property interest entitled to notice to the Commission and to the District Court. They failed to present evidence that proved such an interest.

The evidence presented to the Commission by affidavits from the individual plaintiffs was that each plaintiff paid an amount of money to Strata. The affidavits state the date and the amount paid to Strata. Each plaintiff claims to have acquired his interest in the leases in either 1989 or 1990. However, there was no evidence of any written documentation of a transfer or conveyance of any kind of an interest from Strata to the individual plaintiffs until Strata made written transfers in November 1995, almost three years after the 1993 Hearing.[1] Apparently, the Plaintiffs paid Strata in 1989 and 1990 and received no written documentation regarding their interests in the leases until 1995; the 1995 conveyances were recorded with the county clerk in November 1995.

No evidence was introduced by the Plaintiffs of any conveyance of an interest in the leases from Strata to the individual plaintiffs until the transfer in 1995, more than two years after the 1993 Hearing. All that the Plaintiffs had in the interim was a right of

---

[1] In *Strata v. Mercury*, 121 N.M. 622, 916 P.2d 822 (1996), a similar situation existed in that Strata had investors in a farmout agreement, but there was no evidence in the record that Strata had assigned any of its interest in the agreement to its investors. Rather, Strata and its investors executed a separate contract that governed the rights and obligations between Strata and its investors.

action against Strata, because Strata chose not to pay the well costs thereby suffering the 200% penalty.

An affidavit in the record executed by Murphy, Strata's president, states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove at Paragraph 5, Strata retained all of the record title interest subject to the beneficial interest of the parties as described at Exhibit A hereto." Murphy admits in this statement that Strata alone had legal title to the lease after the Plaintiffs bought into the Strata enterprise. Murphy characterized the Plaintiffs' interests at that time as merely a "beneficial interest." Additionally, Exhibit B to the Affidavit on its first page contains the following statements by Strata: "*Strata owns 100% of the record title interest and leasehold operating rights." "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." These statements appear on a document executed by Murphy as president of Strata on November 7, 1995. Plaintiffs' beneficial interest did not entitle them to notice any more than a beneficiary of a trust is entitled to notice of actions affecting property owned by the trust. *See Back Acres Pure Trust v. Fahnlander,* 443 N.W. 2d 604 (1989) (as a general rule, the trustee is the proper person to sue or be sued on behalf of the trust); *In re Estate of Viola,* 482 N.E.2d 29 (1985) (title in real property cannot remain in abeyance; it must be vested in someone, since public policy favors certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownerships which may engender needless litigation)

B. Plaintiffs Were Investors in the Strata Enterprise

Murphy testified that he told Mitchell's landman Smith on October 26, 1992, that Strata had other partners. 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." Murphy also testified that the entities identified in a January 13, 1993 letter were long-term partners of Strata. 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." Murphy also testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease."

The practice described by Murphy provided benefits to both Strata and its investors, *i.e.*, the Plaintiffs. The Plaintiffs enjoyed the benefits of not being the title holders, *e.g.*, not having to record the individual assignments, not having to be available for negotiations, not having to make elections to participate; but at the same time, they claim as well the benefits of record title holders such as the right to notice. They cannot have both; they are either interest owners entitled to notice or not. In this case, the evidence is that the Plaintiffs were not property interest owners entitled to notice of the 1993 hearing. Rather, the Plaintiffs' interests are more like those of a shareholder in a corporation. The corporation is the legal entity entitled to notice of actions affecting

property owned by the corporation, not the individual shareholders, *i.e.*, investors. *See* NMSA 1978, § 53-11-14.

The Commission noted the recordation statute, NMSA 1978, § 70-1-1 (1927), not as a basis for denying the Plaintiffs notice as is argued by the Plaintiffs. The Commission noted the recordation statute, because the statute is premised on there being something tangible to record, *e.g.* a lease, a deed, an assignment. From a review of all the evidence presented to the Commission, it is apparent that there was no tangible document that the individual Plaintiffs could have recorded in 1993. At the earliest, the Plaintiffs could have recorded the conveyance by Strata in 1995, more than two years after the hearing.

Why did the Plaintiffs wait for almost three years from the date the 1993 Hearing was held to bring their claims? Would the claims have been brought now if the well had not produced? The Plaintiffs want the penalty imposed on Strata for electing not to participate in a successful well removed so that their interests as investors in Strata are more rewarding. The case is an attempt to avoid the penalty imposed on Strata for choosing not to pay its share of the costs of the well.

The Plaintiffs' argument attempts to convince this Court that the Plaintiffs are in the position of the plaintiff in *Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991)*. This is not the case. Mrs. Uhden was the owner in fee of an oil and gas lease who leased it to Amoco but retained a royalty interest. There was no dispute that Mrs. Uhden had a real property interest. The Plaintiffs in the case before this Court simply had no cognizable real property interest at the time of the1993 hearing, and therefore the Plaintiffs were not entitled to notice of the 1993 hearing.

CONCLUSION

The Commission requests that the Court deny the Plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the New Mexico Oil Conservation Commission's **Response to Petition for Writ of Certiorari** was mailed to all counsel of record on the 27th day of January, 2000.

Marilyn S. Hebert

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H.CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORP., a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,

Plaintiffs-Appellants,

vs. **No. 21020**

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, and MITCHELL ENERGY CORPORATION,

Defendants-Appellees.

MOTION TO RECONSIDER GRANT OF ACCEPTANCE OF PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS APPEAL

The Appellee New Mexico Oil Conservation Commission ("Commission"), respectfully asks the Court of Appeals to reconsider its acceptance of the Appellants' Petition for Writ of Certiorari as timely filed and moves the Court of Appeals to dismiss the Petition for Writ of Certiorari for failure to comply with the Rules of Appellate Procedure. In support of this motion, the Commission states:

1. The Appellant appealed the Oil Conservation Commission's order dated

March 19, 1997, to the district court. The appeal to the district court was pursuant to Rule 1-074 NMRA and NMSA 1978, § 70-2-25.

2. The district court affirmed the Commission's order by Judgment filed on December 17, 1999, a copy of the Judgment is attached to Appellants' Petition for Writ of Certiorari.

3. Appeals from decisions of the district courts reviewing administrative appeals are made pursuant to Rule 12-505 NMRA. Rule 12-505.C requires a petition for a writ of certiorari to be filed with the clerk of the Court of Appeals within twenty (20) days after entry of the final action by the district court. The three (3) day mailing period set forth in Rule 12-308 does not apply.

4. Appellants were required to file a petition for writ of certiorari in the Court of Appeals by January 6, 2000. Appellants did not file their Petition for Writ of Certiorari until January 11, 2000, five days after the allowed time period expired.

5. Timely filing of a petition for writ of certiorari is a mandatory precondition, and Rule 12-505 NMRA has been in effect since September 1, 1998. The Appellants have not shown good cause for their failure to comply with the Rules of Appellate Procedure, and the appeal should be dismissed.

6. The Commission contacted Harold D. Stratton, attorney for the Appellants, and Mr. Stratton intends to oppose this motion. The Commission contacted W. Thomas Kellahin, attorney for Appellee Mitchell Energy Corp., and Mr. Kellahin concurs with this motion.

Wherefore, the Appellee Oil Conservation Commission asks this Court to reconsider the acceptance of the Petition for Writ of Certiorari and dismiss this appeal.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Reconsider Grant of Acceptance of Petition for Writ of Certiorari and Motion to Dismiss Appeal was mailed to the following counsel of record on January 21st, 2000:

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Marilyn S. Hebert
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Commission

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini** **Ct. App. No.** 21020
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

MOTION TO ACCEPT WRIT OF CERTIORARI AS TIMELY FILED

Granted.
1-12-00

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ATTORNEYS FOR PLAINTIFFS-APPELLANTS

COPY

COURT OF APPEALS OF NEW MEXICO
FILED
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Patricia R. Wallace

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini**
		Ct. App. No. __________
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

PETITION FOR WRIT OF CERTIORARI

Harold D. Stratton, Jr.
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Resp. due
1/31/00

Pts did not have a prop. int. that entitled them to notice
Set forth prop. int - from [illegible]

I. DATE OF ENTRY OF JUDGMENT

The final Judgment in this matter was entered on December 17, 1999. A copy of the Final Judgment and Opinion of the Court are attached hereto as Exhibits "A" and "B," respectively.

II. APPELLATE ISSUES

Attached hereto as Exhibit "C" is a copy of Appellants' Statement of Appellate Issues filed in the District Court. Attached hereto as Exhibit "D" is a copy of the Appellee New Mexico Oil Conservation Commission's Statement of Appellate Issues filed in the District Court. Attached hereto as Exhibit "E" is a copy of Appellee Mitchell Energy Corporation's Response to Appellants' Statement of Appellate Issues.

III. QUESTIONS PRESENTED FOR REVIEW BY COURT OF APPEALS

1. Whether the Court properly found that the Commission was correct in finding that all proper parties to the Application of Defendant Mitchell Energy Corporation ("Mitchell") received proper notice and participated in the hearing conducted by the New Mexico Oil Conservation Commission ("Commission").

2. Whether the Court correctly found that Mitchell did not have actual notice of Plaintiffs' interest such that Plaintiffs can receive the benefit of the New Mexico Supreme Court's decision in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1995).

3. Whether the Court was correct in finding that Plaintiffs are bound by and took their

interests in the lease subject to the interest of Strata Production Company ("Strata").

4. Whether the Court was correct in finding that at all times material, Plaintiffs were investors in the Strata enterprise and notice to Strata was notice to them.

5. Whether the Court was correct in finding that it was Strata's responsibility to provide notice to Plaintiffs in this matter.

6. Whether the Court was correct in finding that Plaintiffs are estopped to deny a partnership with Strata and are bound by the notice given to Strata.

7. Whether the Court was correct in finding that Strata adequately represented the interests held by Plaintiffs in this case.

8. Whether the Court was correct in finding that at all times material thereto the Plaintiffs did not have a property interest that entitled them to notice by Mitchell or the Commission of the Application for compulsory pooling.

9. Whether the Court was correct in finding that Plaintiffs had no written documentation of a real property interest that would entitle them to notice as declared by the law in the holding of the Supreme Court of New Mexico in the *Uhden* case.

10. Whether the Court was correct in finding that there was no evidence of record to indicate that the Commission('s):

(A) acted fraudulently, arbitrarily or capriciously in conducting the hearings and rendering its decision in this case;

(B) final decision is not supported by evidence; or

(C) did not act in accordance with the law.

11. Whether the Court was correct in finding that there was no evidence in the record to support Plaintiffs' contention that they were denied due process of law.

12. Whether the Court was correct in finding that the Commission's Order No. R-10672-A in Case No. 11510 should be affirmed.

IV. THE FACTS MATERIAL TO QUESTIONS PRESENTED

On December 8, 1992, Mitchell filed an application with the New Mexico Oil Conservation Division ("Division") requesting an order pooling all mineral interests from the top of the Wolf Camp formation to the base of the Pennsylvanian formation underlying the western 1/2 of Sec. 28, Township 20 S, Range 33 E, N.M.P.M. ("Application"). Prior to filing its Application, Mitchell entered into negotiations with Strata, a working interest owner. During the course of these negotiations, Strata's president, Mark Murphy, informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved who had an interest in the subject property. On January 13, 1993, Mr. Murphy, sent, via facsimile, a list of all working interest owners and their interests in the subject property to Mr. Smith. Of the working interest owners, only Strata was notified of the hearing on Mitchell's Application. A hearing was subsequently held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. Mitchell did not spud the subject well until May 18, 1993.

