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' BRIEF IN SUPPORT OF ITS MOTION TO REOPEN CASE OR, IN THE ALTERNATIVE, APPLICATION FOR HEARING *DE NOVO*

The Movants herein, hereby submit their brief of points and authorities in support of their Motion to Reopen the Case ("Motion"):

I. INTRODUCTION

All of the Movants herein are working interest or overriding royalty interest owners in the S/2 SW/4 of Section 28, Township 20 South, Range 33 East, NMPM in Lea County, New Mexico.[1] In this case, Mitchell Energy Corporation ("Mitchell") sought and was granted by the New Mexico Oil Conservation Division ("Division"), after a hearing, an order for compulsory pooling which included the above referenced property.[2] None of the Movants who bring this

[1] The identity of all Movants who bring this Motion are listed on page one of the Movants' Motion.

[2] Mitchell also requested approval of an unorthodox well location which was also granted by the Division.

Motion were afforded notice of the hearing, notwithstanding the knowledge by Mitchell of the Movants' interests, identity and whereabouts.

The failure of Mitchell to provide notice to the Movants, which deprived Movants of an opportunity to participate in the proposed well and otherwise be heard at the Division's hearing on the application, violates the statute providing for such notice, NMSA 1978, § 70-2-17(C) (1995 Repl.), the Division's regulation regarding notice, Division Rule 1207, and more importantly, the Due Process Clause of the United States and New Mexico Constitutions. Since the Movants were deprived of a protected property right without notice and a meaningful opportunity to be heard, the Division's Order is void as to the Movants. The Division must, therefore, reopen this proceeding and allow the Movants to participate in a way that affords them an opportunity to protect their property interests.

II. RELEVANT FACTS OF THE CASE

On December 8, 1992, in connection with its proposal to drill the Mitchell Tomahawk "28" Federal Com No. 1 Well ("Tomahawk Well"), Mitchell filed its application with the Division requesting an order pooling all mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM. Prior to the filing of the application, Mitchell entered into negotiations with Strata Production Company ("Strata"), a working interest owner in the S/2SW/4 of Section 28. These negotiations were unsuccessful. A hearing was then held on January 21, 1993 and the Division entered Order No. R-9845 granting Mitchell's pooling request and approving the unorthodox well location on February 15, 1993. Mitchell then spudded the Tomahawk Well on May 18, 1993.

Prior to the hearing in this matter, Mitchell became aware of the Movants' property interests in the S/2SW/4 of Section 28. The Movants acquired their interests years before Mitchell's application and the hearing. In fact, all of the Movants' acquired their interests before April 1, 1990.[3] During the course of the negotiations prior to Mitchell's application and the hearing, Mitchell was made aware that there were other working interest and overriding royalty interest owners in the S/2SW/4 of Section 28. As early as October 26, 1992, during the course of negotiations, Mitchell learned of these interests from Mark Murphy, President of Strata. Most importantly, however, Mitchell received actual notice of the Movants' interests from Mr. Murphy, in detail, by way of Mr. Murphy's letter of January 13, 1993 to Mitchell which is attached hereto as Exhibit "A." This letter provided Mitchell with actual knowledge of the detailed ownership interests, identity and whereabouts of the Movants. Notwithstanding this knowledge, Mitchell chose not to provide the Movants with notice of the hearing. Order No. R-9845 clearly affects the property interests of the Movants by precluding them from sharing in the production of the Tomahawk Well--a well which was not spudded until four months after the hearing and three months after the Division entered Order No. R-9845.

