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

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

Case No. 10656
(Refer to Case No. 11510)
Order No. R-9845

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

MOVANTS' REPLY MEMORANDUM TO MITCHELL ENERGY CORPORATION'S MEMORANDUM OF LAW AND STATEMENT OF FACTS

The Movants herein, hereby submit their Reply Memorandum to Mitchell Energy Corporation's ("Mitchell") Memorandum of Law and Statement of Facts:

I. INTRODUCTION

In its memorandum of law and statement of facts, Mitchell attempts to devise any argument possible as to why the Movants should not have been notified of the hearing that would pool their interests in the S/2 SW/4, of Section 28, Township 20 South, Range 33 East NMPM (sometimes, hereinafter, referred to as the "subject property") and why it wasn't Mitchell's duty to provide such notice to the Movants.

First, it is clear that all of the Movants had a protected property interest by virtue of their working interests and overriding royalty interests in the subject property which was acquired well before the application was filed by Mitchell. It is also clear, from the testimony and exhibits presented at the hearing, that Mitchell's senior landman and

representative, Steve Smith, knew that there were interests other than that of Strata Production Company ("Strata") in the subject property over a month before the pooling application was filed and knew of the exact nature of the Movants' interests as well as their addresses where they could be notified before the hearing. Finally, it is equally clear that the Movants were not notified of the hearing and did not have an opportunity to be heard at the hearing.

It is irrelevant, under the circumstances, who had the duty to notify the Movants of the hearing. They were not notified and the Oil Conservation Division ("Division") never obtained jurisdiction over them. Any order issued by the Division which would affect the rights of the Movants without such notice and an opportunity to be heard is void. The Division must reopen the proceedings and allow the Movants an opportunity to be heard regarding the pooling of their interests in the subject property.

II. FACTS RELEVANT TO THE ISSUE OF DUE PROCESS

The relevant facts in the case were set out in the Movants' Brief in Support of their Motion to Reopen. However, since the hearing these facts are now supported by the evidence as follows:

The Movants all acquired working interests or overriding royalty interests in the subject property. Branko Exs. Nos. 1 through 17. All of these interests were acquired well before Mitchell filed its application in this case. *Id.*[1] Mitchell, through their senior landman

[1] All of the interests of the Movants were acquired in late 1989 or early 1990.

who was working on the deal, Steve Smith, became aware through conversations with Mark Murphy, the President of Strata, that there were interests other than Strata's in the subject property as early as October 26, 1992. (Tr. 19, 61-62, 66).[2] Throughout the negotiations between Mr. Murphy and Mr. Smith, Mr. Murphy continued to emphasize the existence of the Movants' interests by informing Mr. Smith that any deal would have to be agreed to and approved by the Movants. (Tr. 19, 20, 22; Branko Exs. Nos. 19, 20, 21, 23 & 24). Finally, when negotiations broke down, Mr. Smith inquired as to the identities of the Movants in early January, 1993. (Tr. 24). Mr. Murphy then immediately sent a letter to Mr. Smith via facsimile listing the names, addresses and interests owned by the Movants in the subject property. (Branko Ex. No. 24). Mr. Smith, even after learning the names and whereabouts of the Movants, still did not cause the Movants to receive notice of the hearing on Mitchell's compulsory pooling application held on January 21, 1993. Although Mr. Smith testified at the hearing that it is the "applicant" in the proceeding who has the duty of giving notice to interested parties (Tr. 69), he said he assumed that Strata had given the Movants notice of the hearing. (Tr. 73). Mr. Smith stated that Mitchell did not give notice to the Movants of the hearing as he was concerned that the pooling application proceedings could be delayed. (Tr. 71-72). Mr. Smith further testified that he had nothing from the Movants that indicated that Strata could represent the Movants in the proceeding. (Tr. 63-64).

---

[2] Citations are to page numbers of the transcript of the Examiner Hearing held on May 2, 1996.