Despite the fact that Mitchell was aware of Plaintiffs' property interest, Mitchell and the

Commission willfully failed to notify Plaintiffs of the hearing of January 21, 1993, even though Mitchell had Plaintiffs' addresses and knowledge of their interests. Plaintiffs' property interests have been affected as they now must pay the 200% penalty provided in Order No. R-9845 rather than participate in the subject well as working interest owners.

On January 29, 1996, Plaintiffs filed a motion with the Division to reopen Case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. Plaintiffs' motion to reopen the case was granted on October 2, 1996 by order of the Division. On October 30, 1996, Mitchell requested a *de novo* hearing which was granted by the Commission. The *de novo* hearing was held on January 16, 1997 before the Commission. Such hearing resulted in Order No. R-10672-A. The Commission concluded that at the time that Mitchell filed its Application in 1992, the Plaintiffs in this case were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and OCD Rule 1207.

Pursuant to NMSA 1978, § 70-2-25, Plaintiffs filed their petition for review of the Commission's decision in the District Court for the Fifth Judicial District of Lea County. On December 17, 1999, the Court rendered a final judgment upholding the actions of the Commission.

On November 22, 1999, the Court entered an opinion, a copy of which is attached hereto as Exhibit "B." The Court found that Plaintiffs did not have a protectable interest in real property entitling them to the due process protections afforded by Art. 2, Sec. 18 of the New Mexico Constitution, U.S. Const. amend. XIV or *Uhden v. New Mexico Oil Conservation Commission*, 112

N.M. 528, 817 P.2d 721 (1995). The Court also found that Mitchell did not have actual knowledge of Plaintiffs' property interests.

V. BASIS FOR THE GRANTING OF WRIT OF CERTIORARI

A. Citation to Supreme Court and Court of Appeals Opinions with which the finding of the District Court is in conflict:

Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 530, 817 P.2d 721, 723 (1995) (In New Mexico a grant of or reservation of underlying oil and gas, or royalty rights provided in a mineral lease is a grant or reservation of real property. A mineral royalty retained or reserved in a conveyance of land is itself real property).

(If a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.) 112 N.M. at 531, 817 P.2d at 724.

Johnson v. New Mexico Oil Conservation Commission, 1999-NMSC-021, 127 N.M. 120, 125-126 (under Rule 1207.A(11), holders were entitled to actual notice of a spacing application. Because neither Burlington nor the Commission provided holders with actual notice of the proceedings on the spacing application, holders were denied the reasonable notice that the OGA in its implementing regulations required).

First National Bank of Belen v. Luce, 87 N.M. 94, 529 P.2d 760 (1974) (. . . the proposition that a person who purchased real estate in possession of another is, in equity, bound to inquire of such possessor what right he has in the real estate. If he fails to make such inquiry, which ordinary faith requires of him, equity charges him with notice of all facts that such inquiry would disclose).

Cano v. Lovato, 105 N.M. 522, 529, 734 P.2d 762, 769 (Ct. App. 1986), *cert. denied*, 104 N.M. 246, 719 P.2d 1267, *cert. quashed*, 105 N.M. 438, 733 P.2d 1321 (1986). (. . . the recording of a deed or such other document is not needed to transfer title to property).

AA Oilfield Service v. New Mexico State Corporation Commission, 118 N.M. 273, 278, 881 P.2d 18, 23 (1994) (if the Corporation Commission enters an order without providing notice and hearing as required, such orders are void and subject to collateral attack).

B. Citations to Statutory Provisions and Administrative Ordinances with which the Final Order of the District Court is in Conflict.

NMSA 1978, § 70-2-17 (notice must be afforded to all owner or owners of each tract or interest in pooling proceedings before the Oil Conservation Division)

19 NMAC 15.N.1207.A.1 (actual notice shall be given to each known individual owning an uncommitted leasehold interest or unleased and uncommitted mineral interest, or royalty interest not subject to a pooling or unitization clause in the lands affected by such avocation which interest must be committed and has not been voluntarily committed to the area proposed to be pooled or unitized).

C. Significant Questions of Law Under the Constitutions of New Mexico and the United States are Involved in This Matter.

The significant question of law presented under Art. 2, Sec. 18 of the New Mexico Constitution and the U.S. Const. amend. XIV is whether Plaintiffs have been denied due process of law by Defendants failing to provide actual notice of the hearing held on January 21, 1993.

D. Issues of Substantial Public Interest that Should Be Determined by the Court of Appeals.

Whether parties who have interests in real property are required to be given actual notice of administrative hearings when their property interests are known, regardless of the form such interests take or the manner in which they are acquired.

VI. ARGUMENT AND AUTHORITIES SUPPORTING THIS REQUEST FOR WRIT OF CERTIORARI

Plaintiffs in this matter have set forth twelve specific issues in their Statement of Appellate Issues filed in the District Court on August 21, 1997. Exhibit "C" at 1-3. The issue presented in Plaintiffs' Writ of Certiorari is simple and straightforward: were Plaintiffs entitled to notice of Mitchell's application to the Division requesting an order pooling all mineral interests subject of the application. Exhibit "C" at 2, ¶¶ 3, 4, 6. NMSA 1978, § 70-2-17 states that "all orders affecting such pooling shall be made after notice and hearing and shall be upon such terms and conditions that are just and reasonable and ***will afford to the owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas...***" (emphasis added). Likewise, 19 NMAC 15.N.1207.A.1 requires that in applications for compulsory pooling under NMSA 1978, § 70-2-17, ***actual notice*** be given to each individual owning a leasehold interest not subject to a pooling or unitization clause. Exhibit "C" at 10. The New Mexico Supreme Court has previously addressed the issue of notice in the case of *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1995). In this matter, the Supreme Court has stated:

> If a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions require the party who filed the spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.

Uhden, 112 N.M. at 531; Exhibit "C" at 2, ¶ 3; *see also Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, 127 N.M. at 125-126. If a party is not provided with the proper notice, the Division's orders are *void* as to that party. *Id.*

Plaintiffs had a protected property interest as a result of their interest in the federal oil and gas lease. Exhibit "C" at 8. Mitchell was aware of the names, addresses and even the nature and extent of each of the Plaintiffs' interest prior to the 1993 hearing at issue. Exhibit "C" at 3, 7. Likewise, the Division was aware of this fact, however chose to proceed in the absence of Plaintiffs. Such action constituted a deprivation of Plaintiffs' property without due process of law.

VII. PRAYER FOR RELIEF

Plaintiffs request that the District Court decision be reversed and that the Court enter an order vacating Orders No. R-9845 and R-10672-A and hold that Order No. R-9845 is void, invalid and unenforceable as to Plaintiffs and that this case be remanded to the District Court for further proceedings.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____

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Brian J. Pezzillo
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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 11th day of January, 2000:

Via Hand Delivery

Patricia C. Rivera Wallace
Attorney Clerk
Supreme Court Building
P. O. Box 2008
Santa Fe, New Mexico 87504-2008

Via Regular Mail

Honorable R. W. Gallini
District Judge
Fifth Judicial District Court
100 N. Main, Box 6-C
Lovington, New Mexico 88260

Official Court Reporter
to Honorable R. W. Gallini
District Judge
Fifth Judicial District Court
100 N. Main, Box 6-C
Lovington, New Mexico 88260

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Santa Fe, New Mexico 87504-2265

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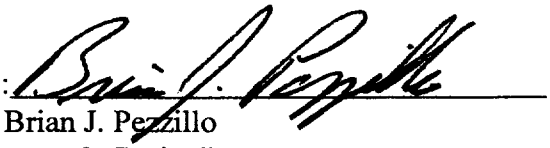
Lovington, New Mexico 88260

By: 
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Attorneys for Plaintiffs-Appellants

FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,	§	
Appellants,	§	CV 97-159G
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Appellees.	§	

JUDGMENT

THIS MATTER CAME BEFORE THE COURT on the Plaintiffs' Petition For Review of The New Mexico Oil Conservation Commission's decision in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A, pursuant to NMSA 1978, §70-2-25 (1995). Having reviewed the record of the proceedings before the New Mexico Oil Conservation Commission and the evidence presented in those proceedings on file herein, the

EXHIBIT
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pleadings and briefs of the parties filed herein, and the arguments of counsel, and having considered the applicable law, the Court has previously entered and filed the Court's Decision setting forth it findings and conclusion. Based on the Court's Decision, this Judgment is entered in favor of the Defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that The New Mexico Oil Conservation Commission's Order No. R-10672-A in Case No. 11510 is, in all respects, affirmed.

Dated this _____ day of December, 1999.

R. W. Gallini

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED AND APPROVED BY:

KELLAHIN AND KELLAHIN

By: By: Approved telephonically on December 13, 1999
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HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

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ATTORNEYS FOR MITCHELL ENERGY CORPORATION

Approved telephonically on December 14, 1999
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FAX: (505) 827-8177
ATTORNEY FOR OIL CONSERVATION COMMISSION

APPROVED AS TO FORM:

STRATTON & CAVIN, P.A.

By: Approved telephonically on December 13, 1999
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ATTORNEYS FOR PLAINTIFFS

MITCHELL\JUDGMENT-FIN

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO

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DISTRICT COURT CLERK

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,

Plaintiffs,

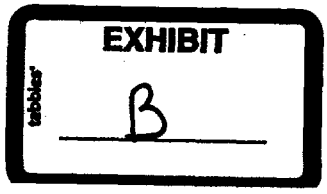
vs. **NO. CV-97-159-G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

COURT'S DECISION

THIS MATTER HAVING COME BEFORE THE COURT on Plaintiffs' petition for review of The New Mexico Oil Conservation Commission's decisions in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A. This review was conducted pursuant to NMSA 1978, §70-2-25 (1995 Repl.). This Court entered its Order Establishing Briefing Schedule on September 24, 1997 and all parties complied with the Court's Order. Oral argument was presented to the Court on May 4, 1998 and the Court took its decision



under advisement in order to study the briefs, review the applicable law and oral argument presented by counsel.

The Court having studied all briefs, the applicable law, and considering oral argument of counsel is now prepared to render its decision in this matter. Section 70-2-25 NMSA 1978 refers the Court to §39-3-1.1D NMSA 1978, which provides: "In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:

(1) the agency acted fraudulently, arbitrarily, or capriciously;

(2) the final decision was not supported by substantial evidence; or

(3) the agency did not act in accordance with law.

PLAINTIFFS' CLAIMS:

The main issue in this case is that the Plaintiffs claim they were working interest and/or overriding royalty interest owners in the S/2 SW/4 of Section 28, Township 20 South, Range 30 East, N.M.P.M., Lea County, New Mexico at the time that Defendant, Mitchell Energy Corporation, who was the operator of the Tomahawk "28" Federal Com No. 1 well, located at the 1980 FWL and 1650 FNL of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, filed its application with Defendant Oil Conservation Commission to pool all mineral interests from the top of the Wolf Camp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, to form a standard 320-acre spacing within said vertical extent, which included but was not necessarily limited to the Undesignated Halfway-Atoka Gas Pool and the Undesignated Salt Lake-Morrow Gas Pool, said unit being dedicated to Mitchell's Tomahawk Well to be drilled at an unorthodox gas well location. Plaintiffs claim they were never

given notice of the filing of the case by Mitchell or the Commission as required by law. Plaintiffs claim they did not learn of the existence of the entry of Order No. R-9845 or the existence of Case No. 10656 until sometime in 1995. Plaintiffs further claim that because they were not notified of the proceedings in Case No. 10656 and the entry of the Order No. R-9845, they were unable to make an election as to whether to participate in the Tomahawk Well in the period allowed by law and regulations and under the time frame provided in the Order which had expired by the time they became aware of its existence. The Plaintiffs claim that this failure to be notified and respond subjected them to a 200% risk factor penalty set forth in the Compulsory Pooling Order R-9845. Plaintiffs claim they were denied due process of law. Therefore, the agency did not act in accordance with the law. Therefore, the decisions and orders of the Oil Conservation Commission should be set aside and found to be void, invalid and unenforceable as to Plaintiffs.