III. ARGUMENT AND AUTHORITIES

At the time of the application and hearing, the Movants owned working interests and/or overriding royalty interests in a part of the property which was the subject of the pooling application of Mitchell. Movants' property interests are interests in real property and as such are

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[3] The interests of the Movants are compiled in Mr. Murphy's letter of January 13, 1993 to Mitchell which is attached hereto as Exhibit "A". Mr. Murphy will be available at the hearing on the Motion to testify regarding the extent and nature of these interests. This information is confirmed by the affidavits of the Movants attached to the Motion as Exhibits "B" through "Q."

protected property rights for purposes of the Due Process Clause of the United States and New Mexico Constitutions. The granting of the pooling request by the Division is clearly a state action which affects the Movants' property interests. The Movants have, by reason of such state action, been deprived of their legal right as working interest and overriding royalty interest owners to participate in the production of the Tomahawk Well. The Movants, like other citizens, are entitled to due process of law before the government takes action which affects their property interests. Before the Division can take any action affecting the property interests of the Movants, the Movants must be provided with constitutionally sufficient notice and a fair opportunity to be heard. Here, no such notice was given and any action taken by the Division without such notice that affects the Movants' property interests is void as to the Movants.

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

The Division need look only to the recently decided case of *Uhden v. New Mexico Oil Conservation Commission, et al.*, 112 N.M. 528, 817 P.2d 721 (1995), to determine the merits of the Movants' Motion in this case. In *Uhden*, the movant, Ms. Uhden, was the owner in fee of an oil and gas estate in San Juan County. In 1978, Uhden executed an oil and gas lease in favor of Amoco Production Company ("Amoco"). The lease contained a pooling clause. Pursuant to its rights under the lease, Amoco drilled the Cahn Well which was originally spaced on 160-acres. Based on the size of the initial spacing unit, Uhden initially received a royalty interest equal to 6.25% of production from the Cahn Well. In 1983, Amoco filed an application with the Division seeking an increase in well spacing from 160-acres to 320-acres. The Cahn

Well and Uhden's royalty interest thereunder were both affected by the application. Even though Amoco had actual notice of Uhden's mailing address, Amoco provided notice of the application by publication only. On January 1984, the Oil Conservation Commission ("Commission") granted temporary approval of Amoco's application, and in February 1986, the Commission granted final and permanent approval, both without notice to Uhden. The net effect to Uhden was a reduced royalty interest equal to 3.125% of production from the Cahn Well.

Uhden unsuccessfully sought relief through the Commission, and then appealed to the district court which affirmed the orders of the Commission. She then appealed to the New Mexico Supreme Court. The New Mexico Supreme Court ruled that Uhden clearly had a property right in the oil and gas lease which was protected by due process of law. Further, in regard to the notice to which Uhden was entitled, the court held that

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

Id., 112 N.M. at 531, 817 P.2d at 724. And, because Uhden was not provided with proper notice, the Division's orders were "void" as to her. *Id.*

In this case, as more fully explained below, the Movants have a protected property interest as a result of their interests in the affected property. Mitchell was aware of the names, addresses and even the nature and extent of each of the Movants' interests prior to the hearing. Notice was provided only by publication. Mitchell did not attempt to serve the Movants personally as required by *Uhden*. The hearing resulted in an order by the Division that affected the Movants'

interest by depriving them of the opportunity to participate in the Tomahawk Well. The order entered as a result of the hearing is therefore void as to the Movants.

1. **The Movants, as working interest and/or overriding royalty interest owners under a federal oil and gas lease, clearly have protected property interests under the Due Process Clause.**

Each of the Movants have an interest in a federal oil and gas lease which covers various lands including the S/2SW/4 of Section 28. *See* Motion and affidavits of Movants attached thereto as Exhibits "B" through "Q." These interests were acquired by the Movants well before the application was filed in this case by Mitchell and well before the hearing. In fact, all of the Movants acquired their respective interests before April 1, 1990.

