BEFORE THE OIL CONSERVATION COMMISSION
NEW MEXICO DEPARTMENT OF ENERGY
MINERALS AND NATURAL RESOURCES

IN THE MATTER OF THE APPLICATION OF HOWARD OLSEN TO REOPEN CASE NOS. 8668 AND 8769, LEA COUNTY, NEW MEXICO

DE NOVO

REPLY MEMORANDUM OF DOYLE HARTMAN
IN SUPPORT OF DISMISSAL OF THE APPLICATIONS

I.

INTRODUCTION

It is often said "There ain't no free lunch." This saying conveys the universal wisdom that, whether in the world of business, sports or social relations, nothing comes without some return cost or effort. The applicant Howard Olsen denies that logic, wanting the Oil Conservation Commission to bestow a windfall upon him. Olsen did nothing to timely act for himself in behalf of voluntary participation in the wells in question; indeed, he rejected it. Olsen has ignored a showing that non-observance of a technicality in the compulsory pooling orders even slightly prejudices him. Olsen does not even bother to come to the hearings and present evidence. He wants a "free lunch".

A. Factual Findings in Division Orders Nos. R-8031-A and R-8091-A.

As a de novo proceeding it is not directly material what decision was made by the Examiner for the Oil Conversation Division ("OCD"). Hartman's Memorandum in this case (page 1-4) quoted extensively from the OCD Orders simply to demonstrate that

the evidence persuaded the Examiner to make findings totally favorable to Hartman. The point, which evidently was not grasped by Olsen, is that the legal results of the OCD orders were a direct contradiction to the findings. The explanation for that turn of events is known only to the OCD.

After thirteen paragraphs of findings supportive of the position of Hartman the OCD Orders state merely,

> (14) "It is not clear from the evidence that Olsen had a reasonable opportunity to participate in drilling the well. . ." (Emphasis added.)

A party applying years after an order is final to reopen a proceedings and set aside that prior order not only has the burden of proof but must establish lack of jurisdiction or other significant, as opposed to harmless, defect. Moreover, the party complaining of a technical non-compliance has the burden to show prejudice has occurred.[1]

Before ever reaching the facts, the application should be dismissed on legal grounds. Olsen presented no evidence to bear the proof burdens that the law requires.

B. The Shifting Sand of Olsen's Grounds For Reopening.

Applicant's Response Memorandum concedes and abandons one of the two grounds on which this proceeding is based. The Application filed August 17, 1987 charges that Olsen is entitled to relief because of certain requirements of the decretal

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[1] See authorities cited in Memorandum of Hartman filed at hearing February 28, 1991 ("Hearing Memorandum"). These rules apply only in jurisdictions, excluding New Mexico, where such reopenings are authorized. This issue is discussed later at Part III A.

portions of Order R-8031 and R-8091 contained in Paragraphs (3) and (4) of each order. See a copy of the Application attached as Appendix "I".

Paragraph (4) related to the reasonableness of well costs incurred by the operator. The applicant has dropped that ground. In his Response Olsen admits that he had an opportunity to audit and ". . .Olsen should have voiced any such objections by now." Response Memorandum, p. 4.

What then of the single remaining ground for reopening? Olsen harangues about the unfulfilled ". . .obligations imposed on Hartman by those Orders." Response Memorandum, p. 6. He then builds an argument entirely premised on Olsen not being notified by Hartman concerning the compulsory pooling risk penalty. In an 11 1/2 page brief the risk penalty is mentioned no less than 17 times! No where does Olsen dare quote what, indeed, was the direction to Hartman under Paragraph (3) of the pooling orders. It provides:

> (3) After the effective date of the order and within 90 days prior to commencing said well, the operator shall furnish the Division and each known working interest owner in the subject unit an itemized schedule of estimated well costs.

There is nothing about notification of the risk penalty. Hartman's only sin was that he provided the estimated well costs too soon (the "AFE"). That error was absolutely harmless and non-prejudicial because Olsen unequivocally, clearly and without contradiction has testified he would not want to and did not opt to participate voluntarily for the amount of well cost projected by Hartman.