The Movants dispute several of the facts enumerated in Mitchell's brief.[3] Item No. (4) states that Mitchell proposed to "all working interest owners the formation of a spacing unit" when in fact, it is undisputed that Mitchell never communicated with the Movants who owned working interests. Item (5) states that Strata owned and controlled the entire 25% working interest in the subject property which is clearly not true and which Steve Smith knew to be untrue as early as October, 1992. (Branko Exs. Nos. 1-17; Tr. 19, 61-62, 66). In Item (25) Mitchell alleges that Strata assigned the operating rights in the subject property to the Movants on November 8, 1995 which is, in fact, not the date the interests were assigned, but, rather the date the interests were recorded. The dates such interests were acquired by the Movants are contained in their affidavits, Branko Exs. Nos. 1-17.

III. ARGUMENT AND AUTHORITIES

Mitchell has attempted to make three, main legal arguments. First, Mitchell asserts that "the Division has previously decided that Mitchell provided notice to the proper party." Second, Mitchell alleges that the Movants do not have a property right which would be protected by the constitution and due process of law. Finally, Mitchell alleges that it was the duty of Strata, and not Mitchell, to notify the Movants of the Division's hearing on Mitchell's compulsory pooling application.

---

[3] Mitchell does not cite to the record or provide any authority supporting any of the facts in its brief.

A. The Division never obtained jurisdiction over the Movants and, therefore, any order issued by the Division in regard to the rights of the Movants is void.

Mitchell argues that "the Division has previously decided that Mitchell provided notice to the proper party" in this proceeding. Mitchell fails to note, however, that the Division made that determination in the absence of notice to and an opportunity to be heard by the Movants. It is uncontested that the Movants were never notified of the application, hearing or the entry of the order in this cause.

It is fundamental that a board, commission or a court does not obtain jurisdiction over a party until that party is served with notice and is given an opportunity to be heard. Any action taken by the Division that affects the Movants' rights is ineffective as to the Movants unless they have been provided with notice and a fair opportunity to be heard.

It is submitted that if this were a proceeding in a New Mexico court and the Movants were not served with notice of the proceeding, that there would be no serious argument about the court's ability to adjudicate the Movants' rights. For a district court to have jurisdiction over a party and comply with due process requirements a summons and complaint must be served on the party pursuant to SCRA 1986, 1-004 in a manner reasonably calculated to bring the proceeding to the defendant's attention. *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988). It is this same standard of due process and justice that is required in an administrative proceeding.

> Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice

> is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty. [citations omitted]

Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 530-531, 817 P.2d 721, 723-724 (1991). The standards of justice and procedural due process are identical whether in a judicial or administrative setting.

As discussed in its initial Brief in Support of its Motion to Reopen by the Movants, the case of *Uhden v. Mew Mexico Oil Conservation Comm'n, et al., supra*, is dispositive as to the issues in this case. In *Uhden*, the New Mexico Supreme Court found that since Uhden was not served personally with notice of the Oil Conservation Commission's ("Commission") hearing, that the order entered by the Commission affecting Uhden's rights was void. The *Uhden* case does not stand alone for this proposition in New Mexico. In *AA Oilfield Service v. New Mexico State Corp. Comm'n*, 118 N.M. 273, 278, 881 P.2d 18, 23 (1994) the New Mexico Supreme Court held that "if the Corporation Commission enters an order without providing notice and hearing as required, such orders are void and subject to collateral attack," basing its decision on a previous New Mexico case, *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n*, 79 N.M. 60, 62, 439 P.2d 709, 711 (1968) reaching the same result.

In Oklahoma, a sister oil and gas state, the Oklahoma Supreme Court held that when parties did not receive the requisite notice of an increased well density application, and thus, a jurisdictional defect was apparent from the face of the record, the Oklahoma Corporation Commission did not have jurisdiction to adjudicate the rights of the parties and the Commission's order was void. *Anson Corp. v. Hill*, 841 P.2d 583 (Okla. 1992). In *Union*

Texas Petroleum v. Corp. Comm'n, 651 P.2d 652 (Okla. 1981) the Oklahoma Supreme Court similarly held that

> the record contains no notice of a mailing to this entity and thus the record demonstrates the Commission attempted to proceed against Union's interest in the absence of jurisdiction over the person of that entity. Accordingly, the order's attempt to adjudicate the rights of Union Oil of California is ineffective, and a nullity insofar as it purports to affect its interests.