In *Uhden, supra*, the court held that Uhden clearly had a property right in the oil and gas lease by virtue of her royalty interest. *Id.* 112 N.M. at 530, 817 P.2d at 723. Amoco argued that due to Uhden's lessor/lessee relationship with Amoco that her property right was somehow diminished. The court was not persuaded by this argument and held that

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

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

The Movants in this case own working interests[4] and/or overriding royalty interests[5] in

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[4] A working interest is an operating interest under an oil and gas lease. H. Williams & C. Meyers, Manual of Oil and Gas Terms 1225 (9th ed. 1994). The working interest under a federal oil and gas lease is generally referred to as the operating rights. 43 C.F.R. §3100.0-5(d)(1988) defines operating rights as follows:

a federal oil and gas lease. Under New Mexico law, these interests clearly constitute an interest in real property. *See Bolack v. Underwood*, 540 F.2d 816, 820 (10th Cir. 1965), *citing Rock Island Oil and Refining Co., et al. v. Simmons, et ux.*, 73 N.M. 142, 386 P.2d 239 (1963). Therefore, the Movants' interests at issue in this case constitute constitutionally protected property rights. *See, Uhden, supra.*

Here, the Movants' property rights are entitled to the due process protection described in *Uhden*. This means that the Movants were entitled to personal service, since their whereabouts and identities were known to Mitchell, of the notice of the Division's hearing in this case. *Uhden*, 112 N.M. at 531, 817 P.2d at 724.

2. **Mitchell was aware of the Movants' interests and should have given them notice of the proceedings as required by due process of law and *Uhden*.**

Here, it is undisputed that Mitchell had actual knowledge of the Movants' interests in the property. Mitchell received, via facsimile and certified mail, a complete list of the Movants, their

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> (d) *Operating Rights* (working interest) means the interest created out of a lease authorizing the holder of that right to enter upon the leased lands to conduct drilling and related operations, including production of oil or gas from such lands in accordance with the terms of the lease.

[5] In *Meeker v. Ambassador Oil Co.*, 308 F.2d 875, 882 (10th Cir. 1962), *rev'd*, 375 U.S. 160 (1963), the Tenth Circuit of Appeals provided the following definition of overriding royalty:

> "An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other costs incident to the production and sale of oil and gas produced from the lease. It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest. It is generally held that an overriding royalty is an interest in real property."

addresses and a description of their interest in the affected lease. *See* Exhibit "A" attached hereto. This information was provided to Mitchell on January 13, 1993, before the hearing on January 21. Moreover, Mitchell could have easily ascertained the information regarding the Movants and their interests in the property by merely asking for it. It is clear, however, that Mitchell would rather deal with Strata alone rather than several small interest owners. Yet, Mitchell went on with the hearing without providing constitutional notice to the Movants. It is difficult to understand why Mitchell chose not to provide notice to the Movants or, at least, make some effort to ascertain whether the Movants actually owned an interest in the affected property. If necessary, the hearing could have been continued to allow for such notice without any inconvenience to Mitchell. The Tomahawk Well was not spudded until May 18, 1993. There was clearly plenty of time to provide notice and an opportunity to be heard to the Movants, but there was also clearly no desire on the part of Mitchell to provide such notice and deal with the Movants.[6] The lack of this notice makes the order that was issued pursuant to the hearing void as to the Movants.

It is expected that Mitchell will make at least two arguments as an excuse for the failure to provide the Movants with constitutionally sufficient notice. One such excuse is that the interests of the Movants were not recorded in the real estate records and that Mitchell is not, therefore, required to provide notice to Movants. There are at least two reasons why this

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[6] While the Tomahawk Well was spudded on May 18, 1993, there are apparently no compelling reasons why the well was spudded at this early date. Indeed, it appears that Mitchell could have waited until October 31, 1994 to spud the well without losing any of the affected leases, as provided by the leases involved. *See* Mitchell Energy Corporation's Exhibit No. 7 (Hinkle, Cox, Eaton, Coffield & Hensley Opinion of Title No. 31,439 dated December 29, 1992) presented to the Oil Conservation Division in Case No. 10656 on January 21, 1993.