II.

STATEMENT OF MATERIAL AND UNDISPUTED FACTS

The record in this case shows without dispute the following facts primarily based on the testimony of the applicant himself.

1. Howard Olsen was sophisticated in the oil and gas business in New Mexico. He had been an operator and developed or operated at least 300 wells. Olsen Dep. 4-5. Olsen had been a party in OCD hearings and represented by counsel. Olsen Dep. 11-12. He understood what would be the probable outcome of a forced pooling application if it were not opposed, including the imposition of a risk factor on non-consent parties. Olsen Dep. 37-39, 53-55.

2. For both applications in question, Cases 8668 and 8769, Olsen was provided due written notice of the application and the hearing date. Hartman Exhs. 5 and 17. Olsen received both notices and decided not to attend or have his interests represented; possibly his Phoenix office delayed in providing him the notice on the first case issued in July 1985. Olsen Dep. 37-39, 53-55.

3. On July 10, 1985 Hartman sent Olsen an Authorization For Expenditure ("AFE") on the first infill well to be drilled on the Carlson Federal lease. This was for the No. 4 well. The amount for a completed well was $390,000. Hartman Exhibit 3.

A. Olsen considered the AFE and thought the cost was too high. Olsen Dep. 20. He felt that it was ". . .about a third high. If it was a third to forty percent less, it would have been more reasonable." Olsen Dep. 23.

B. Even had the AFE had been $300,000 instead of $390,000., Olsen would still not say that he would have participated; only that if it were $275,000 he "would have looked at it very seriously." Olsen Dep. 25.

C. On being shown the $390,000 AFE with Hartman Exhibit 3, Olsen testified:

> Q. Okay. And from your prior testimony, without having to rehash that, your reaction was you didn't want to participate based on these kinds of costs?
>
> A. That wasn't something I was bound to do it.
>
> Q. Well, you didn't want to?
>
> A. I didn't want to, that's correct. (Emphasis added) Olsen Dep. 32.

4. At the hearing on the second forced pooling case for the No. 5 well, in which Olsen chose not to participate, an AFE was introduced. The AFE for the No. 5 infill well was exactly the same as for the No. 4 well. Hartman Exhibit 19, page 21.

5. Olsen's position was that he was satisfied with the production from the old Nos. 2 and 3 wells and did not want to pay his share of $390,000 ". . .not knowing whether he would ever get it back. . .." Olsen dep. 57-58.

6. Even after the infill wells were successfully completed; even after the costs were known to be less than the AFE amounts, Olsen did not want to be a voluntary participant, viz:

> Q. And just so the record is very clear on this, once it was done -- I won't argue with you about what you had to do to do it. But once it was done, it was your decision that you did not

want to be a voluntary partner, as you put it, or joint interest participant in the wells, the Number 4 and the Number 5?

A. That's correct.

Q. Okay. And the fact that the Number 4 well was drilled for a cost of some $16,000.00 less than the AFE and the Number 5 for some $75,000.00 less than the AFE makes no difference to you?

A. No. (Olsen Dep. 76.)

III.

ARGUMENT AND AUTHORITIES

A. The Notification Complained Of Was Not Required By The Division Pooling Orders

The applicant's case consists of a great deal of huffing and puffing. When the smoke is blown away we find that the complaint is really that Olsen ". . . did not have opportunity to elect to participate knowing the percentage penalty assessed under the Force Pooling Orders." Response Memorandum, p. 4. Therein, is the applicant's case. A case that falls to the floor and dissolves.

