NM1 - 6

GENERAL CORRESPONDENCE

YEAR(S): 2002-2001

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

December 6, 2002

Mr. Michael Felderwert
Holland & Hart
P.O.Box 2208
Santa Fe, NM 87504-2208

Re: ***Controlled Recovery, Inc. v. Williams, et al.***
Case No. CV-2001-310
Firth Judicial District Court
Lea County, New Mexico

Dear Mike:

Enclosed is the original signature page for the deposition of Martyne Kieling.

As you may observe, no changes were made.

Should you have any questions, please call me at (505)-476-3450.

Very truly yours,

David K. Brooks
Assistant General Counsel

cc: Martyne Kieling

TO BE PUBLISHED ON OR BEFORE SEPTEMBER 12, 2002

NEW MEXICO ENVIRONMENT DEPARTMENT

Notice is hereby given that, pursuant to New Mexico Water Quality Control Commission Regulations, the following proposed ground water discharge permit(s) have been submitted for approval to the New Mexico Environment Department. The information in this notice generally has been supplied by the applicant and may or may not have been confirmed by the NM Environment Department.

DP-109, BLUEWATER SEWAGE LAGOONS, Van Spencer, Chairman, proposes to renew the discharge permit for the discharge of up to 65,000 gallons per day of domestic waste. The facility is located in Bluewater in Section 23, T12N, R11W, Cibola County. Up to 65,000 gallons per day of domestic wastewater is treated in a package treatment plant then discharged to an unlined lagoon. Following disinfection wastewater is land applied to 4.45 acres at the Bluewater Village cemetery. Ground water most likely to be affected is at a depth of approximately 178 feet and has a total dissolved solids concentration of approximately 950 milligrams per liter.

DP-519, LOVELACE RESPIRATORY RESEARCH INSTITUTE, Stephen Rohrer, proposes to renew the discharge permit for the former sewage lagoon. The facility is located on Kirtland Air Force Base in Albuquerque in Section 3, T08N, R04E, Bernalillo County. There will be no discharge of wastewater. The permit is for post-closure monitoring of ground water following the closure of a sewage lagoon in 1996. Ground water most likely to be affected is a depth of approximately 100 feet and has a total dissolved solids concentration of approximately 1600 milligrams per liter.

DP-658, AMERICAN WASTE REMOVAL, Gregory Jarvies, President, proposes to renew the discharge permit for the discharge of 6,000 gallons per day of wastewater generated from the processing of restaurant grease trap waste. The facility is located in Albuquerque at 502 Carmony Road, NE, in projected Section 4, T10N, R3E, Bernalillo County. Restaurant grease trap waste is processed on-site in above ground tanks, and recovered grease is transported off-site for sale. Wastewater is temporarily stored in two partially buried 10,000 gallon tanks, prior to being transported to the City of Albuquerque's wastewater treatment plant. Ground water below the site is at a depth of approximately 35 feet and has a total dissolved solids concentration of approximately 200 milligrams per liter.

DP-686, CITY OF FARMINGTON SLUDGE DISPOSAL PROJECT, Dean Roquemore, Plant Manager, proposes to renew and modify the discharge permit for the discharge of 2.5 dry tons per day of municipal sludge. The facility is located approximately 2 miles northwest of Farmington in Section 29, T30N, R13W, San Juan County. Dried sludge will be land applied and disked into 80 acres at the La Plata reclamation site. The modification consists of reducing the land application area by 239 acres through discontinuing the use of the Palmer Farm land application area. Ground water most likely to be affected is at a depth of approximately 400 feet and has a total dissolved solids concentration of approximately 2,500 milligrams per liter.

DP-808, VILLAGE OF MELROSE WASTEWATER TREATMENT PLANT, Ray Hestor, Mayor, proposes to renew the discharge permit for the discharge of 90,000 gallons per day of domestic wastewater. The facility is located approximately 1 mile south of Melrose in Section 7, T2N, R32E, Curry County. Wastewater is treated by an oxidation lagoon followed by a constructed wetland, prior to disposal to infiltration ponds or to 80 acres of land application area located within the wastewater treatment plant property boundaries. Ground water most likely to be affected is at a depth of approximately 50 feet and has a total dissolved solids concentration of approximately 448 milligrams per liter.

DP-818, CONTROLLED RECOVERY INC., Ken Marsh, Owner, proposes to renew the discharge permit for the discharge of up to 55,550 gallons per day of industrial waste. The facility is located approximately 37 miles southwest of Hobbs in Section 27, T20S, R32E, Lea County. Up to 275 cubic yards per day of soils contaminated with hydrocarbons and agricultural solids are land applied within a 62-acre landfarm and disked to increase aeration. Limited amounts of nonhazardous hydrocarbon contaminated liquids are periodically added to the soils to enhance remediation. Ground water most likely to be affected is at a depth of approximately 14 feet and has a total dissolved solids concentration of approximately 3300 milligrams per liter.

DP-831, WASTE ISOLATION PILOT PLANT, Inez Triay, Manager, proposes to renew the discharge permit for the discharge of 33,000 gallons per day of domestic waste and non-hazardous brine water. The facility is located 26 miles east of Carlsbad in Sections 28 & 29, T22S, R31E, Eddy County. Up to 23,000 gallons per day of domestic wastewater and 100 gallons annually of neutralized acid waste is discharged to five synthetically lined lagoons for evaporation. Up to 2,000 gallons per day of non-hazardous brine water is discharged to a synthetically lined pond for total evaporation. Up to 8,000 gallons per day of non-hazardous brine water generated from mine dewatering activities, pumping of ground water wells, and from other non-hazardous sources to a synthetically lined evaporation pond. Ground water most likely to be affected is at a depth of approximately 608 feet and has a total dissolved solids concentration of approximately 3920 milligrams per liter.

DP-1025, WORDEN DAIRY, Charles Worden, Owner, proposes to renew and modify the discharge permit for the discharge of 40,000 gallons per day of agricultural waste. The facility is located 3 miles south of Lovington in Section 7, T17S, R37E, Lea County. Dairy wastewater will be discharged to two clay-lined lagoons for storage. From the lagoons, the wastewater will be land applied to 120 acres of cropland by center-pivot irrigation. The modification consists of adding a new 120-acre land application area in the southeast ¼ of Section 7, T17S, R37E. Ground water most likely to be affected is at a depth of approximately 47 feet and has a total dissolved solids concentration of approximately 500 milligrams per liter.

DP-1065, GENERAL ELECTRIC AIRCRAFT ENGINES, Julie DeWane, Manager, proposes to modify the discharge permit for the discharge of 1,814,400 gallons per day of treated groundwater. The modification allows for the addition of one deep zone extraction well, and up to three additional deep zone injection wells. The facility is located in Albuquerque's South Valley on Woodward Road, in Sections 32 and 33, T10N, R03E, Bernalillo County. Ground water contaminated with volatile organic compounds is currently recovered by eight shallow zone and three deep zone extraction wells, and is treated to Water Quality Control Commission Standards using filtration, air stripping, and activated carbon polishing. Effluent is currently discharged to one shallow zone and 10 deep zone injection wells. The depth to ground water in the deep zone aquifer below the site ranges from approximately 50 feet to 150 feet, and has a total dissolved solids concentration of approximately 500 milligrams per liter. Shallow zone ground water below the site is at a depth of approximately 18 to 26 feet, and has a total dissolved solids concentration that ranges from 577 to 2210 milligrams per liter.

DP-1080, WOODLANDS SUBDIVISION WASTEWATER TREATMENT, C. J. Mead, Owner, proposes to renew the discharge permit for the discharge of 31,800 gallons per day of domestic wastewater. The facility is located in Tijeras in Section 10, T10N, R06E, Bernalillo County. Wastewater is treated using a nitrifying filter and constructed wetlands, prior to disposal in a leachfield. Ground water most likely to be affected is at a depth of approximately 150 feet and has a total dissolved solids concentration of approximately 700 milligrams per liter.

DP-1125, STULL TRAILER WASH, Dale Stull, Owner, proposes to renew the discharge permit for the discharge of 3,600 gallons per day of wastewater from a livestock trailer wash. The facility is located 0.5 miles east of Nara Visa in Section 14, T16N, R36E, Quay County. Wastewater from trailer washing is discharged to a concrete sump and then pumped to a synthetically lined lagoon for storage. Wastewater from the lagoon is land applied to either 31.11 acres adjacent to the trailer wash, to 31 acres of cropland located in Section 21,

T15N, R36E, or to 200 acres of cropland located in Section 6, T18N, R37E, Union County. Ground water most likely to be affected is at a depth of approximately 40 feet and has a total dissolved solids concentration of approximately 250 milligrams per liter.