DEFENDANTS' CLAIMS:

Defendants claim that Strata Production Company appeared at the hearing in opposition to the granting of Defendant Mitchell's application and claimed that Mitchell had failed to provide notification to Strata's "undisclosed partners" and it was Mitchell's duty to request Strata to disclose the names and addresses and then to provide those parties with an opportunity to join or compulsory pool each party. Defendants further claim that at all times during negotiations and at the time the application was filed and notice was given, Strata was the record title owner of the mineral interests in question and held 100% of both record title and operating rights title, which included the so-called "undisclosed partners" whose interests, if any at the time, did not appear of record. Defendants further claim that on November 7, 1995, some six years after the Strata partners claimed to have acquired an interest in the subject lease, more than 31 months after the entry of the compulsory

pooling order in this case, and after Mitchell had drilled the well, Strata finally signed written instruments conveying interests to its undisclosed partners which were then recorded in Lea County on November 8, 1995. Defendants further claim that notice to Strata was notice to the "undisclosed partners," the Plaintiffs herein, and Strata was obligated to tell them about the application and the hearing. Defendants contend that the Commission in entering its orders and decisions did not act fraudulently, arbitrarily or capriciously; that the final decision of the Commission was supported by substantial evidence and that the Commission acted in accordance with law. Therefore, the Plaintiffs' appeal should be dismissed with prejudice.

STANDARD OF REVIEW:

In reviewing an administrative order, this Court must determine whether, based on the record as a whole, the Commission's order is substantially supported by the evidence and by the applicable law. In reviewing the whole record, the Court must view the evidence in a light most favorable to upholding the agency determination. The Court must uphold the agency decision if the evidence in the record demonstrates the reasonableness of the decision.

DECISION OF THE COURT:

As a matter of Law, this Court finds and concludes as follows:

1. The Commission correctly found that all proper parties to Mitchell's application received proper notice and participated in the hearings conducted by the Oil Conservation Commission.

2. Mitchell did not have actual notice of Plaintiffs' interests such that Plaintiffs can receive the benefit of the New Mexico Supreme Court's decision in ***Uhden v. New Mexico Oil Conservation Commission*** because (a) ***Uhden*** is not applicable to the facts of this case. (b) Defendant Mitchell did not have actual notice of any interest purportedly held by Plaintiffs.

3. Plaintiffs are bound by and took their interests in the lease subject to the interest of Strata Production Company.

4. Plaintiffs are estopped to deny the partnership with Strata, and are bound by the notice given to Strata.

5. Strata Production Company adequately represented the interests now held by the Plaintiffs at the hearings.

6. Plaintiffs cannot use the administrative process in order to seek risk-free benefits after they have determined the subject well reached its payout.

7. At all times material thereto, the Plaintiffs did not have a property interest that entitled them to notice by Mitchell or the Commission of the Application for compulsory pooling.

8. The plaintiffs had no written documentation of a real property interest that would entitle them to notice as required by law and the holding of the Supreme Court of New Mexico in the ***Uhden case***.

9. At all times material thereto, the plaintiffs were, if anything, investors in the Strata enterprise and notice to Strata was notice to them. It was Strata's responsibility to provide its investors with the information they needed to protect their investment.

10. There is no evidence in the record to indicate that the New Mexico Oil Conservation Commission('s):

(A) acted fraudulently, arbitrarily or capriciously in conducting the hearings and rendering its decisions in this case;

(B) final decision was not supported by substantial evidence; or

(C) did not act in accordance with law.

11. There is no evidence in the record to support Plaintiffs' contention that they were denied due process of law.

12. The Commission's Order No. R-10672-A in Case No. 11510 should be affirmed.

Counsel for the defendants shall prepare the judgment in accordance with this decision and present to counsel for plaintiffs for review and approval as to form. Upon entry of the Judgment this matter shall be remanded to the New Mexico Oil Conservation Commission for any further proceedings in connection with this matter.

R. W. Gallini

R. W. Gallini, District Judge

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' STATEMENT OF APPELLATE ISSUES

Plaintiffs hereby submit their statement of appellate issues and authorities in support of their appeal from the Oil Conservation Commission:

I. STATEMENT OF THE ISSUES

The Plaintiffs hereby submit the following Statement of Issues to be decided by the Court in this cause:

1. Whether the Oil Conservation Commission ("Commission") failed to find that all of the Plaintiffs' 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 ("Division") hearing in this matter.

2. Whether the Commission erred in failing to find that Mitchell Energy Corporation ("Mitchell") was provided with and received actual notice of the Plaintiffs' interests in the S½ of the SW¼ of Section 28 a number of times prior to the January 21, 1993 hearing in this matter.

3. Whether the Commission erred in failing to find that despite the property interests owned by the Plaintiffs and Mitchell's actual knowledge of such interests, the Plaintiffs were not given 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. Whether the Commission erred in failing to find and conclude that the Plaintiffs were not properly offered an opportunity to be heard at the January 21, 1993 hearing.

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

6. Whether the Commission erred in failing to find that the failure to provide notice of the January 21, 1993 hearing in this case deprived the Plaintiffs 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. Whether 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. Whether the Commission's Finding of Fact No. 10 is supported by the facts of the case.

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

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

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

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

II. SUMMARY OF THE PROCEEDINGS

On December 8, 1992, in connection with its proposal to drill the Mitchell Tomahawk "28" Federal Com No. 1 Well ("Tomahawk Well"), Mitchell filed its application with the Division requesting an order pooling all 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 ("Application"), a copy of which is attached as Exhibit A.[1] Prior to filing the application, Mitchell entered into negotiations with Strata Production Company ("Strata"), a working interest owner in the S/2 SW/4 of Section 28. (R. at Tr. of 1993 Hearing at 28-46, 50-53, 118-128.) During the course of the negotiations, Strata's President, Mark Murphy, continually informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved in the subject property. (R. at Tr. of 1993 Hearing at 29, 34-35, 39, 42, 46, 51-53, 58, 122, 128.) These negotiations were eventually

[1] The Application was omitted from the record submitted to this Court. Filed concurrently herewith is Plaintiffs' unopposed motion to supplement the record with a copy of Mitchell's Application.

unsuccessful. (R. at Mitchell Exhibit No. 16 of 1993 Hearing). On January 13, 1993, prior to the hearing, Strata's President, Mark Murphy, sent, via facsimile, a list of all working interest owners and their interests in the subject property to Mr. Smith of Mitchell Energy. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Of the working interest owners, only Strata was notified of the hearing on Mitchell's application. (R. at 238) A hearing was then held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. (R. at Mitchell Exhibit 1 from 1996 Hearing). Mitchell did not spud the Tomahawk Well until May 18, 1993.

It is clear that prior to the hearing in this matter, Mitchell was aware of all of the Plaintiffs' property interests in the S/2 SW/4 of Section 28. (R. at Branko Exhibit No. 24 of 1996 Hearing). Notwithstanding this knowledge, Mitchell and the Commission willfully failed to notify the Plaintiffs of the hearing on January 21, 1993, even though Mitchell had the Plaintiffs' addresses and knowledge of their interests. *Id.*

On January 29, 1996, Plaintiffs filed a motion with the Division to reopen case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. (R. at 1-75.) Plaintiffs' motion to reopen the case was granted on October 2, 1996 by order of the Division. (R. at 237-243). On October 30, 1996 Mitchell requested a de novo hearing, (R. at 178) which was granted by the Commission. A hearing de novo was held on January 16, 1997 before the Commission. This hearing resulted in Order No. R-10672-A. (R. at 251-259.) Pursuant to such order, the Commission concluded that at the time that Mitchell filed its Application in 1992 the Plaintiffs in this case were not

interest owners entitled to notice pursuant to NMSA 1978, §70-2-17 and OCD Rule 1207. (R. at 259.)

On April 7, 1997, Plaintiffs then filed an Application for Rehearing with the Commission. (R. at 260-263.) Plaintiffs' Application for Rehearing was denied by the Commission pursuant to NMSA 1978, §70-2-25(A) on April 17, 1997. Pursuant to NMSA 1978, §70-2-25 Plaintiffs filed their petition for review of the Commission's decision.

III. ARGUMENT AND AUTHORITIES

At the time of the application and hearing, Plaintiffs owned working interests and/or overriding royalty interests in a part of the property which was the subject of the pooling application of Mitchell. Mitchell was aware of all of the Plaintiffs' interests prior to the hearing and could have acquired knowledge of such interests even earlier with the exercise of some minimal diligence. Plaintiffs' property interests are interests in real property and as such, are protected property rights for purposes of the due process clause of the United States and New Mexico Constitutions. The Division's granting of Mitchell's pooling request is a state action which affects the Plaintiffs' property interests. Plaintiffs have, by reason of such action, been deprived of their legal right as working interest and overriding royalty interest owners to participate in the production of the Tomahawk Well pursuant to their respective interests.[2] Before the Division could take any action affecting the property interests of Plaintiffs, the Plaintiffs must have been provided with constitutionally sufficient notice and a fair opportunity

[2] The Plaintiffs' property interests have been affected as they now must pay the 200% penalty provided in R-9845 rather than participate in the Tomahawk Well as working interest owners.

to be heard. Here, no such notice was given, and therefore, any action taken by the Division without such notice that affects the Plaintiffs' property interest is void as to Plaintiffs.

A. Lack of Notice of the Hearing in this Case Deprived Plaintiffs of Their Property Without Due Process of Law and Contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

This Court need look only to the case of *Uhden v. New Mexico Oil Conservation Commission, et al.*, 112 N.M. 528, 817 P.2d 721 (1991), to determine the merits of Plaintiffs' case. In *Uhden*, Ms. Uhden, was the owner in fee of an oil and gas estate in San Juan County. In 1978, Uhden executed an oil and gas lease in favor of Amoco Production Company ("Amoco"). The lease contained a pooling clause. Pursuant to its rights under the lease, Amoco drilled the Cahn Well which was originally spaced on 160 acres. Based on the size of the initial spacing unit, Uhden initially received a royalty interest equal to 6.25% of production from the Cahn Well. In 1983, Amoco filed an application with the Division seeking an increase in well spacing from 160 acres to 320 acres. The Cahn Well and Uhden's royalty interest thereunder were both affected by the application. Even though Amoco had actual notice of Uhden's mailing address, Amoco provided notice of the application by publication only. In January 1984, the Commission granted temporary approval of Amoco's application, and in February 1986, the Commission granted final and permanent approval, both without notice to Uhden. The net effect to Uhden was a reduced royalty interest equal to 3.125% of production from the Cahn Well. Uhden unsuccessfully sought relief through the Commission, and then appealed to the district court which affirmed the orders of the Commission. Ms. Uhden then appealed to the New Mexico Supreme Court. The New Mexico Supreme Court ruled that Uhden clearly had a

property right in the oil and gas lease which was protected by due process of law. Further, in regard to the notice to which Uhden was entitled, the court held that

> if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.