Paragraph (3) of Orders R-8031 and R-8091 required absolutely nothing of Hartman concerning the percentage risk penalty. The allegedly violated paragraph required estimated well costs. In contrast to the facts in Mountain States Natural Gas Corporation v. Petroleum Corporation of Texas, 693 F.2d 1015 (C.A. 20, 1982) the non-operator Olsen was furnished with the estimated costs. Unlike the non-operators in the Petro Case, who attempted to voluntarily participate and were rejected, Olsen did not want to participate. Even when his deposition was taken in August 1989, four years after

the infill wells were successfully drilled at less than the AFE amounts, Olsen did not want to participate.[2]

B. There Is No Legal Power In the Commission For Reopening.

This proceeding was brought in August 1987. That was almost two years after Order R-8031 was issued in Case No. 8668 on September 27, 1985. It was brought approximately one and one-half years after Order R-8091 in Case No. 8769 entered December 6, 1985.

Rehearings or proceedings in the nature thereof, whether called anything else, are governed by N.M.S.A. 1978, Section 70-2-25 A. Twenty days are allowed for such filing. No other statutory authority applies.

Jurisdictions are split on the issue of whether an administrative agency has the authority in the absence of statute to grant a rehearing or otherwise reconsider, reopen or set aside their own final decisions. 2 Am. Jur.2d "Administrative Law" §534.

New Mexico follows the view that in the absence of an express grant of authority, the power of any agency to reopen or reconsider its final decisions exists only when and to the extent the legislature has specifically given it that power. Armijo v. Save 'N Gain, 108 N.M. 281, 771 P.2d 989 (App. 1989); Kennecott Copper Corp. v. Employment Security Comm., 78 N.M. 398, 432 P.2d 109 (1967).

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[2] The argument of Applicant suggests a special Olsen Dicta to the effect that not only can he wait and see whether the well is commercial but also whether it pays out.

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CHRONOLOGICAL STATEMENT OF THE KEY FACTS

January 24, 1985	Hartman initiates negotiations for the sale of Olsen's interest in Carlson leases, two 40 acre tracts.
January 31, 1985	Donna M. Mariner, Assistant to Olsen, rejects Mr. Hartman's offer of January 24, 1985, by letter to Mr. Hartman.
July 10, 1985	Hartman furnished Olsen with estimate of costs for the Carlson Federal No. 4 (Case No. 8668).
July 19, 1985	Application filed in Case No. 8668 seeking force pooling for Carlson Federal No. 4, SE/4, SE/4, Sec. 23 T-25-5, R-37-E, NMPM, Lea County, New Mexico.
July 22, 1985	Olsen notified of hearing in Case No. 8668 set for July 31, 1985 by certified mail.
July 31, 1985	Hearing on Case No. 8668 (Olsen elected not to intervene).
September 10, 1985	Carlson Federal No. 4 spudded.
September 20, 1985	Hartman had received Olsen's agreement to sell his interest (Hartman letter to Olsen's agent enclosing an Assignment for execution).
September 27, 1985	Order No. R-8031 issued in Case No. 8668 (force pooling, Carlson Federal No. 4).
October 1, 1985	Certified letter to Olsen from Ruth Sutton concerning changes in position by Olsen and failure of negotiations.
October 4, 1985	Drilling completed, Carlson Federal No. 4.
October 29, 1985	Application filed in Case No. 8769 seeking force pooling for Carlson Federal No. 5, SE/4, NE/4, Sec. 26, T-25-5 R-37-E, N.M.P.M., Lea County, New Mexico

October 4, 1985	Letter from James Foraker to Olsen confirming Olsen's instructions to end negotiations for the sale of the lease.
November 11, 1985	Olsen was notified of hearing set for November 21, 1985 by certified mail. (Olsen elected not to intervene.)
November 21, 1985	Hearing on Case No. 8769.
December 6, 1985	Order No. R-8091 issued in Case No. 8769 (force pooling, Carlson Federal No. 5).
December 10, 1985	Carlson Federal No. 5 spudded.
January 5, 1986	Drilling completed on Carlson Federal No. 5.
January 6, 1986	Olsen notified of force pooling order and completion of Carlson Federal No. 5 by certified mail Hartman requested closing of the agreed sale by Olsen of his interest .
January ?, 1986	Olsen refused to accept Hartman's letter of January 6, 1986.
August 17, 1987	Application of Howard Olsen's accounts to Reopen Case Nos. 8668 and 8769 was filed.
October, 1987	Audit by Olsen's accountant of Hartman's records on the Carlson Federal No. 4 and No. 5.
November, 1987	Olsen's CPA reports actual well costs based upon his audit; one unresolved exception.