651 P.2d at 659. *See also*, *Capitol Federal Savings Bank v. Bewley*, 795 P.2d 1051, 1053 (Okla. 1990).

Here, the Movants had a right to be notified of the Division's proceeding by personal service. *See Uhden*, *supra*.[4] The Movants were not notified of either the application or the hearing which purportedly resulted in the pooling of the Movants' interests in the subject property. Due to the lack of notice and personal service on the Movants, the Division never obtained jurisdiction over them. The action taken by the Division in the proceeding and the resultant order is, therefore, void and ineffective as to the Movants and their interests in the subject property.[5]

---

[4] It should be noted that even in light of the direction given the Division by the New Mexico Supreme Court in *Uhden* regarding the form of notice required, the Division still has not amended its notice regulations to provide for personal service. *See* Division Rules 1204 and 1207.

[5] Mitchell has not made an argument regarding whether the Movants received "casual notice" of the hearing from some source outside of proper service under *Uhden*. The Movants have agreed to provide the Division and Mitchell with supplemental affidavits as to when each of the Movants became aware of the following facts: 1) Mitchell's proposal for the Tomahawk "28" Federal Com Well No 1; 2) Mitchell's compulsory pooling application; 3) the OCD hearing held on January 21, 1993; and 4) the Order issued February 15, 1993. Eight of those affidavits are submitted herewith as exhibits to the hearing. The remainder will be submitted soon. These affidavits indicate the Movants had no knowledge of these

B. All Movants possess interests that are protected property rights and subject to due process of law.

Mitchell argues, not that the Movants did not have an interest in the subject property,[6] but that since such interests were not recorded with the Lea County Clerk or with the Bureau of Land Management that they are not protected by due process clauses of the United States and New Mexico Constitutions. This argument has been previously addressed in the Movants' Brief in Support of their Motion. To briefly review, 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 for the purpose of providing constructive notice to subsequent third-party purchasers. Nowhere in NMSA 1978, § 70-2-17 (1995 Repl.) does the statute refer to recorded interests. There are no provisions in the statute that provide that interests in property must be recorded to be subject to the provisions of the statute. Similarly, the Division rules do not require that notice be afforded only to those who have recorded their interests with county clerks. Division Rule 1207(A) provides that "[a]ctual notice shall be given to each known individual." The Division rule

---

events until sometime in 1995, well after they occurred.

Notwithstanding these facts, it is clear that even if the Movants had received such casual notice, that it is not a substitute for proper notice under *Uhden*. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 2d 1027 (1915); *Reliable Elec. Co., Inc. v. Olson Const. Co.*, 726 F.2d 620 (10th Cir. 1984); *Ortiz v. Regan*, 749 F. Supp. 1254 (S.D.N.Y. 1990); *In re Allbev, Inc.* 160 B.R. 61 (Bankr. W.D.N.C. 1993).

[6] It is uncontested that the Movants obtained working interests and overriding royalty interests in the subject property well before the pooling application was filed by Mitchell. The Movants' affidavits regarding these interests were admitted without objection detailing these interests and when they were acquired by the Movants. Branko Exs. Nos. 1 through 17.

does not provide that notice of the proceedings be restricted to each recorded interest owner but, rather, to each *known individual* who has an interest in the outcome of the proceedings.

The New Mexico Supreme Court also makes it clear in *Uhden* that recording a property interest is not a prerequisite to owning a protected property interest. To reiterate the rule:

> *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). Once again, the test is not whether the interest is recorded with the county clerk, but whether the party's identity and whereabouts *are known or could be ascertained through due diligence*. The statutes allowing a party to record a real estate interest in the records of the county clerk are only one way of providing an applicant with notice of that party's interest. There are clearly other ways of obtaining actual knowledge of such an interest as is illustrated by this case.

This rule is in accordance with other New Mexico real property cases. The general rule is 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).