Id., 112 N.M. at 531, 817 P.2d at 724. As a result of the improper notice given to Ms. Uhden, the Division's orders were "void" as to her. *Id.*

In this case, Plaintiffs have a protected property interest as a result of their interest in the affected property. Mitchell was aware of the names, addresses, and even the nature and extent of each of the movant's interests prior to the hearing. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Notice of the hearing was provided only by publication. Mitchell did not attempt to serve Plaintiffs personally as required by *Uhden.*[3] The hearing resulted in an order by the Division that affected the Plaintiffs' interests by depriving them of the opportunity to participate in the Tomahawk Well. The order entered as a result of the hearing is therefore void as to Plaintiffs.

B. Plaintiffs, as Working Interest and/or Overriding Royalty Interest Owners Under a Federal Oil and Gas Lease, Have Protected Property Interests Under the Due Process Clause.

Each of the Plaintiffs has an interest in a federal oil and gas lease which covers various lands including the S/2 SW/4 of Section 28. These interests were acquired by Plaintiffs well before the Application was filed in this case by Mitchell and well before the hearing held on

[3] In fact, notwithstanding the holding in *Uhden*, the Commission still does not require notice of such proceedings by personal service. *See* OCD Rule 1204 which requires notice by mail.

January 21, 1993. In fact, all of the Plaintiffs acquired their respective interests prior to April 1, 1990. (R. at Branko Exhibits 1-17 of 1996 Hearing.) In *Uhden, supra*, the court held that Uhden had a property right in the oil and gas lease by virtue of her royalty interest. *Id.*, 112 N.M. at 530, 817 P.2d at 723. Amoco argued that due to Uhden's lessor/lessee relationship with Amoco that her property right was somehow diminished. The court was not persuaded by this argument and held that

> [i]n this state a grant or reservation of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this state, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property.

Id., (*citing Duvall v. Stone*, 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citations omitted)).

The Plaintiffs in this case own working interests[4] and/or overriding royalty interests in a federal oil and gas lease. Under New Mexico law, these interests constitute an interest in real property. *See Bolack v. Underwood*, 540 F.2d 816, 820 (10th Cir. 1965), *citing Rock Island Oil and Refining Co., et al. v. Simons, et ux.*, 73 N.M. 142, 386 P.2d 239 (1963). Therefore, the Plaintiffs' interest at issue in this case constitute constitutionally protected property rights. *See Uhden, supra.* As provided in *Uhden*, the Plaintiffs in this case were entitled to personal service of the notice of the Division's hearing, since their whereabouts and identities were known to Mitchell. *See Uhden*, 112 N.M. at 531, 817 P.2d at 724.

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[4] A working interest is an operating interest under an oil and gas lease. *H. Williams and C. Meyers,* Manual of Oil and Gas Terms, 1225 (9th Ed. 1994)

C. Mitchell Was Aware of the Plaintiffs' Interests and Should Have Given Them Notice of the Proceedings as Required By Due Process of Law and *Uhden.*

It is undisputed that Mitchell had actual knowledge of the Plaintiffs' interest in the property. Mitchell received, via facsimile and certified mail, a complete list of the Plaintiffs, their addresses, and a description of their interests in the affected lease. (R. at Branko Exhibit No. 24, 1996 Hearing.) This information was provided to Mitchell on January 13, 1993, prior to the hearing held on January 21, 1993. Further, such information was available to Mitchell, in that, Mitchell could simply have asked for such information anytime prior. Mitchell, however, failed to exercise due diligence, or any diligence, in ascertaining the identities of Plaintiffs even though Mitchell knew they existed. Mitchell therefore purposely kept itself ignorant as to the identity of the Plaintiffs. Such a tactic, however, does not comport with due process and as a result, Plaintiffs' rights have been violated. As previously stated the Tomahawk Well was not spudded until May 18, 1993. Therefore, the hearing which took place on January 21, 1993 could have been continued to allow for personal service of notice to the Plaintiffs, without any inconvenience to Mitchell. Mitchell, however, proceeded to the January hearing without providing notice to the Plaintiffs despite the fact that it had actual knowledge as to the Plaintiffs' identity and whereabouts. (R. at Branko Exhibit 24, 1996 Hearing); (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). This lack of notice makes the order that was issued pursuant to the Division hearing, *void* as to Plaintiffs.

D. The Commission's Conclusion That Branko Was Not An Interest Owner Entitled to Notice is Clearly Erroneous.

The Commission, in upholding the Division orders, found in its Order of January 16, 1997 that Plaintiffs were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and

OCD Rule 1207. (R. at 259.) Such a finding, however, is not in accordance with New Mexico law. The Commission appears to base its conclusion that Plaintiffs were not interest owners on the fact that Plaintiffs' interests in the lease were not *recorded* prior to November 7, 1995. *Id.* The New Mexico pooling statute, NMSA 1978, § 70-2-17(C) (1995 Repl.), is not concerned only with interest owners who have recorded their interests in county real estate records. The filing of interests in county real estate records is done solely for the purpose of providing one type of notice, constructive notice, to subsequent third-party purchasers. Nowhere in the New Mexico pooling statute does the statute refer to recorded interests nor require the recordation of such interests. Further, the Division rules do not require that notice be afforded only to those who have recorded interests. Division Rule 1207(A) provides that "[a]ctual notice shall be given to each *known* individual" (emphasis added). The Division rule specifically requires notice to be provided to each *known individual* who has an interest in the outcome of the proceedings. As has been stated, Mitchell was made aware of the interests of the Plaintiffs prior to the 1993 hearing. The basis asserted by the Commission in finding that Plaintiffs had no protectable interest further fails the test provided by the New Mexico Supreme Court as articulated in *Uhden*. The New Mexico Supreme Court has stated that

> *If a party's identity and whereabouts are known or could be ascertained through due diligence,* the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by *personal service to such parties* whose property rights may be affected as a result.

Uhden, 112 N.M. at 531, 817 P.2d at 724 (emphasis added). Again, the test is not whether the interest has been recorded with the county clerk, as suggested by the Commission, but rather,

whether the party's identity and whereabouts are known or could be ascertained through due diligence.

The holding in *Uhden* is in accordance with real property law in New Mexico. The New Mexico Supreme Court stated that "an unacknowledged [and unrecorded] deed is binding between the parties thereto, their heirs and representatives, *and persons having actual notice of the instrument.*" *Baker v. Baker*, 90 N.M. 38, 40, 559 P.2d 415, 417 (1977) (citations omitted) (emphasis added). Although the Commission contends that Plaintiffs did not have an interest at the time Mitchell filed the 1992 Application and at the time of the 1993 hearing, such a finding is clearly erroneous. Mitchell had actual knowledge of the Plaintiffs' interests no later than January 13, 1993. (R. at Branko Exhibit 24, 1996 Hearing.) Further, by its own admission Mitchell had knowledge that there were other interest owners prior to January 1993. (R. at Tr. of 1996 Hearing at 19-20, 61-62).

Mitchell had knowledge of the existence of the Plaintiffs' interests as early as October of 1992, and had a duty at that time under *Uhden* to use due diligence to ascertain the identity and whereabouts of the Plaintiffs. It was at this time that Mr. Murphy informed Steve Smith of the existence of Plaintiffs. (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). When questioned as to why he did not attempt to discover the identities of the Plaintiffs, Mr. Smith responded that he did not make any attempts "because." (R. at Tr. of May 2, 1996 Hearing at 66.) Mitchell had merely to inquire of Strata as to the interests owned by, identity and whereabouts of the Plaintiffs. When this inquiry was eventually made in January of 1993, Mitchell was immediately given all information regarding the Plaintiffs from Mr. Murphy of Strata prior to the hearing. (R. at Branko Exhibit 24, 1996 Hearing.)

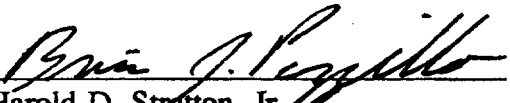
Under the facts of this case, Defendants have acted in a manner which violates Plaintiffs' due process rights. At all relevant times, Defendants were aware of Plaintiffs' existence and chose to act in a manner which was inconsistent with Plaintiffs' rights.

IV. STATEMENT OF RELIEF SOUGHT

Plaintiffs request that this Court enter an order vacating Orders No. R-9845 and No. R-10672-A and holding that Order No. R-9845 is void, invalid and unenforceable as to Plaintiffs.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: 

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I hereby certify that a true and correct copy of the foregoing pleading was served via first-class mail on opposing counsel of record at the following addresses:

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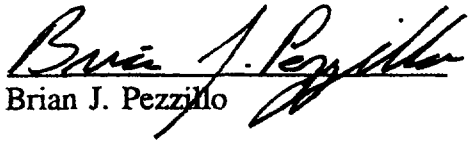
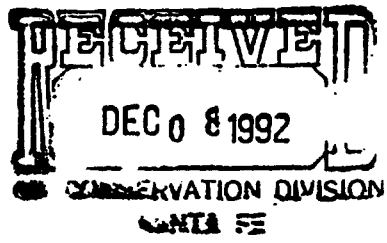
this 20th day of August, 1997.

STRATTON & CAVIN, P.A.

By: 
Brian J. Pezzillo

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



IN THE MATTER OF THE APPLICATION
OF MITCHELL ENERGY CORPORATION
FOR COMPULSORY POOLING, AND AN
UNORTHODOX GAS WELL LOCATION
LEA COUNTY, NEW MEXICO.

CASE NO. 10656

A P P L I C A T I O N

Comes now MITCHELL ENERGY CORPORATION, by its attorneys, Kellahin & Kellahin, and in accordance with Section 70-2-17(c) (1978) applies to the New Mexico Oil Conservation Division for an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to Mitchell Energy Corporation's Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from

the North line (Unit F) of said Section 28. Applicant further proposes that it be designated the operator and that the Division set a charge for the risk involved in drilling and completing said well.

In support of its application, Mitchell Energy Corporation ("Mitchell") states:

1. Mitchell has a working interest ownership in the oil and gas minerals underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico.

2. Mitchell proposes that a standard 320-acre spacing unit be pooled and dedicated to its Tomahawk "28" Fed COM #1 Well to be drilled and located at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28.

3. All of the working interest ownership of the oil & gas minerals from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28 has voluntarily agreed to the formation of this spacing unit for this well WITH THE EXCEPTION OF:

Party:	Interest:
Strata Production Company 648 Petroleum Building Roswell, New Mexico 88201 Attn: Mr. Mark B. Murphy	25%

4. Mitchell has proposed the subject well to all parties but, as of the date of this application, Mitchell has not be able to obtain a voluntary agreement from Strata Production Company.

5. Pursuant to Section 70-2-17(C) NMSA (1978) and in order to obtain its just and equitable share of potential production underlying this spacing unit, Mitchell needs an order of the Division pooling the identified and described mineral interests involved in order to protect correlative rights and prevent waste.

6. In accordance with the Division's notice requirements, a copy of this application has been sent to Strata Production Company and the offset operators identified in paragraph 7 (below) notifying it of this case and of the applicant's request for a hearing of this matter before the Division on the next available Examiner's docket now scheduled for December 7, 1993.