Any interested person may obtain further information from the Ground Water Pollution Prevention Section of the NM Environment Department, telephone (505) 827-2900, and may submit written comments to the Ground Water Pollution Prevention Section, NM Environment Department, P.O. Box 26110, Santa Fe, NM 87502. Prior to ruling on any proposed discharge permit or its modification, the NM Environment Department will allow thirty (30) days after the date of publication of this notice to receive written comments and during which a public hearing may be requested by any interested person. Requests for public hearing shall set forth the reasons why the hearing should be held. A hearing will be held if the NM Environment Department determines that there is significant public interest.

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Michael H. Feldewert

mfeldewert@hollandhart.com

September 9, 2002

VIA HAND DELIVERY

This Document Is Provided For Settlement Purposes Only and Shall Not Be Admissible for Any Purpose.

David K. Brooks, Legal Bureau
New Mexico Energy, Minerals & Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Re: Controlled Recovery Inc. v. Williams, et al.
Closure Plan – Settlement Discussions

Dear Mr. Brooks:

CRI appreciates the Division's participation in the recent settlement efforts initiated by Secretary Betty Rivera. I remain hopeful that a resolution can be reached without the need for further involvement by the court. As a result, we will refrain from conducting the discovery afforded by the court until such time as these settlement efforts have been exhausted.

On September 15, 2000, CRI submitted to the Division for settlement discussions a detailed closure plan. CRI informed the Division in its cover letter that once the closure plan was approved, CRI would obtain third-party bids on the costs. *See* Rule 711.B(1)(i) (cost estimates to close a surface waste management facility must be "based upon the use of the equipment *normally available to a third party contractor.*") Included with CRI's proposed closure plan were supporting letters from a hydrogeologist, a geological engineer, and an environmental consultant stating that the tasks outlined in CRI's plan were sufficient to protect the public health and environment in this unique geologic area. *See* Rule 711.b(1)(i) (requiring a closure plan to be "sufficient to close the facility to protect public health and the environment"). *See also* Division Order No. R-9166 at ¶ 10 (identifying the unique geology underlying CRI's facility) and ¶ 17 (requiring a $25,000 closure bond because of the unique geology of the area). As you know, CRI's site is remote to human population, future development is highly unlikely, the facility is located in an area that does not have groundwater sufficient for used by livestock or humans, impenetrable red beds underlie the facility, the site is not subject to any surface water run-on or run-off,

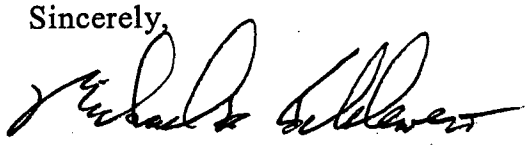
and the nearest surface body of water (Laguna Toston north of the facility) is a salt water lake used for brine disposal by a potash mine.

The Division's August 6, 2002 response seeks to impose "additional requirements" to the proposed closure plan without indicating why these additional requirements are necessary to protect public health and the environment in this unique geologic area. Moreover, the Division has arbitrarily assigned costs to each task without indicating how these figures were derived or whether they are "based upon the use of the equipment normally available to a third-party contractor" as required by Rule 711.B(1)(i). As a result, CRI is concerned the Division's response is an arbitrary assignment of costs to a generic wish list of tasks that have no relationship to the unique geologies of the area and go beyond what is necessary to protect the public health and environment in this area.

Attached is a detailed response to the Division comments. CRI's response identifies the areas of disagreement and indicates where the Division's "additional requirements" are based on erroneous "assumptions" or unnecessary to protect the public health and environment. To the extent the Division disagrees with this analysis, CRI asks that the Division (a) identify the geologic, engineering or other data indicating why each "additional requirement" is necessary to protect the public health and environment in this unique geologic area, and (b) identify how the Division arrived at its cost figures for each of the enumerated tasks.

CRI remains committed to a closure plan that protects the public health and environment. However, the Division must realize that arbitrary bonding requirements go beyond what is necessary to protect the public health and environment in this unique area unfairly affect CRI's balance sheet and CRI's ability to borrow the money it needs to continue to service the industry. I remain hopeful that once the Division responds in a more detailed fashion to CRI's comments, the parties will be able to reach agreement on a closure plan and bond amount that protects the public health and environment in this unique area and reflects third-party cost estimates as required by Rule 711.B(1)(i).

Sincerely,



Michael H. Feldewert

MHF/js
Enclosure
cc: Secretary Betty Rivera
Ken Marsh, Controlled Recovery, Inc.

CRI's RESPONSE TO THE DIVISION'S COMMENTS ON A PROPOSED CLOSING PLAN
(September 9, 2002)

Task 1: **Lock gates, post closed, no trespassing signs. No new material will be acceptable.**

OCD Comments: Task 1 must include notification of the OCD. The OCD Santa Fe and Hobbs offices must be notified when operation of the facility is to be discontinued.

CRI Response: CRI has no disagreement with these requirements.

Task 2: **Drain water from produced water receiving tanks, pits 1a and 1b (lined skim pits) to 3a. Remove residue from 3-750 bbl. tanks to 2a and 2b for drying.**

OCD Comments: The OCD must assume that all pits and tanks are full of fluid/sludge. What cannot be managed on site must be hauled to an offsite disposal facility.

Pit sludge disposal: $1,320;
Tank fluid transport and disposal: $3,778.

CRI Response: It is incorrect for the Division to "assume" that all pits and tanks will be full since they are not designed or constructed to be full. Moreover, the tanks at CRI's facility contain only produced water, which can easily be managed on site without transport and disposal costs. As Mr. Boyer (a hydrogeologist) noted in his report supporting CRI's closure plan, "high temperatures, low relative humidity, and an annual rainfall of approximately 9 inches enhance evaporation at the site."

Task 3: **Remove oil from treating plant to purchaser, drain all lines, remove untreated product to Pit 13.**

OCD Comments: The OCD assumes that all tanks will be full of material that will either be considered a waste or will need treatment. Untreated tank bottoms or BS & W must be removed to another treating plant for treatment and recycling. This includes the material in pit 13 that is stored pending treatment/recycling.

Tank material: $17,877;
Disposal costs: $7,150;
Transport of 5500 bbl.: $25,027;
Remove and recycle material in pit 13

estimated to be 1111 yd^3: $32,237.

CRI Response: It is incorrect for the Division to "assume" that all tanks will be full since tanks are not designed or constructed to be full. Moreover, the material in the tanks referenced is typically more than 50% water and therefore can easily be managed on site without transport and disposal costs. As Mr. Boyer (a hydrogeologist) noted in his report supporting CRI's closure plan, "high temperatures, low relative humidity, and an annual rainfall of approximately 9 inches enhance evaporation at the site." Finally, the transport and recycling costs are not justified or necessary to protect the public health and environment.

Task 4: **Allow fluids to evaporate and dry.**

OCD Comments: With pits full of fluid, evaporation and infiltration will take 2 years. The facility will have to be monitored 7 days a week for 2 years to ensure berm integrity is maintained, monitor H_2S and ensure that no illegal dumping is occurring.

Monitoring cost: $28,538.

CRI Response: The pits at CRI's facility have never been "full of fluid" and there is no factual basis for concluding that it will take two years for the required drying. As Mr. Boyer (a hydrogeologist) noted in his report supporting CRI's closure plan, "high temperatures, low relative humidity, and an annual rainfall of approximately 9 inches enhance evaporation at the site." Moreover, daily monitoring will not be required. Locked gates and fences approved by the Division exist at the site. Weekly monitoring will be sufficient. No H_2S is generated at the site and therefore no monitoring of H_2S is required.

Task 5: **Return unused boiler fuel to supplier.**

OCD Comments: The tanks, steel pits, pipe, boiler, equipment, used and unused chemicals, fuel, oil, and trash must be recycled or disposed of as applicable.

Equipment cleanup: $16,000.

CRI Response: The equipment can be left in place if not sold to a third party. The equipment poses no threat to the public health or the environment.

Task 6: **Push pits 2a, b, c, 4, 5, 6, which have contained sump material, drilling mud, drill cuttings, work over solids, and other non-hazardous oilfield wastes into 3d. Scrape residue from 3a, 3b, and 3c, which have contained produced water and wash water, and move to 3d. Any liquids or viscous material will be**

mixed with dry solids. Soil borings will be conducted in pits 3a, 3b, and 3c to determine vertical extent of hydrocarbons.

OCD Comments: Soil samples must be taken and analyzed from the bottom and sidewalls of each of the pits and below tank footprints.

Forty samples at $290 each and labor: $14,240;
Moving an estimated 1434 yd^3: $3,264;
Moving an estimated 3958 yd^3 from Pit 3a, 3b, 3c: $10,206.