The parties to this proceeding stipulate to the accuracy of the foregoing and to its admission in evidence at the hearing on the captioned applications.

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IN THE MATTER OF THE APPLICATION OF
HOWARD OLSEN TO REOPEN CASE
NOS. 8668 AND 8769, LEA COUNTY,
NEW MEXICO **DE NOVO**

MEMORANDUM OF DOYLE HARTMAN IN SUPPORT OF DISMISSAL OF APPLICATIONS

INTRODUCTION

This matter is before the full Commission for de novo adjudication of an application filed August 17, 1987 by one Howard Olsen to reopen Cases Nos. 8668 and 8769.[1]

That application to reopen was finally heard by the Division, Examiner Michael E. Stogner, on September 6, 1989. Sixteen months later on January 8, 1991 the Division issued its Orders Nos. R-8031-A and R-8091-A. The pertinent findings of those orders were essentially the same and read as follows in Order R-8091-A:

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

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[1] Order No. R-8031 entered September 27, 1985 in Case No. 8668, Application of Doyle Hartman for Compulsory Pooling, Lea County, New Mexico; Order No. R-8091 entered December 6, 1985 in Case No. 8769, Application of Doyle Hartman for Compulsory Pooling, Lea County, New Mexico.

(2) Olsen filed his application to reopen this case seeking strict compliance with Order No. R-8091 on August 17, 1987. Olsen specifically seeks enforcement of the Division's order requiring the submission by the operator of estimated well costs prior to drilling, the effect of which will enable him now to receive well costs, challenge those costs and make a decision about whether or not to join the well, knowing the productive ability and approximate current payout status of the well.

(3) The parties in this case, appearing by counsel, have submitted depositions and have stipulated to a Chronological Statement of Key Facts, and there are no factual disputes about the order of events.

(4) Howard Olsen did not appear and enter any objection at the original compulsory pooling hearing held on November 21, 1985, nor does he challenge the validity of the order.

(5) Howard Olsen was a party force-pooled by Order R-8091 into a standard proration unit in the Langlie-Mattix Pool, being the SE/4 NE/4 of Section 26, Township 25 South, Range 37 East, NMPM, Lea County, New Mexico, upon the application of Doyle Hartman.

(6) Doyle Hartman commenced drilling the Carlson Federal No. 5 well (the "subject well"), on said proration unit on December 10, 1985, which is four days after the entry by the Division of Order No. R-8091.

(7) Although Hartman provided Olson with an AFE for the subject well prior to the compulsory pooling hearing, he did not do so after the order was entered

and at least thirty days prior to drilling the well in accordance with the provisions of the order.

(8) The uncontroverted evidence is that Olsen was aware of Hartman's plans to drill the subject well and had entered into negotiations to sell his interest to Hartman prior to the drilling of the well, but he did not continue with those negotiations after the well was drilled. There is additional evidence that Olsen refused communications from Hartman regarding operations on this well. (Emphasis added.)

(9) Olsen did not file his application to reopen until August 1987, almost two years after the well was spudded.

(10) In October and November of 1987 a certified public accountant retained by Mr. Olsen examined the financial records of Doyle Hartman relating to the costs of the subject well. Olsen has not filed any objection to the costs of said well, and the actual well costs should be determined to be reasonable. (Emphasis added.)

(11) The Division will normally require strict compliance with its orders, but it must rely on affected parties to bring non-compliance to its attention. (Emphasis added)

(12) Olsen did not diligently pursue his remedy although the evidence shows that he had substantive knowledge of sufficient information to enable him to protect his interests. This failure on his part to seek relief make it impossible for the Division to compel strict compliance with the terms of Order R-8091. (Emphasis added.)