7. Because of a combination of geological and topographical reasons, applicant must locate the subject well at the proposed unorthodox well location rather than the closest standard location. Said well encroaches towards the following operators:

(a) Southwestern Resources, Inc.
111 West Country Club Road
Roswell, New Mexico 88201

(b) Enerlock Resources, Inc.
616 Mechem Drive
Ruidoso, New Mexico 88345-6903

(c) Santa Fe Energy Operating Partners, L. P.
550 West Texas
Suite 1330
Midland, Texas 79701

(d) Maralo, Inc.
P.O. Box 832
Midland, Texas 79702

(e) Phillips Petroleum Co.
4001 Penbrook, Suite 401
Odessa, Texas 79762

(f) Oryx Energy Corp. (formerly Sun Exploration & Production Co.)
Box 2880
Dallas, Texas 75221-2880

(g) Grace Petroleum Corporation
6501 North Broadway
Oklahoma City, Oklahoma 73116-8246

WHEREFORE, Mitchell, as applicant, requests that this application be set for hearing on December 7, 1993 before the Division's duly appointed examiner, and that after notice and hearing as required by law, the Division enter its order pooling the mineral interest described in this spacing unit for the drilling of the subject well at the proposed unorthodox gas well location upon terms and conditions which include:

(1) Mitchell Energy Corporation be named operator;

(2) The order make provisions for applicant and all working interest owners to participate in the costs of drilling, completing, equipping and operating the well;

(3) In the event a working interest owner fails to elect to participate, then provision be made to recover out of production, the costs of the drilling, completing, equipping and operating the well, including a risk factor penalty of 200%;

(4) For such other and further relief as may be proper.

RESPECTFULLY SUBMITTED:

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P. O. Box 2265
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(505) 982-4285
Attorneys for Applicant

App1201.031

CASE 10656: **Application of Mitchell Energy Corporation for compulsory pooling and an unorthodox gas well location, Lea County, New Mexico.** Applicant, in the above-styled cause, seeks an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to its Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28. Also to be considered will be the costs of drilling and completing said well and the allocation of the costs thereof as well as actual operating costs and charges for supervision, designation of applicant as the operator of the well and a charge for risk involved in drilling said well. Said unit is located approximately 22 miles southeast from Maljamar, New Mexico.

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S.H. CAVIN, ROBERT W. EATON,
TERRY KRAMER, and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE McCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE S. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs - Appellants,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION,

Defendants - Appellees.

NEW MEXICO OIL CONSERVATION COMMISSION'S STATEMENT OF APPELLATE ISSUES

COMES NOW the New Mexico Oil Conservation Commission ("Commission") and pursuant to Rule 1-074 (L) NMRA 1997 responds as follows to the Plaintiffs' Statement of Appellate Issues:

STATEMENT OF ISSUES

The Plaintiffs have failed to comply with Rule 1-074(K)(3) NMRA 1997 that states, in part, that the appellant's statement of appellate issues shall contain, *inter alia*:

EXHIBIT
D

> an argument, which shall contain the contentions of the appellant **with respect to each issue presented in the statement of appellate issues**, with citations to the authorities, statutes and parts of the record on appeal relied upon.

(Emphasis added.)

The Plaintiffs list twelve separate issues in their "Statement of Issues," but the Plaintiffs present argument as to only four of the twelve issues. In so doing, the Plaintiffs have made numerous statements of fact in its "Statement of Issues" that are not supported in the "Argument" section by citations to the authorities, statutes and parts of the record on which the Plaintiffs rely.

Additionally, the Plaintiffs have made assertions concerning findings of fact from Commission Order No. R-10672-A ("Order") in its "Statement of Issues" that are not findings contained in the Order. Plaintiffs' Issue 7 asks: "Whether the Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants...." First, the Commission simply made no such finding. (R.P. 251-259) Second, it is not clear to whom Plaintiffs are referring by the term "applicants." Is this the reference to Defendant-Appellee Mitchell Energy Corporation ("Mitchell") that was the applicant for the forced pooling order before the Commission? Why would Mitchell be "given" notice as Mitchell was the applicant? Or, is this a reference to the Plaintiffs, *i.e.*, the party complaining about lack of notice?

Issue 12 asks: "Whether the Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable." Again, a review of the Commission's Order reveals that the Commission made no such finding. (R.P. 251-259)

The Commission requests that the eight issues that are not argued by the Plaintiffs, Issue Numbers 1, 2, 4, 5, 7, 10, 11 and 12, be stricken and that the issues that are misstatements of the

Commission's Order, Issue Numbers 7 and 12, be stricken.

SUMMARY OF THE PROCEEDINGS[1]

The Plaintiffs' summary of the proceedings combines the procedural history of this case with subjective comments. The Plaintiffs apparently attempt to circumvent the page limitation for their argument imposed by Rule 1-074 NMRA 1997 by putting much of their argument in this summary. Therefore, the Commission provides the following summary:

1. On December 8, 1992, Mitchell filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location ("1992 Application") with the Oil Conservation Division ("OCD") pursuant to NMSA 1978, § 70-2-17 (Repl.Pamp.1995). The OCD assigned Case No. 10656 to this matter.

2. On January 21, 1993, a hearing was held in Case No. 10656 before an OCD hearing examiner ("1993 Hearing"). Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company ("Strata") appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A. (1993 Hearing Tr. 5)

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[1] The Plaintiffs refer to the application filed in 1992 by Mitchell as having been "omitted" from the record on appeal filed with the Court. This is inaccurate. The application is not a part of the record on appeal of the case before this Court. While it is true that the exhibits and transcriptions from an earlier case, Case No. 10656, were introduced and received into evidence in Case No. 11510, the pleadings and papers from Case No. 10656 were not introduced and did not become a part of the record for Case No. 11510. (1997 Hearing Tr. 4-8)

The Commission did not oppose the Plaintiffs' motion to supplement the record on appeal of Case No. 11510 by adding the application, but the Plaintiffs just make matters more confusing by referring to the application as "omitted," implying that it was, indeed, a part of the record of Case No. 11510, when in fact it was not.

3. On February 15, 1993, the OCD Director entered Order No. R-9845 in Case No. 10656 which pooled certain mineral interests to form a proration unit to be dedicated to the Tomahawk "28" Federal Com Well No. 1. (R.P. 82-90)

4. By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, § 70-2-13 (Repl.Pamp.1995).

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

6. Almost three years after the entry of OCD Order R-9845, on January 29, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* ("Motion") in Case No. 10656 was faxed by Harold D. Stratton of Stratton & Cavin, P.A. to OCD on behalf of the Plaintiffs. (R.P. 01-75)

7. On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 ("Reply"). (R.P. 76-90)

8. On May 2, 1996, a hearing on the Motion was held by an OCD hearing examiner who assigned the case as Case No. 11510 ("1996 Hearing").

9. On October 2, 1996, the OCD Director entered Order No. R-10672 in Case No. 11510; the order reopened Case No. 10656. (R.P. 165-171)

10. On October 30, 1996, Mitchell filed a Request for a Hearing *De Novo* before the Commission of Case No. 11510, Order No. R-10672. (R.P. 177-195)

11. On January 16, 1997, the Commission held a *de novo* hearing of Case No. 11510. The parties stipulated to the introduction of the exhibits and transcripts from the 1993 Hearing

and the 1996 Hearing. The parties offered no new evidence, but through their counsel, the parties presented argument to the Commission. (1997 Hearing Tr. 4-8)

12. On March 19, 1997, the Commission entered its order in Case No. 11510. The Commission's Order, Order No. R-10672-A, denied the Plaintiffs' Motion to Reopen Case No. 10656. (R.P. 251-259)

13. On April 7, 1997, the Plaintiffs filed an Application for Rehearing pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995). The application was deemed denied on April 17, 1997 pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995) as the Commission took no action on the application. (R.P. 260-263)

14. On April 25, 1997, the Plaintiffs filed its Petition for Review of the Commission's Order with this Court pursuant to Rule 1-074 NMRA 1997 and NMSA 1978, § 70-2-25 (Repl.Pamp.1995).

ARGUMENT

A. The Plaintiffs Did Not Have a Property Interest That Entitled Them to Notice

The Plaintiffs each claim to have had a property interest in certain federal oil and gas leases at the time of the 1992 Application and the 1993 Hearing before the OCD hearing examiner. The Plaintiffs claim that these property interests entitled them to notice of the 1992 Application and the 1993 Hearing.

What property interest did the Plaintiffs have at the time of the 1992 Application and the 1993 Hearing? The evidence presented to the Commission by affidavits from the individual plaintiffs was that each plaintiff paid an amount of money to Strata for a certain percentage

interest in federal oil and gas leases. The leases in question are United States Oil and Gas Lease NM 57683 and United States Oil and Gas Lease NM 82927. These affidavits state the date and the amount paid to Strata for an interest in leasehold operating rights in the federal leases. Each plaintiff claims to have acquired his interest in the leases in either 1989 or 1990. (1996 Hearing, Branko Exhibits Nos. 1 through 16) However, there is no written documentation of a transfer of the interest from Strata to the individual plaintiff in the record before this Court except for the attempted transfer by Strata on November 7, 1995, three years after the 1992 Application was filed.[2] (1996 Hearing, Branko Exhibit 17, exhibits B and C attached thereto) Apparently, the Plaintiffs paid Strata in 1989 and 1990 and received no written documentation regarding their interests in the leases until 1995.

The Plaintiffs in their Statement of Appellate Issues correctly state that leasehold operating rights and overriding royalty interests are interests in real property. *Johnson v. Gray*, 75 N.M. 726, 410 P.2d 948 (1966). NMSA 1978, § 38-1-3 (Repl. Pamp.1987) incorporates the English Statute of Frauds and makes it in force in New Mexico. *Coseboom v. Margaret S. Marshall's Trust,* 64 N.M. 170, 326 P.2d 368 (1958), rev'd on other grounds, 67 N.M. 405, 356 P.2d 117 (1960). The Statute of Frauds (29 Charles II, c 3) provides:

> No action shall be brought on any contract or sale of tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the

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[2] In *Strata v. Mercury*, 121 N.M. 622, 916 P.2d 822 (1996), a similar situation existed in that Strata had investors in a farmout agreement, but there was no evidence in the record that Strata had assigned any of its interest in the agreement to its investors. Rather, Strata and its investors executed a separate contract that governed the rights and obligations between Strata and its investors.

> party to be charged therewith, or by some person therewith by him lawfully authorized.

The Statute of Frauds would have prevented the Plaintiffs from enforcing in the courts any oral agreement they had with Strata concerning these leases.

NMSA 1978, § 70-1-1 (Repl.Pamp.1995) states:

> That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands 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.

(Emphasis added.)

The only documentary evidence the Plaintiffs presented as to their interests having been recorded with the county clerk is in Branko's Exhibit 17 from the 1996 Hearing. Exhibit 17 is the January 17, 1996 affidavit of Mark B. Murphy, president of Strata. Attached to the Affidavit are Exhibits A, B and C. Exhibit B to the Affidavit is the attempted transfer of a 1.5% overriding royalty interest in United States Oil and Gas Lease NM 82927 to three of the Plaintiffs. Exhibit B was signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Exhibit C to the Affidavit is the attempted transfer of 81.5% of the operating rights to United States Oil and Gas Lease NM 82927 to thirteen of the Plaintiffs.[3] Exhibit C was also signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Three years had elapsed between the filing of the 1992 Application and the

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[3] One of the Plaintiffs, Scott Exploration Inc., claimed both an overriding royalty interest and an operating interest in the lease. Two of the entities listed as transferees on Exhibit C, Arrowhead Oil Corporation and Warren, Inc., did not join the Plaintiffs as parties to this case.

filings of the attempted transfers in 1995.

In ¶ 6 of the Affidavit Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove at Paragraph 5, Strata retained all of the record title interest subject to the beneficial interest of the parties as described at Exhibit A hereto." (1996 Hearing, Branko's Exhibit 17) Murphy admits in this statement that Strata alone had legal title to the United States Oil and Gas Lease NM 82927 after the Plaintiffs bought into the Strata enterprise. Murphy characterized the Plaintiffs' interests at that time as merely a "beneficial interest." Additionally, Exhibit B to the Affidavit on its first page contains the following statements by Strata: "*Strata owns 100% of the record title interest and leasehold operating rights." "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." These statements appear on a document executed by Murphy as president of Strata on November 7, 1995. Plaintiffs' beneficial interest did not entitle them to notice any more than a beneficiary of a trust is entitled to notice of actions affecting property owned by the trust.