> **CRI Response:** CRI's consultants have recommended that soil samples be taken from the main liquids pits (3a, 3b, and 3c) in order to maintain a record in CRI's files. However, soil samples from the remaining pits and tanks are not necessary to protect the public health and environment due to the nature of those pits and tanks and the unique geology underlying this facility. As the Division determined, and as the expert reports submitted in support of this closure plan confirm, this facility is located in an area that does not have groundwater sufficient for used by livestock or humans, impenetrable red beds underlie the facility, the site is not subject to any surface water run-on or run-off, and the nearest surface body of water (Laguna Toston north of the facility) is a salt water lake used for brine disposal by a potash mine. Soil samples in this unique situation are not necessary to protect public health or the environment.

Task 7: **Move liner and material from 1a and 1b to 3d.**

OCD Comments: Material from 1a and 1b was covered in OCD's response to Task 2. The removal of the liner and remaining contaminated soil and analytical costs are in OCD reply to Task 6.

> **CRI Response:** CRI directs the Division to its responses under Task 2 and Task 6.

Task 8: **Move liner and materials from 16, which has contained bottom sediment with paraffin, to 3d.**

OCD Comments: Tank bottoms or BS & W that contain recoverable hydrocarbons must be removed to another treating plant for treatment and recycling. This includes the material that is stored in pit 16.

Transport and recycle approximately 1481 yd^3: $44,390.

> **CRI Response:** This material can easily be managed on site and there is no indication that any of this material is recoverable. The transport and recycling costs are not justified or necessary to protect the public health and environment.

Task 9: **Move 7, 8, 9, 10, 11, and 12 which have contained sump material, drilling muck, drilling cuttings, work over solids, and other non-hazardous oilfield wastes, to 3d. Any liquids or viscous material will be mixed with dry solids.**

OCD Comments: Moving and disposal of approximately 1721 yd^3: $4,468.

CRI Response: CRI agrees that moving and disposal costs will be incurred to move the material to Pit 3d, but does not understand the basis for the estimated cost of this task.

Task 10: **Cover 3d with 12" caliche and coarse native material, contoured to prevent wind and water erosion.**

OCD Comments: Pit 3d is within the east end of the larger pit 3 area. Design and construction of a landfill cap for Pit 3d must include the following: The pit must be filled and compacted with clean soil and then covered, compacted and mounded so that the location of the former pit will allow for positive drainage of precipitation. The cap must consist of a 12-inch intermediate cover material, 18-inch clay cap, and 6 inches of topsoil. A proposal using coarse material as the final layer to cap the landfill must be submitted to the OCD for review and approval. This proposal must include landfill industry-specific data as to the design and construction of caps using this material. Clean material to construct the cap may be acquired on site. The landfill cap must be allowed to stabilize and post-closure care period will be required.

Estimated 4685 yd^3 of cap material: $12,425.

The remaining open portion of pit 3 must be filled in and domed so as not to act as an open collection point for precipitation or leachate that may seep from the waste pile and pond next to the buried waste.

Estimated 54,375 yd^3 of fill material: $128,360.

CRI Response: *12" of cover for Pit 3d is adequate to prevent erosion in this* area and no post-closure care is required to protect the public health and environment. As the Division determined, and as the expert reports submitted in support of this closure plan confirm, this facility is located in an area that does not have groundwater sufficient for used by livestock or humans, impenetrable red beds underlie the facility, the site is not subject to any surface water run-on or run-off, the area only receives approximately 9 inches of rain a year, and the nearest surface body of water (Laguna Toston north of the facility) is a salt water lake used for brine disposal by a potash mine. Indeed, the Division routinely allows reserve pits to be left on site in areas where groundwater is present with only a thin caliche cover or no cover at all.

The remaining portion of pit 3 does not require filling at the Division's estimated cost of $128,000 to protect public health and the environment. As Mr. Boyer notes in his report, "high temperatures, low relative humidity, and an annual rainfall of approximately 9 inches enhance evaporation at the site." Any precipitation or seepage will quickly and easily evaporate. Moreover, the area is completely fenced and gated.

Task 11: Move material, liner, and nets from 13, which has contained bottom sediment and water, to solids area. Any remaining liquids or viscous material will be mixed with dry solids. Cap solids area with 12" caliche and coarse native material. Contoured to prevent wind and water erosion.

OCD Comments: Recycle material with usable oil cannot be disposed of. The contents of pit 13 must be transferred to another treating plant for treatment See the response in Task 3.

Design and construction of a Landfill Cap for pit 15 must include the following:

The pit will be filled and compacted with clean soil and then covered, compacted and mounded so that the pit location will allow for positive drainage of precipitation. The cap must consist of a 12-inch intermediate cover material, 18-inch clay cap, and 6 inches of topsoil. A proposal using coarse material as the final layer to the cap the landfill must be submitted to the OCD for review and approval. This proposal must include landfill industry-specific data as to the design and construction of caps using this material. Clean material to construct the cap may be acquired on site. The landfill cap will be allowed to stabilize and a post-closure care period will be required.

Estimated 27,000 yd^3 of cap material and construction: $64,300.

CRI Response: CRI directs the Division to its comments to Task 10. Moreover, this material can easily be managed on site and there is no indication that any of this material is recoverable. The transport and recycling costs are not justified or necessary to protect the public health and environment.

Task 12: Conduct NORM survey.

OCD Comments: The NORM survey must be conducted at the facility prior to removal of tanks, pipe, and equipment and prior to the moving of waste for burial.

NORM survey: $648.

CRI Response: There is no disagreement with respect to this task.

Task 13: **Record with Lea County clerk and notice that the site has been used as an oilfield disposal and treatment facility.**

OCD Comments: The notice to the Lea County clerk must include a survey description of the location of all buried wastes on site.

CRI Response: There is no disagreement with respect to this task.

Task 14: **OCD to inspect and release financial assurance obligation within 30 days of inspection.**

OCD Comments: Upon OCD-approved final closure the financial assurance will be released.

CRI Response: Given the Division's two-year delay in responding to CRI's closure plan, a reasonable time limit should be set within which the Division must act and release the bond.

Items not included in the above tasks:

1) Plug and abandon 14 groundwater monitoring wells of approximately 815 feet total length: $2,740;

2) Level berms and contour pits 1, 1b, 2a, 2b, 2c, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 16 so there will not be pit areas that would be available for unauthorized dumping: $85, 947.

CRI Response: There are no groundwater monitoring wells at CRI's facility. Moreover, the leveling of berms and contour pits is already included within the Tasks addressing each of these pits. Since the areas is fenced and gated, there is no threat of unauthorized dumping in this area.

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Jennifer A. Salisbury
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

December 3, 2001

Mr. Michael H. Felderwert
Holland & Hart and Campbell & Carr
P.O.Box 2208
Santa Fe, NM 87504-2208

Re: Case No. CV-2001-310
Controlled Recovery, Inc. v. Williams, et al
5th District Court, State of New Mexico

Dear Michael:

Responding to your letter of November 28, OCD will make the files referenced in your letter, with the exception of any privileged materials that may be contained therein, available for your inspection at OCD offices during regular business hours on or after Monday, December 10, 2001. The files will be produced as they are kept in the ordinary course of business.

It is the policy of OCD not to allow files out of our custody. However, we have an agreement with Kinko's to make copies of documents designated by requesting parties. You will need to make the arrangements for copying with them. Then they will pick up the documents you have designated for copying at our offices and return them to our offices. Of course, the copies will be made at your expense.

Please advise me when you be coming to inspect these records.

Very truly yours,

/s/

David K. Brooks
Assistant General Counsel

cc: Roger Anderson
Martyne Kieling

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

CONTROLLED RECOVERY INC.,
a New Mexico Corporation,

Plaintiff,

vs. **No. CV-2001-310**

CHRIS WILLIAMS, New Mexico Oil Conservation Division District 1 Supervisor, Hobbs, New Mexico; NEW MEXICO OIL CONSERVATION DIVISION, A State Agency; and LORI WROTENBERY, New Mexico Oil Conservation Division Director,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT DISCOVERY PRIOR TO FILING A RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Controlled Recovery Inc. ("CRI") files this reply brief in support of its Motion for Leave to Conduct Discovery Prior to Filing a Response to Defendants' Motion to Dismiss.