(13) It is the intent of compulsory pooling orders entered by the Division to give parties pooled thereunder the opportunity to pay their costs and share in

the risks and benefits of drilling the well, or in the alternative to allow those parties paying the costs and taking the risk to be compensated for that risk." (Emphasis added.) Yet, after making those findings, the Orders exercised magnificent contradiction by providing that six years after the force pooling cases and drilling of the wells, Howard Olsen would nonetheless be allowed to elect to participate voluntarily by paying his 25% share of the costs and receiving his share of gas purchase revenue.

Olsen's case rests entirely on legalistic technicalities. He did not receive estimated and actual well costs for the Carlson Federal No. 4 and No. 5 wells in precisely the manner prescribed by the force pooling orders. That circumstance is supposed to permit Olsen to sleep on his rights and sit back to observe whether participation in the Hartman drilled wells turned out later to look like a good deal financially.

If substance, practicality and diligence mean anything, then the evidence will show without contravention that in fact Hartman did furnish Olsen with estimated and actual well costs to satisfy the substance of the pooling orders. In November 1987 Olsen availed himself of a complete audit on the wells. He had the opportunity to join in the wells financially (but the eventual payout status was then unknown) or to object to the well costs. He did neither.

Olsen received all the information, and more, than he would have obtained had there been strict compliance with the force pooling orders. Moreover, there will be absolutely no evidence that Olsen was prejudiced by the lack of such technical compliance.

LEGAL ARGUMENT AND AUTHORITY

POINT I

AN ADMINISTRATIVE AGENCY HAS DISCRETION TO RELAX OR MODIFY ITS PROCEDURAL RULES FOR HARMLESS AND NONPREJUDICIAL ERROR

It is well settled that administrative agency decisions will not be set aside for procedural errors unless they are major, substantial and prejudicial. American Farm Lines v. Black Ball Freight Service, 397 U.S. 563, 90 S.Ct. 1288, 1292 (1970); County of Del Norte v. United States, 732 F.2d 1462, 1467 (9th Cir. 1984); N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967); Anderson v. United States Forest Service, 647 F.Supp. 3, 7 (E.D. Cal. 1985). This is especially true where the error was harmless because there was no resulting prejudice, or where the failure to follow the procedural rule inflicts no significant injury upon the party entitled to the rule's observance. Dodson v. Nat'l Transp. Safety Bd., 644 F.2d 647, 652 (7th Cir. 1981).

POINT II

BURDEN OF PROOF IS ON OLSEN TO SHOW PREJUDICE

The burden is on the complaining party to establish prejudice has occurred. N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967); Center for Auto Safety v. Tiemann, 414 F.Supp. 215, 226 (D.C. 1976); Langingham v. United States, 2 Cl.Ct. 535, 556 (Cl. Ct. 1983).

Where an agency furnished notice to plaintiff earlier than required by that agency's regulations thereby affording plaintiff the opportunity intended to be furnished

to plaintiff by the regulation, such procedural irregularity was deemed trivial and did not mandate setting aside agency's action. County of Del Norte, 732 F.2d 1462. In Tiemann a plaintiff challenging an agency's action failed to meet its burden of showing it had been prejudiced by an agency's failure to hold open public meetings regarding its intended action as required by statute because plaintiff was able, albeit through its own initiative, to comment on the intended action while it was pending before the agency. Tiemann, 414 F.Supp. at 226. In Laningham the United States was unable to show it had been prejudiced by unauthorized personnel having conducted an investigation of a claim for disability retirement rather than the designated authority where the facts clearly supported the conclusion of that investigation and the procedural rule was deemed so technical as to be inconsequential, constituting harmless error, if any. Laningham, 2 Cl. Ct. at 556.