argument is not valid. First, the pooling statute, NMSA 1978, § 70-2-17(C) (1995 Repl.), is concerned simply with interest owners, and not just interest owners who have recorded their interests in the county records.[7] Moreover, the related Division notice provision, Division Rule 1207(A)(1), provides that "[a]ctual notice shall be given to each known individual." The pooling statute and the related notice provision indicate that whether the interest has been recorded in the county records is not determinative as to who is entitled to notice. Second, the recordation of interests in the county records pursuant to NMSA 1978, § 14-9-1, *et seq.* (1995 Repl.), is only one method of providing notice of the ownership of a property interest. Although recordation under the statute does provide constructive notice, there are other methods by which one may become aware of a property interest including actual notice which Mitchell had in this case. Mitchell cannot avail itself of the fact that the Movants interests were not recorded and, therefore, did not have constructive notice. Mitchell had actual notice of the Movants interests which is the whole purpose of notice statutes and requirements.[8]

Mitchell may also argue that the Movants had "casual" or "extra-official" notice or knowledge of the Division proceedings in this case which should, therefore, be constitutionally sufficient to apprise them of the hearing. Casual or extra-official notice, for obvious reasons, is never sufficient notice in a case which affects a party's property right under state or federal law.

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[7] The pooling statute appears to recognize that many oil and gas interests are not reflected in the public records. Such interest owners are entitled to notice and an opportunity to be heard in a compulsory pooling case where their identity and whereabouts are known, or are easily ascertainable. *Uhden, supra.*

[8] The Movants are aware that Mitchell obtained at least one title opinion in this case but have not been provided with a copy of the title opinion(s) and therefore are unaware of whether the title opinion(s) may have noted the possibility or likelihood of unrecorded interests in the pooled property.

In *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L. Ed. 2d 1027 (1915) the U.S. Supreme Court held that "extra-official" or "casual" notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property, is not a substantial substitute for the due process of law which the Fourteenth Amendment of the U.S. Constitution requires. The notice must be formal and provided within the context of the proceedings. In New Mexico, this notice in a case before this Division or the Commission must be by personal service as determined in *Uhden* if the parties whereabouts can be ascertained through due diligence.[9] With a notice standard this stringent it is fundamental that Mitchell cannot rely upon some third party to effect informal or casual notice upon those who are constitutionally entitled to it and who are required by statute to be notified by Mitchell. The New Mexico statute and Division Rules recognize this concept by placing the burden of notice directly upon the applicant, Mitchell in this case. *See*, NMSA 1978, § 70-2-18(A) (1995 Repl.), and Division Rule 1207(A)(1).

3. Order No. R-9845 is void as to the Movants.

The effect of Order No. R-9845 is that it precludes the Movants from participating in the Tomahawk Well without paying the 200 percent risk penalty. It, therefore, precludes the

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[9] In New Mexico it is clear that *Uhden* has set the minimum notice standard of personal service when the identity and whereabouts of the parties are known or can be ascertained. Under federal case law notice by mail has been held to be the absolute minimum when constitutional notice is required. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). Under any circumstances, the method of notice provided must be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In light of the facts in *Uhden*, however, it is unlikely that notice by mail would be constitutionally sufficient under the New Mexico Constitution where the applicant is aware of or can discover a party's whereabouts. Of course, here, Mitchell provided neither notice by personal service or mail.

Movants from exercising their rights as working interest or overriding royalty interest owners to participate in the Tomahawk Well without penalty. Also, Movants were precluded from raising other important issues at the hearing such as the proper allocation of costs. This action taken by the Division, however, is void as to the Movants.

In *Uhden*, the court, after noting the violation of Uhden's due process rights, held that the Commission order was "void as to Uhden" due to the lack of notice and opportunity to be heard. *Uhden*, 112 N.M. at 531, 817 P.2d at 724. Such is also the holding under federal case law. *Coe v. Armour Fertilizer Works, supra.* And, under New Mexico law, a subsequent "ratification" of the action by the Commission is not effective to correct the error since an invalid act cannot be made valid by ratification. *See, Miller v. City of Albuquerque*, 89 N.M. 507, 511, 554 P.2d 665, 669 (1976).

Here, the Division's Order No. R-9845 affecting the Movants' property rights is void as to the Movants. Each Movant maintains their respective property rights as if the order had not been entered.