Here, even though the interests of the Movants were not recorded in the Lea County Clerk's office, Mitchell had actual knowledge of the interests no later than January 13, 1993,

when Mr. Smith received the letter from Strata. Branko Ex. No. 24. Mr. Smith, and thus Mitchell, had actual knowledge of the existence of the interests much earlier, in October of 1992, and had a duty at that time under *Uhden* to use due diligence to ascertain the identity and whereabouts of the Movants. (Tr. 20, 61 & 66). Had Mitchell merely inquired of Strata as to the interests owned by, identity and whereabouts of the Movants it would have obviously borne fruit. When this inquiry was eventually made by Mr. Smith in January of 1993, he immediately received all of the information regarding the Movants from Mr. Murphy of Strata. (Tr. 23 & Branko Ex. No. 24).

Mitchell also argues that the Movants will only acquire an interest in the federal lease when the BLM approves their assignment of interest in the subject property. In this regard, Mitchell quotes the following from 43 C.F.R. § 3106.1 (b): "The rights of a transferee to a lease or an interest therein shall not be recognized *by the Department* until the transfer has been approved by the authorized officer." (emphasis added). From this, Mitchell concludes that the Movants do not have a constitutionally protected property interest until the transfer has been approved by the BLM. There is no legal support for Mitchell's position. The BLM regulations cited by Mitchell only affect the Movants' interests for Department of Interior administrative purposes and all such regulations relate to the rights of private parties vis-à-vis the Department of Interior. As to disputes between private parties, however, it is clear that state law and not federal regulations governs. In this regard, the Tenth Circuit Court of Appeals in *Bolack v. Underwood*, 340 F.2d 816 (1965) held as follows:

> There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in

> such instance, where no right of the federal government is involved, state law governs. *See* also, *Wallis v. Pan American Petroleum Corporation, et al.*, 384 U.S. 63 (1966).

Thus, since there is clearly no right of the federal government involved in this proceeding, state law governs the rights and interests of the Movants in the subject property.

C. Mitchell was responsible for providing notice of the application and hearing to the Movants.

Mitchell has alleged in its memorandum that "Strata and not Mitchell is responsible for the interest of the undisclosed partners." Presumably, this statement purports to mean that Strata had the obligation to notify the Movants of Mitchell's pooling application and the hearing.

First, it makes no difference to the Movants, as to who was supposed to notify them of the Mitchell pooling application hearing. They were not notified and, therefore, did not have a fair opportunity to be heard at the hearing. This fact alone deprived the Division of jurisdiction as to Movants and their interests.

It is clear, however, that it is the "applicant" who is responsible for notifying other interest owners of a compulsory pooling application and the resultant hearing. The Division's regulation regarding such notice clearly states that it is the "applicant" who is responsible for providing notice to interest owners. The Division's regulation states as follows:

> Rule 1207. - ADDITIONAL NOTICE REQUIREMENTS
>
> A. Each *applicant* for hearing before the Division or Commission shall give additional notice as set forth below:

> (1) In cases of applications filed for compulsory pooling under Section 70-2-17 NMSA 1978, as amended, or statutory unitization under Section 70-7-1, et. seq. NMSA 1978, as amended: 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 polling 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 polled or unitized. . . .

(emphasis added). Under the Division's regulations, it is the clearly the "applicant" and no one else who has the obligation to provide notice to interest owners in the subject property.

And, once again, the Division need only look to *Uhden* for the New Mexico Supreme Court's determination as to who is responsible for notice in regard to the application and the hearing:

> [W]e hold 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.

112 N.M. at 531, 817 P.2d at 724 (emphasis added). It could not be more clear who has the duty to provide notice. It is only logical that the party asking the Division for the order and the relief must be responsible for notice. Should notice be defective, it is the applicant who is adversely affected and not the other parties properly noticed in the action such as is the case here with Strata. Here, it is Mitchell and the Commission that must answer to the Movants for taking action without providing due process and proper notice that adversely affected their rights.