CRI Is Entitled to Discovery to Establish the Jurisdictional Facts Relevant to Defendants' Exhaustion Doctrine and Primary Jurisdiction Arguments

Relying on over five pages of "Facts and Background" and three affidavits, Defendants contend in their Motion to Dismiss that the Court cannot entertain CRI's claims that the Division's actions are unlawful, arbitrary and in derogation of CRI's constitutionally protected due process rights because CRI has not invoked the Division's administrative hearing process, and because Defendants allege "primary jurisdiction" over these issues rests with the Division. In response, CRI has filed a

Motion for Leave to Conduct Discovery to establish facts relevant to Defendants' jurisdictional arguments. *See* N.M.R.Civ.P.1-012 (noting that a party faced with a motion to dismiss supported by factual allegations and matters outside the pleadings "shall be given reasonable opportunity to present all material made pertinent to such motion.")

In their response to CRI's motion, Defendants recognize that under the New Mexico law, "discovery and an evidentiary hearing are appropriate where jurisdictional facts are the subject of genuine dispute." Defendants' Response In Opposition at p. 7. However, Defendants suggest CRI should be forced to respond to Defendants' affidavits and Motion to Dismiss without any discovery in this case because **Defendants "believe** that there are no fact issues pertinent to its Motion to Dismiss that will be, in good faith contested." Response In Opposition at p. 1. While CRI is hopeful that an undisputed set of jurisdictional facts can be developed for the Court, discovery is nonetheless required to **uncover** those facts and to **support** them.

Moreover, Defendants' view of the relevant jurisdictional facts is extremely narrow. Defendants limit the relevant facts to the "nature" of CRI's complaint, the "existence" of an administrative remedy, and CRI's failure to invoke that administrative remedy. *Id.* at p. 7. The facts relevant to Defendants' exhaustion doctrine and jurisdictional arguments are much broader than Defendants suggest.

1. Discovery is Necessary to Determine the Identity and "Expertise" of the Administrative Decision-makers.

Defendants' jurisdiction and exhaustion arguments rest on the proposition that CRI must invoke the Division's "special competence" and "agency expertise" before it can file its complaint with this Court. *See* Defendants' Brief In Support Of Motion To

Dismiss at p. 11; Defendants' Response In Opposition at p. 6.[1] In order to address Defendants' jurisdictional arguments, the Court must have at least an understanding of **who** the decision-makers will be at any proposed administrative hearing and **what** their area of expertise includes. Discovery will establish that the legal questions to be decided in this case - such as whether Defendants have acted arbitrarily, outside the scope of their authority or in violation of CRI's due process rights - are questions of law falling outside the expertise of the decision-makers involved in the Division's administrative process.[2]

2. Discovery is Necessary to Establish the "Futility" of the Division's Administrative Process In This Case.

It is undisputed that "[t]he doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which *are vain and futile.*" ***State ex rel. Norvell v. Credit Bureau,*** 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (emphasis added). The question whether the Division's administrative process would be "vain and futile" in this case can only be determined once discovery reveals facts addressing:

(a) The employees involved and the circumstances surrounding the issuance of the Division directives at issue in this case;

---

[1] The Defendants ignore the fact that the Division and its Director have already determined on three occasions that it has the authority to issue the Division directives at issue in this case.

[2] Indeed, questions of law are not subject to the exhaustion doctrine. *See* ***State ex rel. Norvell v. Credit Bureau***, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (characterizing as "specious" the argument that the exhaustion doctrine applies to questions of law.); ***Pan American Petroleum Corp. v. El Paso Natural Gas Co.***, 77 N.M. 481, 485, 424 P.2d 397, 401 (1966) (characterizing as "without merit" the argument that the exhaustion doctrine applies to "a question of law, rather than one of fact.").

(b) The decision-makers involved in the Division's administrative process and their relationship to the employees involved in the issuance of the Division directives at issue in this case;

(c) The role of the Division's Director in both the actions at issue in this case and the Division's administrative process; and

(d) The independence of the decision-makers involved in the referenced administrative process.

CRI certainly cannot establish a futility exception without conducting the discovery necessary to establish these basic facts.

CONCLUSION

Tercero v. Diocese of Norwich, 127 N.M. 294, 297, 980 P.2d 77, 80 (N.M. Ct.App. 1999) holds that when jurisdictional questions are raised, the court has discretion to permit discovery. Although, as Defendants point out, *Tercero* involved an objection to personal jurisdiction rather than subject matter jurisdiction, the underlying principle is the same: A party must be allowed a reasonable opportunity to establish facts necessary to determine whether the court has jurisdiction over the case. **See also** N.M.R. Liv. P. 1-012. Defendants themselves state that they "do not question that discovery and an evidentiary hearing are appropriate where jurisdictional facts are the subject of genuine dispute." Defendants' Brief In Opposition at p. 7. CRI simply seeks a reasonable opportunity to present all material necessary to determine whether the exhaustion doctrine applies and whether the Court has jurisdiction over the issues raised in CRI's complaint.

Respectfully submitted,

HOLLAND & HART and CAMPBELL & CARR
Michael H. Feldewert
Post Office Box 2208
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(505) 988-4421
HEIDEL, SAMBERSON, NEWELL,
COX & McMAHON

By: _____
C. Gene Samberson
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ATTORNEYS FOR CONTROLLED RECOVERY INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2001, I have caused to be hand-delivered a copy of Plaintiff's Reply in Support of Motion for Leave to Conduct Discovery Prior to Filing a Response to Defendants' Motion to Dismiss in the above-captioned case to the following counsel of record:

David K. Brooks
Assistant General Counsel
New Mexico Energy, Minerals and
Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

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Michael H. Feldewert

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November 28, 2001

David K. Brooks, Legal Bureau
New Mexico Energy, Minerals and
Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

01 NOV 29 PM 1:54
OIL CONSERVATION DIV

Re: Controlled Recovery Inc. v. NMOCD

Dear Mr. Brooks:

As we discussed by telephone, I would like to begin the process of gathering and reviewing all files maintained by the Division and the Commission that concern CRI's facility in Lea County, New Mexico. This effort should include, without limitation, files containing the following:

Records pertaining to Case No. 9882 and Order R-9166 (the 1990 permitting order);

The exhibits attached to CRI's district court Complaint;

Records pertaining to inspections of CRI's facility; and

Records pertaining to any written or oral complaint involving CRI's facility.

I appreciate your offer to meet with Division personnel to determine what files have been maintained for CRI's facility. Once I have heard back from you, we can make the necessary arrangements to review those files.

Thank you for your cooperation in this matter.

Sincerely,

Michael H. Feldewert

MHF/js

Joyce M. Miley
Director, Environmental
Conoco Gas & Power

Conoco Inc.
600 N. Dairy Ashford (77079) HU 3036
P.O. Box 2197
Houston, TX 77252-2197
(281) 293-4498
Fax: (281) 293-1214

Via Email

November 5, 2001

Mr. Roger C. Anderson
Chief, Environmental Bureau
Oil Conservation Division
2040 South Pacheco Street
Santa Fe, New Mexico 87505

RE: Discharge Plan GW-175
Raptor Gas Transmission LLC
Hobbs Gas Plant
Lea County, New Mexico

Dear Mr. Anderson:

The above-referenced facility operates pursuant to a Discharge Plan approved on February 4, 2000. Raptor assumed ownership of the facility in December 2000; Conoco operates the facility on behalf of Raptor. Conoco recently completed an environmental audit, in which it discovered a potential violation of Discharge Plan Approval Condition #3. Conoco is seeking to promptly disclose the potential violation in order to assure that it complies with the guidance set out in New Mexico's Voluntary Environmental Self Evaluation Policy.

It appears from documents in the file that a shipment of 130 barrels of wastewater was sent to CRI, an OCD approved Class II facility, on August 10, 2001. The Conoco manifest is ambiguous in that it classified the shipment as produced water and rainwater, even though these two water streams are maintained separately at the facility. As a result, it is unclear at this time as to whether exempt or nonexempt oilfield wastes was shipped to CRI. However, sampling results completed in July 2001 indicated that one of the wastewater streams contained 8.59 ppm benzene. If Conoco shipped nonexempt waste to CRI in August, and if the sample was drawn from the nonexempt stream, Conoco violated Condition #3.

Conoco will continue to investigate the situation.

Sincerely,

Joyce Miley

cc: Ken Marsh - CRI (via Fax 505-393-3615)
Paula Kochman - Conoco Legal

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

CONTROLLED RECOVERY INC.,
a New Mexico Corporation,

Plaintiff,

vs. **No. CV-2001-310**

CHRIS WILLIAMS, New Mexico Oil Conservation Division District 1 Supervisor, Hobbs, New Mexico; NEW MEXICO OIL CONSERVATION DIVISION, A State Agency; and LORI WROTENBERY, New Mexico Oil Conservation Division Director,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT DISCOVERY PRIOR TO FILING A RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Controlled Recovery Inc. ("CRI") files this reply brief in support of its Motion for Leave to Conduct Discovery Prior to Filing a Response to Defendants' Motion to Dismiss.