B. The Division Must Reopen the Case and Amend Order No. R-9845 to Conform to the Property Rights of the Movants.

Order No. R-9845 does not conform to the property rights of the Movants. The Movants only request that they be allowed to participate commensurate with their rights as working interest and overriding royalty interest owners. They do not ask for anything more and do not ask that any rights be taken from Mitchell.

IV. CONCLUSION

The Division should reopen the case and allow a hearing *de novo* as to the Movants.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Movants' Brief in Support of its Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* was sent via facsimile transmission and via first class mail this 17th day of April, 1996, to:

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By: _____
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STRATA PRODUCTION COMPANY

TELEPHONE (505) 622-1127
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200 WEST FIRST STREET, ROSWELL PETROLEUM BUILDING, SUITE 700
ROSWELL, NEW MEXICO 88201

January 13, 1993

Via Telefax (915 682-6439)/Hard Copy by Certified Mail

Mitchell Energy Corporation
1000 Independence Plaza
400 West Illinois
Midland, Texas 79701
Attn: Steve Smith

Re: Leasehold Ownership Information
North Gavilon Prospect
NM #92957, S/2 SW/4, SW/4 SE/4
Section 28, T-20-S, R-33-E
Lea County, New Mexico

Dear Mr Smith:

During our telephone conversation this morning you expressed some concern that you had not been provided a list of leasehold partners and ownership in the above referenced lease. As Mitchell has set a compulsory pooling and unorthodox gas well location hearing (Case #10656) for Thursday January 21, 1993, I provide this information to facilitate your notification of said owners. Strata has or is in the process of making a direct assignment of each partners proportionate ownership. The names, addresses and ownership is as follows:

Name/Address	Leasehold Ownership
Arrowhead Oil Corporation P.O. Box 548 Artesia, New Mexico 88211-0548	6.25%
Branko, Inc. 45 Beaverbrook Crescent St. Albert, Alberta, Canada, T8N2L-4	1.56250%
Duane Brown 1315 Marquette PL, NE Albuquerque, New Mexico 87106	5.0%
S.H. Cavin P.O. Box 1125 Roswell, New Mexico 88202	2.0%

EXHIBIT A

Name/Address	Leasehold Ownership
Robert W. Eaton 2505 Don Juan NW Albuquerque, New Mexico 87104	1.56250%
Terry & Barb Kramer 5108 Irving BLVD., N.W. Albuquerque, New Mexico 87114	30.0%
Landwest 215 West 100 South Salt Lake City, UT 84101	1.0%
Candance McClelland 4 Country Hill Road Roswell, New Mexico 88201	2.1250%
Permian Hunter Corporation 215 West 100 South Salt Lake City, UT 84101	4.0%
Scott Exploration, Inc. 200 W. First Suite 648 Roswell, New Mexico 88201	9.0%
Strata Production Company 200 W. First, Suite 700 P.O. Box 1030 Roswell, New Mexico 88202	18.50%
Warren, Inc. P.O. Box 7250 Albuquerque, New Mexico 87194-7250	5.0%
Charles J. Wellborn P.O. Box 2168 Albuquerque, New Mexico 87103-2168	2.0%
Winn Investments, Inc. 706 W. Brazos Roswell, New Mexico 88201	1.0%
Lori Scott Worrall 200 W. First, Suite 648 Roswell, New Mexico 88201	1.0%
Xion Investments 215 West 100 South Salt Lake City, UT 84101	10.0%
	Total 100%

In addition the following own a overriding royalty interest (ORRI) as set forth below:

Name/Address	ORRI
Steve Mitchell 200 W. First, Suite 648 Roswell, New Mexico 88201	.5
George L. Scott III 200 W. First, Suite 648 Roswell, New Mexico 88201	.5
Scott Exploration Inc. 200 W. First, Suite 648 Roswell, New Mexico 88201	.5

Total 1.5%

If I may be of further assistance please call.

Very truly yours,

STRATA PRODUCTION COMPANY

Mark B. Murphy
President

cc: Sealy H. Cavin, Jr., Esq.

MBM/mo