The other argument made by Mitchell is that it, presumably in the person of it's landman, Steve Smith, believed that Strata had authority to accept service on behalf of the

Movants and represent them in the proceeding. The facts, as adduced at the hearing, do not indicate that Strata ever represented or intimated that they had authority to accept service for and represent the Movants in the compulsory pooling proceeding before the Division. In fact, Strata's actions in notifying Mitchell of other interests in the subject property early on and its continued admonition to Mitchell that there were other interests in the subject property belie this conclusion. Mr. Murphy, in the negotiations with Mr. Smith, repeatedly informed Mr. Smith that any deal would have to be approved by the Movants. (Tr. 19, 20, 22; Branko Exs. Nos. 19, 20, 21, 23, 24). And, Mr. Murphy provided Mr. Smith with a list of the Movants so they could be served. (Branko Ex. No. 24). How Mr. Smith could have believed that Strata would accept service on behalf of all the Movants is difficult to understand. In fact, the real reason Mr. Smith and Mitchell failed to properly notify the Movants of the hearing is because they did not want to delay the proceedings. (Tr. 71-72).

But, more importantly, under New Mexico law, for an agent to have authority on behalf of the principal, such authority must emanate from the principal and unauthorized statements of an agent to a third party concerning the existence of his authority cannot be relied upon to establish apparent authority. In *Romero v. Mervyn's*, 109 N.M. 249, 253, 784 P.2d 992, 996 (1989) the New Mexico Supreme Court stated

> while actual authority is determined in light of the principal's "manifestations of consent" to the agent, apparent authority arises from the principal's manifestations to third parties, *Restatement (Second) of Agency* § 8 (1958)....

Justice Ransom in a specially concurring opinion in *Comstock v. Mitchell*, 110 N.M. 131, 134, 793 P.2d 261, 264 (1990) (Ransom, J., specially concurring), more fully explained the apparent authority doctrine in New Mexico by stating

> I wish to emphasize that apparent authority must emanate from the conduct of the person to be charged as principal. *Restatement (Second) of Agency* § 8 comment e, § 27 comment a (1958). . . . For this reason, *the unauthorized statements of an agent to the third party concerning the existence or extent of his authority cannot be relied upon to establish apparent authority. See Restatement (Second) of Agency* § 27 comment a. . . .

(emphasis added). Clearly, any understanding that Mr. Smith may have relied upon regarding Strata's authority to represent the Movants, must come from the Movants and not Strata. In his testimony, Mr. Smith made it clear that he had "nothing" from the Movants that indicated that Strata could represent their interests in this proceeding. (Tr. 63-63). If Mr. Smith did rely upon Strata to represent the interests of the Movants, such reliance was unjustified under New Mexico law and certainly cannot be used to excuse Mitchell and the Division from the obligation under the due process provisions of the United States and New Mexico Constitutions to provide the Movants with notice of and opportunity to be heard at the hearing.

D. SCRA 1986, 1-025(C) is wholly inapplicable to this proceeding.

SRCA 1986, 1-025(C) controls the proceedings in New Mexico state district courts when a transfer of interest occurs during suit. It is not applicable to this proceeding and is not even analogous to the facts in the case. Here, the interest acquired by the Movants was acquired well before the Mitchell compulsory pooling application was filed. (Branko Exs.

Nos. 1-17). No interest has been transferred by Strata during the pendency of the proceedings and, therefore, Mitchell's argument regarding such transfer is not applicable.

IV. CONCLUSION

Because the Movants were not afforded notice and an opportunity to be heard at the Division's January 21, 1993 hearing, the Division must vacate the order entered pursuant to such hearing as it affects the Movants and reopen the case to allow the Movants to participate in the proceedings.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Attorneys for Movants
Post Office Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Movants' Reply Memorandum to Mitchell Energy Corporation's Memorandum of Law and Statement of Facts was sent via hand delivery this 23rd day of May, 1996, to:

W. Thomas Kellahin, Esq.
Kellahin & Kellahin
117 North Guadalupe
Santa Fe, New Mexico 87501

Rand L. Carroll, Esq.
New Mexico Oil & Conservation Division
2040 S. Pacheco Street
Santa Fe, New Mexico 87505-5472

By: _____
Harold D. Stratton, Jr.