Mark Murphy, the president of Strata, testified at the 1993 Hearing that Strata, not the Plaintiffs, was the record title holder on the date of the title opinion (1993 Hearing Tr. 141). Mitchell's landman, Stephen J. Smith, also testified that the title opinion dated December 29, 1992 for Mitchell prepared by William B. Burford of the Hinkle, Cox, Eaton, Coffield & Hensley law firm also indicated that ownership of the property interest in question was held by Strata. (1993 Hearing Tr. 27, 28)

Murphy testified that he told Mitchell's landman Smith on October 26, 1992, that Strata had other partners. (1993 Hearing Tr. 122). 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. 127) Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17 from the 1993 Hearing, were long-term partners of Strata. (1993 Hearing Tr. 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. 130) Murphy also 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. 141)

The practice described by Murphy provided benefits to both Strata and its investors, *i.e.*, the Plaintiffs. The Plaintiffs enjoyed the benefits of not being the title holders, *e.g.*, not having to record the individual assignments, not having to be available for negotiations, not having to make elections to participate; but at the same time, they claim as well the benefits of record title holders such as the right to notice. They cannot have both; they are either interest owners entitled to notice or not. In this case, the evidence is that they were not property interest owners entitled to notice of the 1992 Application filing or the 1993 Hearing. Rather, the Plaintiffs' interests are more like those of a shareholder in a corporation. The corporation is the legal entity entitled to notice of actions affecting property owned by the corporation, not the individual shareholders, *i.e.*, investors.

Why did the Plaintiffs wait for over three years from the date the 1992 Application was

filed and the 1993 Hearing was held to bring their claims? Why did Stratton on behalf of Strata withdraw the request for a *de novo* review of the OCD order in 1993? Would the claims have been brought now if the well had not produced? The Plaintiffs want the penalty imposed on Strata for electing not to participate in a successful well removed so that their interests as investors in Strata are more rewarding. (1993 Hearing Tr. 32) The case is an attempt to avoid the penalty imposed on Strata for choosing not to pay its share of the costs of the well.

The Plaintiffs' argument attempts to convince this Court that the Plaintiffs are in the position of the plaintiff in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). Mrs. Uhden was the owner in fee of an oil and gas lease who leased it to Amoco but retained a royalty interest. There was no dispute in *Uhden* that the plaintiff had a real property interest; the dispute was whether the property interest she had was entitled to notice. The Plaintiffs in the case before this Court simply had no cognizable real property interest at the time of the 1992 Application or the 1993 Hearing, and therefore the Plaintiffs were not entitled to notice of the 1992 Application or 1993 Hearing.

B. The Plaintiffs Were Not Transferees of the Federal Leases in 1992 or 1993

The leases in questions are federal oil and gas leases. Any attempt to transfer ownership interests in the leases must be approved by the Bureau of Land Management of the United States Department of Interior pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 187a (1994). This act states, in part: "[A]ny oil and gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary." Not only were the attempted transfers to the Plaintiffs never approved by the

BLM or accepted as required by the transferees so far as the evidence provided by the Plaintiffs indicates, they were not even executed by Strata until November 7, 1995. (1996 Hearing, Branko Exhibit 17, Exhibits B and C attached thereto)

A recent federal district court case from Utah emphasized that BLM's approval of the transfer of interest in a federal oil and gas lease is necessary for the transfer to have any effect, not only as between the federal government and the transferor and transferee but also as between private entities. *River Gas Corp. v. Pullman*, 960 F. Supp. 264 (D. Utah 1997). In this case the plaintiffs sought to quiet title to certain interests in a federal oil and gas lease. The plaintiffs had been assigned 100% of the record title to the federal lease by PG&E Company (PG&E), and the assignment was approved by the BLM on July 1, 1994. However, the defendants in the quiet title action had purportedly been assigned 100% of the record title to the same federal lease by PG&E's corporate predecessor much earlier on August 9, 1990. This attempted assignment was never approved by the BLM. The court granted the plaintiffs' request and entered a quiet title decree in their favor stating, regarding the earlier attempted assignment, "[i]t is well established that a party must receive the approval of the Secretary of the Interior in order for an assignment of a government lease to be valid." The court continued "... an assignment does not actually occur until approval is granted." The court also stated, "Because the interests in the lease remain with the assignor until BLM approval is obtained, Pullman **never had an interest** in the government lease." *Id.* at 266 (emphasis added).

The defendants in *River Gas Corp.* cited *Norbeck v. Crawford*, 836 P.2d 1231 (1992 Mont.) as a case in which assignees of a federal lease were allowed to resubmit the assignment for BLM approval some fifty-six years after the attempted assignment. However, the *River Gas*

Corp. court was quick to point out that even though the BLM did approve the assignment fifty-six years after the attempted assignment, the assignee was not entitled to any past profits from the lease "...because there was never a valid assignment and therefore no change of title." *River Gas Corp.*, 960 F. Supp. at 266, FN[2].

The Plaintiffs in the case before this Court are, at best, in the position of the defendants in the *River Gas Corp.* if indeed the assignments were ever approved by the BLM. The Plaintiffs' cognizable property interest arose, if ever, at the time of such approval by the BLM, *i.e.*, sometime after November 1995. However, at the time of the 1992 Application and the 1993 Hearing, the Plaintiffs had no interest in the federal oil and gas leases that entitled them to notice of the application and hearing.

STATEMENT OF RELIEF SOUGHT

The Commission requests that the Court enter its order affirming the Commission's Order No. R-10672-A in Case No. 11510.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
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(505) 827-1364

Certificate of Service

I hereby certify that a copy of the New Mexico Oil Conservation Commission's Statement of Appellate Issues was mailed to all counsel of record on the 16th day of September, 1997.

Marilyn S. Hebert

FIFTH JUDICIAL DISTRICT COURT

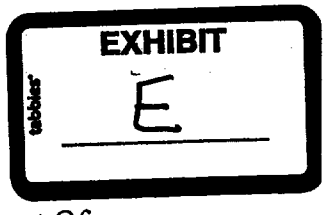
COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. 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,	§	
Appellants,	§	CV 97-159G
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Appellees.	§	

MITCHELL ENERGY CORPORATION'S RESPONSE TO APPELLANTS' STATEMENT OF APPELLATE ISSUES

COMES NOW the Appellee, Mitchell Energy Corporation ("Mitchell"), and pursuant to Rule 1-074 N.M.R.A. 1997 ("Rule 1-074"), submits its response to Appellants' Statement Of Appellate issues:



I. STATEMENT OF THE ISSUES

Mitchell objects to the Appellants' (collectively referred to as "Branko") Statement Of Appellate Issues on two grounds. First, Branko ignores the appropriate standard of review. As

discussed further below, it is Branko's burden to show that the New Mexico Oil Conservation Commission's ("Commission") findings, based on the record as a whole, are not supported by substantial evidence or are arbitrary, capricious, or contrary to law. *Viking Petroleum v. Oil Conservation Commission.* 100 N.M. 451, 672 P.2d 280 (1983), *Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d. 182 (1995). Second, Mitchell objects to Branko's Statement of Issues to the extent that it seeks to raise issues not raised before the Commission. N.M. Stat. Ann. (1978) Section 70-2-25(B) (the issues to be reviewed by the District Court in an appeal of a decision from the Commission "shall be only questions presented to the Commission in the application for rehearing").

On April 7, 1997, Branko filed an Application for Rehearing listing twelve (12) issues which it has repeated in its Appellants' Statement of the Issues. The repetitious nature of these "twelve" issues can be consolidated into three fundamental issues for review:

(1) Whether the Commission properly rejected the claim of Branko that it owned a property interest, either at the time of Mitchell's application or the hearing thereon, making it a proper party entitled to notice for adjudicating a compulsory pooling case before the Oil Conservation Division, where the claim was based on an unapproved assignment of interests in an oil and gas lease made years after the fact but purporting to be effective prior to Mitchell's Application?

(2) Whether the Commission properly rejected Branko's attempt to manipulate the administrative process by acquiring, after the fact, a property interest in a federal oil & gas lease, and then using that acquisition to collaterally attack a valid Division compulsory pooling order that is binding on its predecessor in interest?

(3) Whether, for a variety of legal reasons, Branko is bound by the actions and inactions of its predecessor in interest, Strata Production Company?

Based on the record as a whole, it is clear that the Commission findings are supported by

substantial evidence, are not arbitrary, capricious, or contrary to law. The Commission Order R-10672-A , therefore, should be affirmed.

II. SUMMARY OF THE PROCEEDINGS

Mitchell objects to Branko's Summary of Proceedings as incomplete, disputed and argumentative. Branko's recitation of the facts is inconsistent with the appropriate standard of review in that it wholly fails to acknowledge evidence supporting the Commission Order, and instead elects to recite only its interpretation of the evidence purporting to favor its claims. Therefore, in accordance with Rule 1-074, Mitchell sets forth the following:

Nature of the case:

Pursuant to the New Mexico Oil and Gas Act, N.M. Stat. Ann. Section 70-2-25(B), this case is before the Court on Appellants' Petition for Review of Order R-10672-A entered by the New Mexico Oil Conservation Commission ("the Commission"). This appeal is limited to those issues raised by the Petitioners in their "Application for Rehearing" filed with the Commission on April 7, 1997, which was denied by the Commission.

Parties:

Branko acquired from Strata Production Company ("Strata") a portion of Strata's interest in a federal oil & gas lease (the "Lease"). Branko claims the interests acquired from Strata are not subject to the terms and conditions of a compulsory pooling order issued by the New Mexico Oil Conservation Division on February 13, 1993, granting the application of Mitchell to involuntarily commit all of Strata's interest including that subsequently assigned to Branko.

Mitchell, a Texas corporation authorized to and doing business in the State of New Mexico, is the operator who obtained this compulsory pooling order and drilled the producing

well.

The Division and Commission are statutory bodies created and existing under the provisions of the New Mexico Oil & Gas Act, N.M. Stat. Ann. (1978) Sections 70-2-1 through 70-2-36.

Jurisdiction:

The Fifth Judicial District, Lea County, New Mexico, has jurisdiction of this case pursuant to N.M. Stat. Ann. (1978) Section 70-2-25(B) because the property affected by Commission Order R-10672-A is located within Lea County, New Mexico.

Factual Summary:

On December 8, 1992, Mitchell filed a Compulsory Pooling Application ("Application") with the Division, and on December 9, 1992, Mitchell served Strata with the Application in NMOCD Case 10656. (TR-I, Mitchell Exhibit 19)[1] . Mitchell had obtained a title opinion which showed that Strata was the owner of 100% of the record title and operating rights for the Lease, which covered 80 acres (25%) of the 320 acres sought to be pooled by Mitchell. (TR-I, p 26-27, Mitchell Exhibit 7). This was confirmed by Mr. Mark Murphy, President of Strata, who testified on January 21, 1993 that Strata owned 100% of the record title and operating rights for the Lease. (TR-I, p. 140-141).

Beginning on October 26, 1992, Mr. Steve Smith, a petroleum landman for Mitchell, engaged in numerous conversations and exchanged correspondence with Mr. Mark Murphy. (Tr-I, Mitchell Exhibits 10-16). By exchanging letters dated January 7 and 12, 1993, Mr. Smith and Mr. Murphy described in great detail their recollections. (TR-I, Mitchell Exhibits 15 and

[1] TR-I refers to the transcript and exhibits for NMOCD Case 10656 heard on January 21, 1993.