CRI Is Entitled to Discovery to Establish the Jurisdictional Facts Relevant to Defendants' Exhaustion Doctrine and Primary Jurisdiction Arguments

Relying on over five pages of "Facts and Background" and three affidavits, Defendants contend in their Motion to Dismiss that the Court cannot entertain CRI's claims that the Division's actions are unlawful, arbitrary and in derogation of CRI's constitutionally protected due process rights because CRI has not invoked the Division's administrative hearing process, and because Defendants allege "primary jurisdiction" over these issues rests with the Division. In response, CRI has filed a

Motion for Leave to Conduct Discovery to establish facts relevant to Defendants' jurisdictional arguments. *See* N.M.R.Civ.P.1-012 (noting that a party faced with a motion to dismiss supported by factual allegations and matters outside the pleadings "shall be given reasonable opportunity to present all material made pertinent to such motion.")

In their response to CRI's motion, Defendants recognize that under the New Mexico law, "discovery and an evidentiary hearing are appropriate where jurisdictional facts are the subject of genuine dispute." Defendants' Response In Opposition at p. 7. However, Defendants suggest CRI should be forced to respond to Defendants' affidavits and Motion to Dismiss without any discovery in this case because **Defendants "believe** that there are no fact issues pertinent to its Motion to Dismiss that will be, in good faith contested." Response In Opposition at p. 1. While CRI is hopeful that an undisputed set of jurisdictional facts can be developed for the Court, discovery is nonetheless required to **uncover** those facts and to **support** them.

Moreover, Defendants' view of the relevant jurisdictional facts is extremely narrow. Defendants limit the relevant facts to the "nature" of CRI's complaint, the "existence" of an administrative remedy, and CRI's failure to invoke that administrative remedy. *Id.* at p. 7. The facts relevant to Defendants' exhaustion doctrine and jurisdictional arguments are much broader than Defendants suggest.

1. Discovery is Necessary to Determine the Identity and "Expertise" of the Administrative Decision-makers.

Defendants' jurisdiction and exhaustion arguments rest on the proposition that CRI must invoke the Division's "special competence" and "agency expertise" before it can file its complaint with this Court. *See* Defendants' Brief In Support Of Motion To

Dismiss at p. 11; Defendants' Response In Opposition at p. 6.[1] In order to address Defendants' jurisdictional arguments, the Court must have at least an understanding of **who** the decision-makers will be at any proposed administrative hearing and **what** their area of expertise includes. Discovery will establish that the legal questions to be decided in this case - such as whether Defendants have acted arbitrarily, outside the scope of their authority or in violation of CRI's due process rights - are questions of law falling outside the expertise of the decision-makers involved in the Division's administrative process.[2]

2. Discovery is Necessary to Establish the "Futility" of the Division's Administrative Process In This Case.

It is undisputed that "[t]he doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which *are vain and futile*." ***State ex rel. Norvell v. Credit Bureau***, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (emphasis added). The question whether the Division's administrative process would be "vain and futile" in this case can only be determined once discovery reveals facts addressing:

(a) The employees involved and the circumstances surrounding the issuance of the Division directives at issue in this case;

[1] The Defendants ignore the fact that the Division and its Director have already determined on three occasions that it has the authority to issue the Division directives at issue in this case.

[2] Indeed, questions of law are not subject to the exhaustion doctrine. *See* ***State ex rel. Norvell v. Credit Bureau***, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (characterizing as "specious" the argument that the exhaustion doctrine applies to questions of law.); ***Pan American Petroleum Corp. v. El Paso Natural Gas Co.***, 77 N.M. 481, 485, 424 P.2d 397, 401 (1966) (characterizing as "without merit" the argument that the exhaustion doctrine applies to "a question of law, rather than one of fact.").

(b) The decision-makers involved in the Division's administrative process and their relationship to the employees involved in the issuance of the Division directives at issue in this case;

(c) The role of the Division's Director in both the actions at issue in this case and the Division's administrative process; and

(d) The independence of the decision-makers involved in the referenced administrative process.

CRI certainly cannot establish a futility exception without conducting the discovery necessary to establish these basic facts.

CONCLUSION

Tercero v. Diocese of Norwich, 127 N.M. 294, 297, 980 P.2d 77, 80 (N.M. Ct.App. 1999) holds that when jurisdictional questions are raised, the court has discretion to permit discovery. Although, as Defendants point out, *Tercero* involved an objection to personal jurisdiction rather than subject matter jurisdiction, the underlying principle is the same: A party must be allowed a reasonable opportunity to establish facts necessary to determine whether the court has jurisdiction over the case. **See also** N.M.R. Liv. P. 1-012. Defendants themselves state that they "do not question that discovery and an evidentiary hearing are appropriate where jurisdictional facts are the subject of genuine dispute." Defendants' Brief In Opposition at p. 7. CRI simply seeks a reasonable opportunity to present all material necessary to determine whether the exhaustion doctrine applies and whether the Court has jurisdiction over the issues raised in CRI's complaint.

Respectfully submitted,

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HEIDEL, SAMBERSON, NEWELL,
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By: [signature] for

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ATTORNEYS FOR CONTROLLED RECOVERY INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2001, I have caused to be hand-delivered a copy of Plaintiff's Reply in Support of Motion for Leave to Conduct Discovery Prior to Filing a Response to Defendants' Motion to Dismiss in the above-captioned case to the following counsel of record:

David K. Brooks
Assistant General Counsel
New Mexico Energy, Minerals and
Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

C. GENE SAMBERSON

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

CONTROLLED RECOVERY INC.,
A New Mexico Corporation,

Plaintiff,

vs. **No. CV2001-310G**

CHRIS WILLIAMS, New Mexico Oil Conservation Division District 1 Supervisor, Hobbs, New Mexico; NEW MEXICO OIL CONSERVATION DIVISION, and LORI WROTENBERY, Director of the New Mexico Oil Conservation Division,

Defendants

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT DISCOVERY

COME NOW **The New Mexico Oil Conservation Division** of the Energy, Minerals and Natural Resources Department of the State of New Mexico (hereafter called "the Division"), **Lori Wrotenbery,** Director of the New Mexico Oil Conservation Division, in her official capacity, and **Chris Williams,** District Supervisor of District I, New Mexico Oil Conservation Division, in his official capacity, Defendants in the above styled and numbered case, and file this, their Response in Opposition to Plaintiff's Motion for Leave to Conduct Discovery, as follows:

I. INTRODUCTION

Plaintiff filed this suit challenging certain administrative permitting actions of the New Mexico Oil Conservations Division (the "Division"). The Division filed its Motion to Dismiss pursuant to N.M.Rule Civ. P. 1-012.B(1) for lack of subject matter jurisdiction because Plaintiff failed to avail itself of available administrative remedies. Rather than responding to Defendants' Motion, Plaintiff has filed a Motion for Leave to Conduct Discovery. Defendants believe that there are no fact issues pertinent to its Motion to Dismiss that will be, in good faith contested. Accordingly, there is no occasion for discovery, and Defendants urge this Court to overrule Plaintiff's motion, and order Plaintiff to respond to Defendants' Motion to Dismiss within fifteen (15) days after the date of the Court's order.

II. THE "FACTUAL MATTERS" TO WHICH PLAINTIFF REFERS ARE A RED HERRING

The alleged "factual matters" which according to Plaintiff, are addressed in the Division's filings, are either (1) not factual, (2) not addressed, or (3) not, in good faith, disputed. Each of these alleged factual matters will be discussed separately, as follows:

> The circumstances under which Director William J. LeMay issued the Division's 1990 permitting Order authorizing Ken Marsh to construct and operate CRI's facility in Lea County.

Defendants' affidavits say nothing about this subject, nor does its brief beyond the fact that such an order was entered, a fact plead by Plaintiff and not contested by Defendants.

> The procedures and proceedings under which the Division adopted Rule 711, and Ken Marsh's participation in those proceedings.

Defendants have asserted only that public hearings were held, that Ken Marsh testified thereat, and that Plaintiff filed a Motion for Rehearing. All of these facts are a matter of public record. The Division would not object to a request to produce copies of the transcripts of the subject hearings and of the documents in the case file.

> The prupose of Rule 711 and the Division's contention that it "intended" the repermitting requirements of Rule 711 "to apply to all existing facilities," including CRI's facility;

The sentence from which the quoted material was extracted appears at the top of Page 3 of Defendant's brief. Aside from the fact that the brief refers to the intent of the Commission (which adopted the rule) and not the Division, when the sentence is read in its entirety, it clearly invites this Court to determine intent from the language of the Rule, which Defendants contend is not ambiguous. Therefore, there is no fact issue requiring discovery.