POINT III

POLICY AND EQUITABLE PRINCIPLES UNDERLYING COMPULSORY POLICY STATUTE DICTATE OLSEN'S APPLICATION BE DISMISSED

Where an administrative agency is expressly given the power to determine what is fair and equitable, equitable principles are necessarily applied in their decisions. Securities & Exch. Com. v. Chenery Corp., 318 U.S. 80, 90-92 (1943); 1 AmJur2d Administrative Law Sec. 143 (1962). When in a given case the ends of justice require it an administrative agency should exercise its discretion to modify or relax its procedural rules. American Farm Lines v. Black Ball Freight Service, 397 U.S. 563, 90 S.Ct. 1288, 1292 (1970); Neighborhood TV Co., Inc. v. F.C.C., 742 F.2d 629, 636 (D.C. 1984).

State law empowers the Division to compel pooling as a means of achieving orderly development when interest owners cannot voluntarily agree to do so. §70-2-17 C. NMSA (1987 Repl.). The purpose of compulsory pooling is to prevent the drilling of unnecessary wells, protect correlative rights and prevent waste. Id.; see also, Rutter & Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 291-292, 532 P.2d 282 (1975) (primary consideration of conservation laws is prevention of waste and protection of correlative rights). The compulsory pooling statute prevents waste by appropriately limiting the number of wells drilled. §70-2-17 B. NMSA 1978 (1987 Repl.). The statute protects correlative rights by assuring each owner the opportunity to produce his just and equitable share of the pooled substances. §70-2-17 A. NMSA 1978 (1987 Repl.).

Under the statutory scheme of compulsory pooling, the operator and participating parties assume all the financial risk of drilling. See, §70-2-17 C. NMSA 1978 (1987 Repl.) (compulsory pooling order should provide that those electing not to pay their proportionate share in advance be reimbursed "solely out of production"). Therefore, the operator and any participating parties bear the loss if a well drilled pursuant to the statute proves to be a dry hole or does not pay-out. In order to compensate the participating parties for their assumption of that risk, the statute assesses a penalty upon the nonparticipating party or so-called force pooled party. §70-2-17 C. NMSA 1978 (1987 Repl.) (charge for risk not to exceed 200% of nonconsenting owners' prorata share of drilling and completing costs); see also, Ranola Oil Co. v. Corporation Commission, 752 P.2d 1116, 1119 (Okla. 1988) (purpose of forced pooling is to equalize the risk of loss by forcing all interest owners to choose in advance whether they will share in both benefits

and risk exploration). The statute further protects the rights of the nonconsenting party by allowing the Division to determine proper costs in the event a dispute arises. §70-2-17 C. NMSA 1978 (1987 Repl.).

CONCLUSION

Olsen is asking the OCD to set aside two force pooling orders issued six years ago because he was not furnished with estimated and actual well costs in the technically exact manner prescribed by those orders. As a practical matter, Hartman has complied with the Division's orders in all respects. Moreover, Olsen has failed to meet his burden to show how he has been prejudiced by technical noncompliance. The error complained of was harmless.

Olsen openly acknowledges having received the information that the orders required to be furnished, as well as having had the opportunity to audit Hartman's records on these wells. In the almost four years which have passed since Olsen's audit Olsen has never objected to the OCD about the reasonableness of the well costs.

The purpose of force pooling is to equalize the risk of loss by forcing all interest owners to choose in advance whether they will share in both the benefits and the risk of pay-out. Hartman has already borne all risk associated with drilling, completing and producing these wells over the last four years. In February 1989 Hartman sold out to Meridian Oil Inc. all his interest in the wells.

What Olsen really is attempting to do is to manipulate a technical procedural rule of the OCD to defeat the purposes and public policy underlying the force pooling statute. Even if that were to be permitted, as the Division Orders provide, then the

accounting for Olsen's belated participation should replicate the conditions that would have prevailed had Hartman provided the well cost data in 1985 and early 1986 and then Olsen either (a) elected to participate and paid expense out of the revenue he would have received from El Paso Natural Gas Co. under his gas purchase agreement, or (b) gone nonconsent and been subject to the 200% penalty provided in the pooling Orders. He cannot have the best of both worlds.

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