16). On numerous occasions prior to January 13, 1993, Mr. Murphy told Mr. Smith that Strata had partners, but Mr. Murphy did not disclose that any of these partners claimed to have any ownership interest in the Lease until December 16, 1992 (TR-I, Mitchell Exhibit 16). Mr. Murphy consistently used the term "partners" when he referred to these undisclosed or other alleged leasehold owners. (TR-I, Mitchell Exhibit 16; TR-II p 23, 56).[2] On November 18, 1992, Mr. Murphy told Mr. Smith that Strata would defend itself and its partners' rights during any proceeding including a force pooling hearing. (Tr-I, Mitchell Exhibit 16). By letter dated December 30, 1992, Mr. Murphy represented and warranted to Mitchell that Strata had the right, power and authority to sell 100% of the lease for the benefit of such undisclosed owners. (TR-I, Mitchell Exhibit 12).

At the time Strata was served with the Application, Strata was the only individual or entity with a property interest in this lease whose identity was known to Mitchell. (Tr-I, p.23). At the time Strata was served with the Application, Strata held 100% of both record title[3] and operating rights title.[4] (TR-I, p.27). Strata claimed to have "partners" but Mitchell did not know who these partners were, what if any unrecorded interest they might have, or how to contact them. (TR-I, Mitchell Exhibits 11, 15, 16). Mr. Smith of Mitchell had inquired of Mr. Murphy, "as to who these partners were" and Mr. Murphy only described them, "as long term investors of

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[2] TR-II refers to the transcript and exhibits for NMOCD Case 10510 heard on May 2, 1996.

[3] record title means the party with the primary interest in a federal oil & gas lease who is responsible to the BLM for lease obligations including the payment of rents and who is the party entitled to assign and relinquish the lease.

[4] is synonymous with "working interest owner" and means an interest obtained from the record title owner which authorizes the holder to conduct drilling and related operations, including production and so share in revenues from the sale of that production.

Strata or people that we've been involved in." (TR-II, p 23).

By its actions, Strata induced Mitchell into not making further inquiry into the identity of Strata's "*undisclosed partners*". (Tr-I p. 29, 40, 51-52, 57-59; Mitchell Exhibit 12; TR-II, p. 56, 61-62, 63, 67). Mitchell had neither actual acknowledge nor constructive notice of any written instrument conveying any interest in this lease to these "*undisclosed partners.*" (TR-I p.28-29). In fact there appears to have been none. Nor did Mitchell know the identity of any of these "*undisclosed partners*" until after the Application was served on Strata. (TR-I pp. 47, 60; TR-II, p. 23).

On January 13, 1993, just a week before the Division hearing in this case, and in an effort to delay the pooling proceedings, Strata for the first time disclosed to Mitchell the identity of Strata's partners. (TR-I, p. 47). Strata claimed there were 15 working interest owners and three overriding royalty owners involved in the Strata lease. (TR-I, pp. 28, 47; Mitchell Exhibit 16; TR-II, pp. 23, 71). However, at the same time, Strata still held 100% of both record title and operating rights title. (TR-I p.141).

On January 21, 1993, the Division conducted a hearing in this case at which Strata sought to have the case continued and contended that Mitchell should be required to provide additional notice because Mitchell had failed to provide notification to Strata's "*undisclosed partners.*" (TR-I, p. 6) (emphasis added).

On February 15, 1993, the Division issued Order R-9845 granting Mitchell's application. (R.P. pp. 82-90)[5]. On February 17, 1993, in accordance with this order, Mitchell sent Strata an election letter requesting Strata to elect within thirty days whether to participate with its 25%

[5] R.P. refers to the Record Proper.

working interest under the pooling order. (TR-II, Mitchell Exhibit 1).

Strata filed and then withdrew on the day of the hearing its request for a *de novo* review and hearing before the Commission. Strata failed to timely elect to participate in this well. (TR-II, p 48-49). Mitchell incurred the expense and took the risk to drill the well, which was completed as a producing well. (R.P. pp. 172-176, 179-182, and 191-195).

Then, Strata waited until it was satisfied that Mitchell's well was profitable and by letter dated November 6, 1995, told the partners that Mitchell's well had now produced sufficient gas to have paid for its costs and that they may have a claim against Mitchell to avoid having to pay any of the 200% risk factor penalty set forth in the Compulsory Pooling Order R-9845. (TR-II, p. 59, Branko Exhibit 27).

On November 7, 1995,[6] some six years after the Strata partners claimed to have acquired an interest in this lease, more than 31 months after the entry of the compulsory pooling order in this case, and after Mitchell had drilled the well, Strata finally signed written instruments conveying interests to its undisclosed partners which were then recorded in Lea County on November 8, 1995. (TR-II, Branko Exhibit 17).

On January 29, 1996, certain of these partners (the appellants herein) filed a Motion with the Commission seeking to reopen Case 10656. (R.P. pp. 01-75).

On May 3, 1996, the Division held a hearing on this motion and on October 2, 1996, entered Order R-10672, (R.P. pp. 165-171).

Among other things, the Division found that:

(10) It would circumvent the purpose of the New Mexico Oil and Gas Act to

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[6] The assignments are dated and notarized on November 7, 1995 while the letter transmitting copies to the *undisclosed partners* is dated November 6, 1995.

> 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 either 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.

The Division then determined that "(11) a cutoff date for notification of affected interest owners is necessary." (R.P. p. 167). However, the Division then found that because Mitchell had not sent notice to Strata's partners affording them a post order election, Case 10656 should be reopened to examine the share of costs that should be apportioned. (R.P. p. 170).

Mitchell appealed this Division order, *de novo*, to the Commission. The Commission agreed with Mitchell, issuing Order R-10672-A (R.P. pp. 251-159), where it essentially concluded the following:

> (1) that actual notice to "each known working interest owner" of an application for compulsory pooling is limited to those working interest owners whose interest is evidenced by a valid and enforceable written instrument of conveyance the existence of which is known to the applicant at the time the application for compulsory pooling was filed; and
>
> (2) that "each known working interest owner" to be furnished with an election opportunity pursuant to a compulsory pooling order is limited to: (a) those working interest owners whose interest is evidenced by a valid and enforceable written instrument the existence of which is known to the applicant at the time the application for compulsory pooling was filed; and (b) to those transferees of said working interest owners whose transfer is evidenced by a valid and enforceable written instrument of transfer which has been delivered to the applicant.

III. ARGUMENT AND AUTHORITIES

A. The Commission Order can only be reversed if it is not supported by substantial evidence or is arbitrary, capricious or otherwise contrary to law.

Branko's Statement of Issues fails to acknowledge or apply the appropriate standard of

review that must be applied by this Court. The applicable standard of review is whether, based on the record on appeal, the Commission's order is substantially supported by the evidence and by the applicable law. *El Paso Natural Gas Co. v. Oil Conservation Com'n.*, 76 N.M. 268, 414 P.2d 296 (1966). In that regard, the standard of review has been summarized as follows:

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rinker v. State Corporation Commission*, 84 N.M. 626, 506 P.2d 783 (1973). [The Court] must view the evidence and all reasonable inferences in the light most favorable to support the findings, and any evidence unfavorable will not be considered. *Martinez v. Sears, Roebuck and Co.*, 81 N.M. 371, 467 P.2d 37 (Ct. App.), 81 N.M. 425, 467 P.2d 997 (1970). Special weight will be given to the experience, technical competence and specialized knowledge of the Commission. *Rutter & Wilbanks Corporation v. Oil Conservation Commission*, 87 N.M. 286, 532 P.2d 582 (1975); *Grace v. Oil Conservation Commission*, 87 N.M. 205, 531 P.2d 939 (1975). [The Court's] review is limited to the evidence presented to the Commission, and the administrative findings of the Commission should be sufficiently extensive to show the basis for the order. *Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962). The findings must disclose the reasoning of the Commission in reaching its conclusion. *Fasken v. Oil Conservation Commission*, 87 P.2d 292, 532 P.2d 588 (1975).

Viking Petroleum v. Oil Conservation Commission., supra, 100 N.M. at 453. Contrary to the correct standard of review, Branko improperly presents a recitation of facts that entirely ignores the evidence supporting the Commission order and selectively presents contrary evidence to support its allegations.

B. The Commission correctly found that all proper parties to Mitchell's Application received notice and participated in the hearings.

Branko's appeal is premised on the incorrect assertion that it owned an interest in the Lease either when the application was filed or when the hearing was held. The substantial, if not overwhelming, evidence in the record establishes that Branko did not own such an interest at any material time. Branko's appeal, therefore must fail.

Branko's appeal asserts that they are entitled to notice protection afforded parties whose

property rights may be affected by Commission action because they claim to have a "property right interest" in the Lease at the time this compulsory pooling application was filed. Unfortunately for them, the property interest for which they seek protection was not created until November 6, 1995, some 32 months after the proceedings in this case were concluded. (TR-II, Branko Exhibit 17; TR-II, p. 59). It is undisputed that these two written instruments, by which Strata attempted to conveyed an interest in the lease to its various partners, did not come into existence until November 7, 1995 when signed by Mr. Murphy. (TR-II, p. 59). It is undisputed that these two written instruments had not been approved by the Secretary of Interior.[7] (TR-II, Branko Exhibit 17). It is also undisputed that these written instruments were not recorded until November 7, 1995. (R.P. pp. 53-57, 29-30).

An oil and gas lease is an interest in real property. *O'Kane v. Walker*, 561 F.2d 207 (10th Cir. 1977). Likewise, an overriding royalty interest in a mineral lease is an interest in real property. *Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 879 P.2d 779 (1994). Under New Mexico law, "all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, *including lands operated under lease or contract from the United States...* shall be recorded in the office of the county clerk of the county where the lands are situated." NMSA 1978, Section 70-1-1 (emphasis added). Also "...*no* assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect title or rights to such royalties of any purchaser or transferee in good faith, without knowledge of the *existence of such unrecorded instrument.*" (emphasis added)

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[7] Strata's assignments of interests in the Lease to Branko must be approved by the Secretary of Interior in order to be valid. Until such assignments are approved then they are not valid and the interest remains with Strata. See, *River Gas Corporation v. Karen Pullman*, 960 F. Supp. 264 (D. Utah 1997).

N.M. Stat. Ann. (1978) Section 70-1-2 and *Bolack v. Underwood*, 340 F.2d 816 (10th Cir. 1965).

Mitchell gave notice of its application to Strata. (TR-I, Mitchell Ex. 19). At that time Strata was the only individual or entity of record with a property interest in the lease. (Tr-I, p.23). At the time Strata was served with the compulsory pooling application, public records showed that Strata held 100% of both record title and working interest title. (TR-I, Mitchell Ex. 12). Strata claimed to have "*undisclosed partners*" but did not initially disclose who these partners were, what if any property interest they might have or how Mitchell could contact them. (TR-I, Mitchell Exhibits 11, 15, 16). Moreover, record ownership was inconsistent with the claim.