> The unsupported allegation that CRI "filed an application" for a Rule 711 permit with the Division at some undisclosed time.

The referenced statement appears in the first full paragraph that begins on Page 3 of Defendants' brief. The reader is referred to Paragraph 17 of the Complaint, which, in turn references Exhibit 6 to the Complaint. Exhibit 6, though not in the form used by the Division for such purpose, contains all of the information required by Rule 711.E(1) to be included in a permit application by an existing, permitted facility, and the Division elected to treat it as such. Defendants do not contend that CRI submitted anything other than Exhibit 6 to the Complaint that constituted an application. There is no controversy about what was filed or when; only about the characterization of the document, which is a legal not a factual issue.

> The circumstances surrounding the letter directives Division Director Lori Wrotenberry issued to Ken Marsh in July of 2000 and again in July of 2001 that purport to "re-permit" CRI's facility.

Defendants' brief says nothing about the "circumstances" surrounding the issuance of the documents that Plaintiff characterizes as "letter directives," except that the July 6, 2001 document was issued "following negotiations." This statement was intended merely to inform the Court, and is irrelevant to the jurisdictional issue. Defendants do not contend that Plaintiff made any binding agreement or waiver in the referenced negotiations, and would object to any evidence concerning the substance of the negotiations as constituting privileged settlement efforts. Defendants' remaining statement about the July 3, 2000 and July 6, 2001 documents merely characterizes the documents. Since there is no controversy about the fact that these documents (which are attached as Exhibits 7 and 9 respectively to the Complaint) were sent and received, nor about their contents, these statements suggest no fact issues. Plaintiff's motion does not indicate wherein any "circumstances" surrounding these documents are relevant to the jurisdictional issue.

> The ability of the Division's administrative hearing process to address the legal issues raised by CRI's complaint and the actions taken by Division Director Lori Wrotenbery and her staff.

Defendants' statements about the Division's and the Commission's administrative hearing process, both in its brief and in the attached affidavit of Lori Wrotenbery, merely describe how the Division hearing process works. Defendants do not believe that Plaintiff seriously disputes any of the statements concerning the mechanics of the process. To the extent that Plaintiff seeks discovery in order to impugn the qualifications of the hearing examiners or of the commissioners, Defendants contend that these matters

are irrelevant. The Legislature has enacted NMSA Sections 70-2-12.B(20),(21) and (22), which confer on the Division general regulatory authority over facilities such as Plaintiffs, Section 70-2-13 prescribing the procedure for Division examiner hearings and for appeal therefrom to the Commission, and Section 70-2-4, establishing the Commission and prescribing its membership. The Legislature has fixed the appropriate forum to address, in the first instance, the issues raised by Plaintiff's complaint, and, accordingly, the factual qualifications of the statutorily designated decision makers is irrelevant.

The section of Plaintiff's motion discussing this subject suggests, though it does not state, that it plans to advance an assertion of bias. Bias cannot be inferred from the fact that the charges are made by the same body that tries the issues. *Seidenberg v. New Mexico Board of Medical Examiners,* 80 N.M. 135, 139, 452 P.2d 469 (1969). Neither can bias of the Director of the Oil Conservation Division be inferred from the fact that, by statute, she is a member of the Commission entitled to participate in the review of her administrative decisions. *Santa Fe Exploration Co. v. Oil Conservation Division,* 114 N.M. 103, 109, 835 P.2d 819 (1992). What is said in *Seidenberg, supra* is directly pertinent here:

> The Board is the one tribunal vested with power to revoke a doctor's license . . . [P]roceedings before the Board may not be restrained merely by reason of the fact that the Board itself initiated the proceedings against a physician and was, therefore, an interested party.

Similarly in this case, the Division and the Commission are the only agencies vested by statute with responsibility for regulation and permitting of facilities such as Plaintiffs. They cannot be deprived of jurisdiction simply because the Division Director has ultimate responsibility for initiation of proceedings as well as a statutory role in

adjudication thereof. Neither should these facts afford Plaintiff an opportunity to go on a fishing expedition in an effort to show bias in fact when there are no circumstances suggesting that. If Plaintiff has grounds to assert a claim of bias in fact against Ms. Wrotenbery, that is a matter properly asserted before the Commission. *See Santa Fe, supra.*

III. THE PERTINENT JURISDICTIONAL FACTS IN THIS CASE ARE UNDIPUTED.

Plaintiff cites four cases none of which is pertinent to the present case. *State ex rel. Norvell v. Credit Bureau*, 85 N.M. 521, 514 P.2d 40 (1973) and *Pan American Petoleum Corp. v. El Paso Natural Gas Co.*, 77 N.M. 481, 424 P.2d 297 (1967) may stand for the proposition that a plaintiff need not exhaust administrative remedies in certain cases which present solely legal issues wholly outside the scope of the relevant administrative agency's domain. Defendants believe theses cases are inapposite because (1) if this Court were to reach the merits of the present case the issues it would have to address would be primarily factual, and (2) the legal questions involved, unlike those in the cited cases involve the interpretation of the agency's rules. It is well settled that administrative agencies have jurisdiction, in the first instance, to interpret their own rules. *See generally Atlixco Coalition v. Maggiore,* 125 N.M. 786, 795. 965 P.2d 370 (Ct.App. 1998), where it is said that although the interpretation of agency rules presents a question of law, the courts "will generally defer to the agency's interpretation if it implicates agency expertise." In any event, these considerations go to the merits of the jurisdictional motion, not to the need for discovery. Plaintiff does not explain, and Defendants cannot

understand, why Plaintiff needs discovery to prove that the case turns upon exclusively legal issues.

Tercero v. Diocese of Norwich, 127 N.M. 294, 980 P.2d 77 (Ct.App. 1999) involved an objection under Rule 1-012.B(2) to personal jurisdiction over the defendant based on the contention that the defendant did not do business in the jurisdiction, clearly a factual issue. Finally, the observations of Judge Donnelly quoted from his dissenting opinion in *Valenzuela v. Singleton,* 100 N.M. 84, 666 P.2d 225 (Ct.App. 1982) obviously represent only the opinion of one judge, not a Court holding. That said, Defendants do not question that discovery and an evidentiary hearing are appropriate where jurisdictional facts are the subject of genuine dispute. This, however, is not such a case. The jurisdictional facts here are (1) the nature of Plaintiff's Complaint, (2) the existence of an administrative remedy that was and remains available to Plaintiff, and (3) Plaintiff's failure to invoke that administrative remedy. The Court can determine the nature of the Complaint by reading it. Defendants doubt that Plaintiff, in good faith, disputes either the existence of the administrative remedy or that it has not been invoked.

III. DEFENDANTS' ALTERNATIVE REQUEST FOR A PROTECTIVE ORDER

In the alternative, if this Court concludes that there are fact issues pertinent to the Defendants' Motion to Dismiss with respect to which discovery should be allowed, Defendants respectfully move this Court to enter a protective order specifying the issues that may be inquired about, and limiting the types and extent of discovery. As suggested in Section IV at Pages 10-12 of Defendants' brief, if this case proceeds to consideration of the merits, it will involve numerous complex factual issues. Defendants should be protected from discovery regarding these issues until the Court has ruled on their Motion

to Dismiss. A simple order limiting discovery to jurisdictional issues would be inadequate in this case. Defendants cannot conceive, and Plaintiff's Motion gives few clues, as to what factual matters Defendants may consider relevant to the jurisdictional issues.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully pray that Plaintiff's Motion for Leave to Conduct Discovery be denied, and that Plaintiff be ordered to file its response to Defendants' Motion to Dismiss not more than fifteen (15) days after the entry of such order. In the alternative, Defendants pray that the Court enter an order specifying the issues concerning which discovery may be conducted, limiting the time allowed therefor, and the types and amount of discovery allowed.

Respectfully Submitted,

David K. Brooks
Special Assistant Attorney General
Oil Conservation Division
Energy, Minerals and Natural Resources Department
State of New Mexico
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505)-476-3450

ATTORNEY FOR DEFENDANTS

Certificate of Service

I hereby certify that a true copy of the above and foregoing Defendants' Response in Opposition to Plaintiff's Motion to Conduct Discovery was served on counsel for the Plaintiff in this case by first-class mail, postage prepaid, by deposit of the same with the United States Postal Service on this _____ day of November, 2001, addressed as follows:

to: Mr. William F. Carr
Mr. Michael H. Felderwert
Holland & Hart and Campbell & Carr
P.O.Box 2208
Santa Fe, NM 87504-2208

to: Mr. C.Gene Samberson
P.O.Drawer 1599
Lovington, NM 88260

David K. Brooks

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

CONTROLLED RECOVERY INC.,
a New Mexico Corporation,

Plaintiff,

vs. **NO. CV-2001-310**

CHRIS WILLIAMS, New Mexico Oil Conservation Division District 1 Supervisor, Hobbs, New Mexico; NEW MEXICO OIL CONSERVATION DIVISION, a State Agency; and LORI WROTENBERY, New Mexico Oil Conservation Division Director,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT DISCOVERY PRIOR TO FILING A RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Controlled Recovery Inc. ("CRI") moves this court for leave to conduct discovery prior to filing a response to Defendants' Motion To Dismiss For Want of Jurisdiction.

The Division's Motion Rests - In Part - On Factual Allegations

In 1990, by Order R-9166, the Division permitted CRI to operate a commercial surface waste management facility in Lea County. The Division's 1990 permitting Order was issued after public hearing, and established the operational and bonding requirements for the facility based on the evidence received at that public hearing.

By letters dated July 3, 2000, and July 6, 2001, Division Director Lori Wrotenbery informed Ken Marsh, president of CRI, that CRI's facility had been "re-permitted" under

Division Rule 711, which was promulgated in 1995. Ms. Wrotenbery's letters further directed:

> That CRI obtain a $250,000 closure bond, the maximum allowed under Division Rule 711 for any facility in New Mexico, even though the Division concluded after public hearing in 1990 that a $25,000 closure bond was sufficient due to the unique geologic conditions underlying CRI's facility;
>
> That CRI's facility comply with ten pages of single spaced "operational requirements" that go beyond the requirements in the Division's 1990 permitting Order, and beyond the operational requirements set forth in Division Rule 711;
>
> That CRI must file a request for a "permit modification" with the Division to conduct landfarming operations, even though the Division approved CRI's landfarming operations in 1990; and
>
> That the netting exemptions CRI received from the Division's district office in 1991 and in 1997 are now revoked and all pits and ponds must be netted, even though the operational conditions which resulted in the netting exemptions still exist today.

CRI's complaint for declaratory judgment and injunctive relief contends the Division's actions are unlawful, arbitrary, and in derogation of CRI's constitutionally protected due process rights.

The Division's motion to dismiss contends the Court lacks jurisdiction to review the legal issues raised by CRI complaint because CRI did not exhaust the Division's administrative hearing process, or because "primary jurisdiction" rests with the Division. The Division's motion rests in part on a section entitled "Facts and Background" and cites affidavits from Roger Anderson, the Division's Chief of the Environmental Bureau; Florence Davidson, an employee of the Division's Santa Fe Office; and Lori Wrotenbery, the Director of the Division.

The Division's motion and supporting affidavits discuss and address such factual matters as the following:

- The circumstances under which Director William J. LeMay issued the Division's 1990 permitting Order authorizing Ken Marsh to construct and operate CRI's facility in Lea County;

- The procedures and proceedings under which the Division adopted Rule 711 in 1995, and Ken Marsh's participation in those proceedings;

- The purpose of Rule 711 and the Division's contention that it "intended" the re-permitting requirements of Rule 711 "to apply to all existing facilities," including CRI's facility;

- The unsupported allegation that CRI "filed an application" for a Rule 711 permit with the Division at some undisclosed time;

- The circumstances surrounding the letter directives Division Director Lori Wrotenbery issued to Ken Marsh in July of 2000 and again in July of 2001 that purport to "re-permit" CRI's facility;

- The circumstances surrounding the letter directive issued by District Supervisor Chris Williams to Ken Marsh in September of 2000 that purports to revoke the netting exemptions the Division's district office granted in 1991 and again in 1997; and

- The ability of the Division's administrative hearing process to address the legal issues raised by CRI's complaint and the actions taken by Division Director Lori Wrotenbery and her staff.

The Division concludes that before CRI can seek relief from this court, CRI must first obtain a hearing before one of the Division's Examiners (who are geologists or engineers by training), await an order from the Division signed by the Division Director Lori Wrotenbery (who already signed two of the three letter directives giving rise to this case) and appeal Ms. Wrotenbery's Order to the three member Oil Conservation Commission, which is chaired by Division Director Lori Wrotenbery.

CRI Is Entitled To Develop The "Jurisdictional Facts" Relevant to the Division's Motion To Dismiss.

The New Mexico Supreme Court has instructed that "[t]he doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which

the administrative tribunal clearly lacks jurisdiction, or which are vain and futile." ***State ex rel. Norvell v. Credit Bureau***, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973). *See also* ***Pan American Petroleum Corp. v. El Paso Natural Gas Company***, 77 N.M. 481, 485, 424 P.2d 397, 401 (1966) (noting that the exhaustion doctrine does not apply "in relation to a question which, even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact.") CRI seeks leave of this court to conduct discovery to establish the "jurisdictional facts" relevant to the Division's motion and these exceptions to the exhaustion doctrine. In particular, CRI contemplates discovery to determine (a) the Division employees involved and the circumstances surrounding the issuance of the Division directives at issue in this case; (b) the decision-makers involved in the Division's administrative process and the nature of the referenced administrative process; (c) the role of the Division's Director in both the actions at issue in this case and the Division's administrative process; (d) the independence of the decision-makers involved in the referenced administrative process; and (e) other matters relevant to the Division's motion to dismiss.

N.M.R.Civ.P. 1-012 states that a party faced with a motion to dismiss supported by factual allegations and matters outside of the pleadings "shall be given reasonable opportunity to present all material made pertinent to such a motion." As a result, New Mexico courts have held that before ruling on motions challenging jurisdiction, "the trial court has discretion to permit discovery to help decide the issue" and hold evidentiary hearings to consider "written affidavits, discovery which included deposition testimony and answers to interrogatories, briefs, correspondence, and oral argument." ***Tercero v. Diocese of Norwich***, 127 N.M. 294, 297, 980 P.2d 77, 80 (Ct.App. 1999). Indeed, New Mexico courts have instructed that a plaintiff has the

burden of establishing the "jurisdictional facts" in the face of a motion to dismiss, and that a district court "may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction." ***Valenzuela v. Singleton***, 100 N.M. 84, 91, 666 P.2d 225, 232 (Ct.App. 1982) (Donnelly, J., dissenting) (observing that the trial court's decision was properly rendered "after notice and opportunity to both parties to present facts regarding the trial court's jurisdiction.")

For the above reasons, CRI respectfully requests that the court permit discovery to develop the jurisdictional facts pertinent to the Division's motion to dismiss, and allow CRI to file its response to the Department's motion upon a schedule to be agreed upon by the parties.

Respectfully submitted,

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ATTORNEYS FOR CONTROLLED RECOVERY INC.

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

CONTROLLED RECOVERY INC.,
a New Mexico Corporation,

Plaintiff,

vs.

NO. CV-2001-310 M

CHRIS WILLIAMS, New Mexico Oil Conservation Division District 1 Supervisor, Hobbs, New Mexico; NEW MEXICO OIL CONSERVATION DIVISION, a State Agency; and LORI WROTENBERY, New Mexico Oil Conservation Division Director,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff Controlled Recovery Inc. (CRI), for its claims against the defendants, states as follows

PARTIES, JURISDICTION AND VENUE

1. CRI is a corporation operating under the laws of the State of New Mexico. CRI's principal place of business is Lea County, New Mexico, where it operates a commercial surface waste management facility ("CRI's facility"). Since 1990, CRI's facility has been permitted by the New Mexico Oil Conservation Division to accept oilfield related waste.

2. The New Mexico Oil Conservation Division ("the Division") is a New Mexico administrative agency created by the legislature under the Oil and Gas Act, NMSA 1978, Section 70-

2-1 et seq. The Division has authority to regulate the disposal of nondomestic wastes resulting from the exploration, development, production, storage, transportation, treatment or refinement of oil or natural gas to the extent delegated to it by the legislature of New Mexico.

3. Defendant Lori Wrotenbery is the Director of the Division and has issued two of the directives that are the subject of this Complaint. Ms. Wrotenbery is sued only in her official capacity as the Director of the Division.

4 Defendant Chris Williams is the Division's District 1 Supervisor and has issued one of the directives that are the subject of this Complaint. Mr. Williams is a resident of Lea County, New Mexico and his offices are located in Hobbs, New Mexico. Mr. Williams is sued only in his official capacity as the Division's District 1 Supervisor.

5 Venue is proper in this district (a) pursuant to NMSA 1978, Section 38-3-1.G because the office of defendant Chris Williams is located in Lea County, (b) pursuant to Section 38-3-1.A because defendant Chris Williams is a resident of Lea County and plaintiff CRI has its principal place of business in Lea County, (c) pursuant to Section 38-3-1.F since the object of this suit is to protect an interest in lands located in Lea County, and (d) pursuant to Sections 70-2-28 and 70-2-31 since the purpose of this action is to prevent the Division from imposing civil or criminal penalties against CRI for its failure to comply with the unlawful directives issued by the defendants.