Prior to January 13, 1993, all that Mitchell had been told was that Strata had partners. (TR-I pp28-29). The representation alone does not create a protected property interest entitling Branko to notice. Rather, there must be an independent document, such as an assignment, that creates the property interest. It is the property interest that gives rise to the right to notice. The representation does not amount to a disclosure that an individual has an interest in the subject oil and gas lease for which he should be entitled to receive notice of a proceeding before the Commission. No assignment had been made to these individuals and therefore they had no interest. Mr. Murphy admitted during his sworn testimony on January 21, 1993 that Strata still held 100% of the record title and working interest ownership of that lease. (TR-I, p 141, Mitchell Exhibits 7, 19).[8]

Branko was not entitled to notice of these proceedings because it did not acquire a protected property right in the Lease until almost three years after the compulsory pooling proceeding had been concluded. As a result, Branko's reliance upon *Uhden v. New Mexico Oil*

[8] See TR-I at p. 140-141.(Questions by Mr. Kellahin, answers by Mr. Murphy)

Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is entirely misplaced. In the *Uhden* case, Amoco filed an application before the New Mexico Oil Conservation Division seeking to increase well spacing from 160 acres to 320 acres in the Cedar Hills pool, at a time when Mrs. Uhden was a mineral owner whose interest was of record in San Juan County, New Mexico. She had signed a lease to Amoco, and Amoco had a copy of that lease which had been recorded. Amoco did not dispute that Mrs. Uhden had a property interest, but claimed that Mrs. Uhden as its lessor had signed a lease which contained provisions which authorized Amoco to change the spacing and therefore, by authorizing Amoco to make the spacing change, it was not necessary to advise her of the hearing. Unlike Mrs. Uhden, Branko was not conveyed an interest in the lease until November 7, 1995, and therefore, at the time of these proceedings, was not owners of real property entitled to notice.

Strata's belated disclosure of its *undisclosed partners* in an attempt to delay the hearing on Mitchell's application did not vest Branko with a protected property interest or entitle Branko to notice. Neither the Commission nor Mitchell should be expected or required to recognize the *undisclosed partners* as having a property interest to be protected prior to the time Strata conveyed an interest to them. While Strata represented that Branko owned working interest and overriding royalty interests, there was and is no documentary evidence to substantiate that representation. In fact, the later assignments made by Strata confirm that the representation was not accurate when made. In other words, the evidence in the record establishes conclusively that Branko did not own a protected property interest such as would entitle the owner to notice of the application and hearing prior to the time the assignment were made in November, 1995.

C. Branko is bound by the actions of its predecessor, Strata, and the prior Orders of the Division.

Branko is bound by the actions of Strata Production Company such that Mitchell's service of the Application and order on Strata bar Branko from any relief:

(a) Branko is bound by and took its interest in the Lease subject to the interest of Strata.

Branko acquired its interest from Strata by assignment dated November 7, 1995. It is axiomatic that Strata could not convey anything more than it owned. Moreover, Strata was subject to and bound by the force pooling order and its election not to participate when it made the assignment. As to Strata, the Order was *res judicata*, and Strata could not attack the order. Branko cannot, by simply selecting an effective date that pre-dated Mitchell's Application, avoid the binding effect of the order, nor can it avoid Strata's election to not participate in the Mitchell well. As a successor to Strata, Branko takes any interest subject to limitations in Strata's right, title, and interest, which includes the force pooling order. Branko is as equally estopped as Strata to retroactively and collaterally attack the force pooling order and Strata's election.

(b) Branko is estopped to deny the partnership with Strata, and is bound by the notice given to Strata.

Strata's belated and conveniently timed disclosure of Branko as its "*undisclosed partners*" is ultimately without merit. If accepted at face value, Strata's conduct creates is an inference that a partnership existed between Strata and Branko. It does not change the facts that only Strata was a record title owner of the property and that no written evidence of any assignment to Branko existed or was presented. In other words, Strata's assertion that Branko owned an interest in the Lease was an unsubstantiated assertion. The fact that it was unsubstantiated and inaccurate was confirmed by Strata's subsequent assignment of interest.

Nonetheless, it is recognized that where one hold himself out as a partner, one is estopped to deny the partnership. N.M. Stat. Ann. (1978) Section 54-1-16. Mr. Murphy's conduct did just that. He confirmed his ability to bind the *undisclosed partners*. On November 18, 1992, Mr. Murphy told Mr. Smith that Strata would defend itself and its partners' rights during any proceeding including a force pooling hearing. (Tr-I; Mitchell Exhibit 16). By letter dated December 30, 1992, Mr. Murphy represented and warranted to Mitchell that Strata had the right, power and authority to sell 100% of the lease for the benefit of such undisclosed owners. (TR-I Mitchell Exhibit 12). It is also well established that partnership property belongs to the partnership, not the individual partner. *In re Lucas,* 107 B.R. 332 (D.N.M. 1989). Therefore, if there was a partnership, the partnership, not Branko, had the property interest and would have been entitled to notice. Under New Mexico law, notice to a partner constitutes notice to the partnership. N.M. Stat. Ann. (1978) Section 54-1-12. Similarly, service of process on a partnership by delivery to any general partner is effective services on the partnership. Rule 1-004(F)(2) N.M.R.A. 1997; *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976) *Loucks v. Albuquerque Nat. Bank*, 76 N.M. 735, 418 P.2d 191 (1966). If there was a partnership, then the notice given to Strata was sufficient to give notice to the partnership.

D. Branko cannot manipulate the administrative process to bootstrap a constitutional claim.

When asked why he had let more than two and one-half years elapse before sending his partners notice that they might have some rights under the compulsory pooling order, Mr. Murphy admitted, "I can't give you a good answer,...." (TR-II, p. 50). If Branko and Strata were partners, Strata had the fiduciary obligation to tell its partners. At the hearing on May 2, 1996, Mr. Carroll, attorney for the Division, inquired if Strata had defended itself and its partners at the

January 23, 1996 hearing, and asked Mr. Murphy, "Did you do that?" to which Mr. Murphy replied, in part, "..my view was that we ought to have.." (TR-II, p. 52-53). Division Order R-10672, issued October 3, 1996, notes "a number of peculiarities in this proceeding that are troubling to the Division."[9] Strata appeared and participated in the original compulsory pooling proceedings, argued lack of notice on behalf of Branko before the Division in 1993, filed an application for *de novo* review in that case to continue to argue lack of proper notice to its partners Branko, then abandoned the notice issue the afternoon before that hearing. Then, after the well has paid out, Branko, Strata's partners, return to once again argue this notice issue.

Branko's entire claim is predicated on assignments of interest made long after the fact but conveniently purporting to be effective before Mitchell even filed its application. The constitutional guarantees of due process are critical to an orderly administration of justice. But the administration of justice does not allow and the administrative process cannot be manipulated to bootstrap a constitutional claim where there was none at the time of the initial application and hearing. Yet that is precisely what Branko seeks to accomplish in this appeal. Branko would have the court impose an obligation to provide notice to potential parties based on assignments of interest that may or may not be made at some undefined time in the future. Alternatively, Branko seeks a result that would render any force pooling order essentially unenforceable, and would subject all similar orders to collateral attack at any time in the future as long as the assignor makes the assignment effective prior to the application. Branko asks that this Court ignore the facts: Strata was the record title owner at all material times; Strata was properly served with the forced pooling application; Strata participated in the hearing for the forced

[9] See Finding (14) Order R-10672

pooling order, Strata received notice of it election to participate; Strata elected not to participate; Branko and Strata waited for Mitchell to drill, complete and produce the well until it had produced enough to pay for all drilling and completion costs; and that only after all that did Strata make any assignment to Branko. For these reasons, it would be patently unfair for Branko to manipulate the administrative process in order to make a claim that it was denied the guarantees of constitutional due process.

IV. STATEMENT OF RELIEF SOUGHT

Mitchell requests that the Court enter its order dismissing this appeal with prejudice, affirming the Commission Order R-10672-A and granting Mitchell such further relief as the Court deems proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 25th day of September, 1997 to the following counsel of record:

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MITCHELL\RESPONSE.FIN

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION, a Utah general partnership,	§	**Dist Ct. No. CV 97-159G** **Fifth Judicial District** **County of Lea, New Mexico** **Honorable R. W. Gallini**
	§	**Ct. App. No. _____**
Plaintiffs-Appellants,	§	
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Defendants-Appellees.	§	

MOTION TO ACCEPT WRIT OF CERTIORARI AS TIMELY FILED

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MOTION TO ACCEPT WRIT OF CERTIORARI AS TIMELY FILED

Plaintiffs, pursuant to Rule 12-309(D), NMRA 2000, respectfully request that the Court accept Plaintiffs' Writ of Certiorari, filed concurrently herewith, as being timely filed and in support thereof would state as follows:

1. Plaintiffs are seeking the issuance of a Writ of Certiorari regarding an appeal originating from the Oil Conservation Commission ("Commission"). Such appeal stems from a December 8, 1992 filing of an application to the Oil Conservation Division requesting an order pooling all mineral interests in the subject property by Mitchell Energy Corporation ("Mitchell"). Plaintiffs in this matter were interest holders in real property; however, they did not receive notice prior to their property rights being adjudicated in the administrative proceeding. A hearing took place on January 21, 1993 and the Division granted Mitchell's pooling request on February 15, 1993. On January 29, 1996, Plaintiffs filed a motion with the Division to reopen Case No. 10656 due to the lack of notice. Plaintiffs motion to reopen the case was granted on October 2, 1996 by order of the Division. On October 30, 1996, Mitchell requested a *de novo* hearing which was granted by the Commission. The *de novo* hearing took place on January 16, 1997 before the Commission. Such hearing resulted in Order No. R-10672-A. Pursuant to such Order, the Commission concluded that at the time Mitchell filed its Application in 1992, Plaintiffs in this case were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and Oil Conservation Division Rule 1207.

2. On April 7, 1997, Plaintiffs filed an Application for Rehearing with the Commission.

Plaintiffs' Application for Rehearing was denied pursuant to NMSA 1978, §70-2-25(A) on April 17, 1997. Pursuant to NMSA 1978, § 70-2-25, Plaintiffs filed their Petition for Review of the Commission's decision in the District Court for the Fifth Judicial District Court in Lea County, New Mexico. On December 17, 1999, the Court rendered an opinion and final judgment denying Plaintiffs' appeal.

3. Plaintiffs have followed the procedures as set forth by NMSA 1978, § 70-2-25 regarding appeals from the Commission. The statute in force at the time of Plaintiffs' appeal to District Court stated that any appeal from the decision of the District Court would be filed with the Supreme Court as with any other civil cases. This normally would have resulted in Plaintiffs having 30 days in which to file the appropriate appellate notice with the Supreme Court of New Mexico. The statute, however, has now been amended effective September 1, 1998 and again effective July 1, 1999. Such changes have effectively altered substantive rights of Plaintiffs. Such appeals under NMSA 1978, § 70-2-25 now follow the procedure as set forth in NMSA 1978, § 39-3-1.1 (2000). Under this statute, a party who wishes to appeal a district court decision must do so by filing a petition for writ of certiorari with the Court of Appeals. NMSA 1978, §39-3-1.1(E). This amendment has taken place during the pendency of Plaintiffs' appeal and the substantive rule changes have resulted in Plaintiffs no longer being afforded a right of direct appeal to the New Mexico Supreme Court. Plaintiffs' writ of certiorari is being filed within the 30 days previously granted by the statute under which Plaintiffs began their appeal. No harm nor prejudice will occur

to Defendants-Appellees by the Court granting Plaintiffs' motion, nor will any substantive delay occur in the protection of this appeal.

4. Plaintiffs have contacted Ms. Marilyn Hebert, counsel for the Oil Conservation Commission and were informed that Ms. Hebert is out of town until January 19, 2000. Likewise, Plaintiffs have attempted to contact Mr. W. Thomas Kellahin on behalf of Mitchell Energy Corporation, but have been unable to do so.

WHEREFORE, Plaintiffs request that the Court of Appeals accept as timely filed Plaintiffs' Writ of Certiorari filed concurrently herewith, along with the tendered docket fee.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

I CERTIFY a true and correct copy of the foregoing pleading was served via first class mail to the following individuals on this the 11th day of January, 2000:

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