BACKGROUND FACTS

A. The Permitting of CRI's Facility by the Division in 1990.

6 On April 27, 1990, Division Director William J. LeMay issued Order R-9166 ("the 1990 Order") which authorized CRI to construct and operate a surface waste disposal facility and oil

treating plant in Lea County, New Mexico. *See* Exhibit 1. The 1990 Order authorized the installation and operation of numerous facilities including separating tanks, water and solid waste disposal pits, skimming equipment and other facilities for the removal and reclamation of oil and related sediments.

7. Paragraphs 9 and 10 of the 1990 Order found that the hydrogeologic evidence presented at hearing demonstrates CRI's facility is situated over "virtually impermeable" shales and is located in a "collapse feature" making CRI's facility an ideal location for the disposal of oilfield related wastes without threat of danger to fresh water supplies or the public health.

8. Because of these unique hydrogeologic conditions, the 1990 Order concluded that a surety or cash bond in the amount of $25,000 was sufficient to protect the public health and environment.

9 Pursuant to the 1990 Order, CRI secured a $25,000 bond in a form approved by the Division

10. On September 13, 1990, Division Director William J. LeMay administratively approved CRI's request to also operate a landfarm at its facility in Lea County. *See* Exhibit 2.

B. The Netting Exemptions Issued for CRI's Facility by the Division's District 1 Supervisor.

11. Division Rule 711.C(8) requires all tanks exceeding 16 feet in diameter and exposed pits and ponds to be screened or netted "to protect migratory birds." *See* Exhibit 3 (Division Rule 711). This provision also provides district supervisors authority to grant exemptions to these netting requirements upon a showing that "the facility is not hazardous to migratory birds."

12. In July of 1991, District 1 Supervisor Jerry Sexton issued Permit No. H-76 exempting a large produced water tank and associated pits at CRI's facility from the netting requirements of Rule 711. *See* Exhibit 4.

13. In April of 1997, District 1 Supervisor Jerry Sexton issued a second netting exemption covering CRI's entire facility. *See* Exhibit 5. Mr. Sexton found that CRI's facility was again "not hazardous to migratory birds" because of the following factors:

A. The facility has night security lights;

B. The facility is subject to 24-hour truck traffic;

C. The facility is adjacent to U.S. Highway 62-180 and County Road C-29;

D. Machinery at the facility generates constant noise and movement;

E. The facility has two security dogs on site at all times and four full-time employees;

F. Flags are located at the facility; and

G No harm to migratory birds has been observed.

14. The operating conditions under which CRI's facility received its netting exemptions from the Division's District 1 Supervisor still exist.

C. CRI's Compliance With The Amendments to Rule 711.

15. In 1995 the Division issued a series of orders (Orders R-10411, R-10411-A, and R-10411-B) that revised Rule 711 to its present state.

16. Rule 711.E set forth the requirements for existing facilities that were already permitted at the time the 1995 amendments to Rule 11 became effective.

17. In 1997, pursuant to Rule 711.E(1) and 711.B(1)(i), CRI submitted a closure plan with a cost estimate from a third party contractor. *See* Exhibit 6. Pursuant to that closure plan, CRI submitted and the Division accepted a bond in the amount of $28,825.

18. CRI has continued to maintain that $28,825 closure bond since 1997.

19. As noted above, in 1997 CRI also obtained a netting exemption pursuant to Rule 711.C(8).

20. CRI has operated and continues to operate its facility in compliance with the "Operational Requirements" set forth in Rule 711.C., the netting exemptions issued in 1991 and 1997, and the requirements set forth in the 1990 Order.

DEFENDANTS' UNLAWFUL CONDUCT NECESSITATING DECLARATORY AND INJUNCTIVE RELIEF.

21 On July 3, 2000, Division Director Lori Wrotenbery issued a letter to CRI under which the Division purports to "re-permit" CRI's facility. Ms. Wrotenbery's July 2000 letter, among other things, unlawfully:

A. Seeks to "re-permit" CRI's facility;

B. Requires CRI to post a $250,000 bond - the maximum allowed under Rule 711.B(3)(c) for any facility;

C. Requires CRI to comply with ten pages of single spaced "operational requirements" - the origin of which are unknown;

D. Revokes CRI's permit to operate a landfarm and requires that CRI file a request "for permit modification"; and

E. Requires CRI to screen or net all tanks exceeding 16 feet in diameter and all exposed pits and ponds of any size.

See Exhibit 7

22. On September 27, 2000, District 1 Supervisor Chris Williams issued a letter to CRI revoking the netting exemptions granted by his predecessor in 1991 and again in 1997. *See* Exhibit 8.

23. The sole basis for Mr. Williams' action was the alleged recovery of one "dead meadowlark" by the U.S. Fish and Wildlife Service from a pond at CRI's facility in November of 1998. *Id.*

24. Since the issuance of these unlawful directives, representatives of the Division and CRI have met on at least two occasions and exchanged correspondence in an attempt to resolve this matter.

25. By letter dated July 6, 2001, Ms. Wrotenbery issued her final directive instructing CRI to comply with what Ms. Wrotenbery termed "revised conditions," but which are virtually the same operational conditions arbitrarily and unlawfully imposed by Ms Wrotenbery's July 3, 2000 directive. *See* Exhibit 9.

26. The Division has threatened to issue a notice of violation and impose penalties against CRI if it does not fully and completely abide by the unlawful and arbitrary directives issued by Ms. Wrotenbery and Mr. Williams.

27. The Oil and Gas Act provides that before the Division can issue any rule, regulation or order, a public hearing shall be held after first giving reasonable notice to any persons having an interest in the subject matter and allowing such persons to be heard. NMSA 1978, Section 70-2-23. Division Rule 1201 sets forth the specific requirements applicable to rulemaking proceedings.

28. Whether styled "re-permitting" efforts or otherwise, the issuance of directives by the Division requiring CRI or any other facility to operate under arbitrary multi-page "operational

requirements" constitutes rulemaking or adjudicatory proceedings designed to modify or amend the "Operational Requirements" in Rule 711.C without notice, hearing or an opportunity to be heard by interested parties.

29. By issuing directives that (a) amend the operational requirements of Rule 711, (b) revoke without cause the netting exemptions specifically authorized by Rule 711, and (c) impose bonding requirements beyond those found appropriate by the defendants' predecessors after notice and hearing, the defendants have acted arbitrarily and capriciously, without sanction of law, in conflict with applicable rules and regulations, and in derogation of CRI's constitutionally protected due process rights.

30. Pursuant to NMSA 1978, Section 44-6-13, the State of New Mexico or any official thereof may be sued for declaratory judgment when the rights or legal relations of the parties call for the construction of the constitution, statutes or laws of New Mexico.

31 Pursuant to NMSA 1978, Section 70-2-27(A), the Court is authorized to grant an injunction against the defendants after notice and hearing where the act done or threatened is without sanction of law or otherwise invalid.

WHEREFORE, CRI respectfully requests that the Court grant the following relief:

A. That the Court upon evidence presented at hearing enter an injunction preventing the defendants from issuing any notice of violation, initiating any action under Section 70-2-28 for civil or criminal penalties under Section 70-2-31, or taking any other punitive action against CRI for failing to abide by the unlawful directives issued by Ms. Wrotenbery and Mr. Williams;

B. That the Court upon evidence presented at hearing enter a declaratory judgment proclaiming that the directives issued by Ms. Wrotenbery and Mr. Williams are unlawful;

C. That pursuant to NMSA 1978, Section 44-6-11, the Court award CRI its just and reasonable costs in bringing this matter; and

D. That the Court otherwise fashion its judgment and equitable relief to fit the circumstances and award such further relief as the Court deems just and proper.

Respectfully submitted,

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Michael H. Feldewert

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August 10, 2001

Via Facsimile

David Brooks, Examiner
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
2040 South Pacheco Street
Santa Fe, New Mexico 87505

Re: Controlled Recovery Inc.
Rule 711 Permit (Order No. R-9166)

Dear Mr. Brooks:

Mr. Marsh has been out of the country and I have only recently been able to visit with him about your August 6th letter, which I did not receive until Wednesday, August 8th. CRI is therefore not in a position to take any action in this matter by Monday, August 13th.

I plan to discuss this matter with Mr. Marsh in more detail next week and will inform you shortly how CRI intends to proceed.

Sincerely,

Michael H. Feldewert

MHF/ras
cc (via fax): Ken Marsh