CONCLUSION

For overwhelming factual reasons and because of controlling principals of law, the Application of Howard Olsen to reopen Case Nos. 8668 and 8769 must be dismissed.

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By _____
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Attorneys for Respondent Doyle Hartman

CERTIFICATE OF MAILING

I hereby certify that I did on 18th day of March, 1991, a true and correct copy of the foregoing Reply Memorandum of Doyle Hartman In Support of Dismissal of the Applications was mailed to opposing counsel of record. T. Calder Ezzell, Jr., Esq., Hinkle, Cox, Eaton, Coffield & Hensley, P. O. Box 10, Roswell, New Mexico 88202, by first class mail, postage prepaid.

_____
J. E. GALLEGOS

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATION OF HOWARD OLSEN
TO REOPEN CASE NOS. 8668 and
8769, LEA COUNTY, NEW MEXICO.

RECEIVED
AUG 17 1987
OIL CONSERVATION DIVISION

Case 8668

APPLICATION

Howard Olsen, in support of his Application to Reopen Case Nos. 8668 and 8769, would show that:

1. The Division has continuing jurisdiction over Case Nos. 8668 and 8769 pursuant to its retention of jurisdiction as stated in the orders issued therein.

CASE NO. 8668
ORDER NO. R-8031

2. Doyle Hartman applied in Case No. 8668 for an order force pooling all mineral interests from the surface to the base of the Langlie-Mattix Pool underlying all of Section 23, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico. Applicant herein was one of the mineral interest owners who Doyle Hartman sought to force pool. The Division entered Order No. R-8031 on September 27, 1985 granting the application.

3. Order No. R-8031 required, among other things, that:

PROVIDED FURTHER THAT,

> . . .(3) After the effective date of this 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.. . .
>
> (5) The operator shall furnish the Division and each known working interest owner an

> itemized schedule of actual well costs within 90 days following completion of the well; if no objection to the actual well costs is received by the Division and the Division has not objected within 45 days following receipt of said schedule, the actual well costs shall be the reasonable costs; provided however, if there is an objection to the actual well costs within said 45-day period the Division will determine reasonable well costs after public notice and hearing.. . .

The well contemplated by Order No. R-8031 was spudded on September 10, 1985 and completed on October 4, 1985.

4. Despite the express requirements of Order No. R-8031, specifically set forth in Paragraph 4 above, Applicant did not receive an itemized schedule of estimated well costs following the effective date of Order No. R-8031, and prior to the commencement of the well, as contemplated by the Order. Furthermore, following the completion of the well, Applicant did not receive an itemized schedule of actual well costs as required by the Order.

CASE NO. 8769
ORDER NO. R-8091

5. Doyle Hartman applied in Case No. 8769 for an order force pooling all mineral interests from the surface to the base of the Langlie-Mattix Pool underlying all of Section 26, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico. Applicant herein was one of the mineral interest owners who Doyle Hartman sought to force pool. The Division enters Order No. R-8091 on December 6, 1985 granting the application.

6. Order No. R-8091 required, among other things, that:

PROVIDED FURTHER THAT,

> . . .(2) After the effective date of this 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.. . .
>
> (5) The operator shall furnish the Division and each known working interest owner an itemized schedule of actual well costs within 90 days following completion of the well; if no objection to the actual well costs is received by the Division and the Division has not objected within 45 days following receipt of said schedule, the actual well costs shall be the reasonable well costs; provided however, if there is an objection to actual well costs within said 45-day period, the Division will determine reasonable well costs after public notice and hearing.. . .

The well contemplated by Order No. R-8091 was spudded on December 10, 1985 and completed on January 5, 1986.

7. Despite the express requirements of Order No. R-8091, specifically set forth above, Applicant did not receive an itemized schedule of estimated well costs following the effective date of Order No. R-8091, and prior to the commencement of the well, as stated by the Order. Following the completion of the well, Applicant did not receive an itemized schedule of actual well costs as required by the Order.

WHEREFORE, Applicant, Howard Olsen, requests that the Division:

(a) Reopen Case Nos. 8868 and 8769 to determine whether Doyle Hartman has complied with the express requirements of Order Nos. R-8031 and R-8091 entered therein.

(b) Order complete compliance with Order Nos. R-8031 and R-8091.

(c) In the alternative to Request (b) above, order that Order Nos. R-8031 and R-8091 be withdrawn in their entirety.

(d) Issue such Orders as may be necessary to protect Applicant's interests in the subject property and to achieve justice as the Division may deem appropriate.

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: _____

Harold L. Hensley, Jr.
Michael F. Millerick
P.O. Box 10
Roswell, NM 88201
(505) 622-6510

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATION OF HOWARD OLSEN
TO REOPEN CASE NOS. 8668 and
8769, LEA COUNTY, NEW MEXICO

ACCEPTANCE OF SERVICE

COMES NOW, ATWOOD, MALONE, MANN & TURNER (Robert H. Strand) and hereby accepts service of the Application on behalf of Defendant, Doyle Hartman.

ATWOOD, MALONE, MANN & TURNER

By: 

Robert H. Strand
P.O. Box 700
Roswell, NM 88201
(505) 622-6221

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

APPLICANT'S MEMORANDUM IN RESPONSE TO MEMORANDUM OF DOYLE HARTMAN IN SUPPORT OF DISMISSAL OF APPLICATIONS

Applicant Howard Olsen submits this Memorandum in Response to the Memorandum presented at the Commission's hearing of February 28, 1991 by Doyle Hartman in support of his contention that the Applications should be dismissed.

INTRODUCTION

Olsen joins in Hartman's Introduction through the point which Hartman quotes portions of the Oil Conservation Division's Order R-8091-A. Hartman's Memorandum at 1-4 (lines 1 and 2). However, Hartman has quoted selectively from Order R-8091-A, ignoring those portions of the Order which reflect adversely upon him. The remaining findings of the Order are as follows:

> (14) It is not clear from the evidence that Olsen had a reasonable opportunity to participate in drilling the well, and he should be afforded the opportunity at this time to pay his pro rata share of the well costs and receive his pro rata share of the proceeds of production, if he so elects to participate.
>
> (15) Hartman has incurred and paid those costs attributable to Olsen's interest, and, considering the time that has passed because this matter has not been diligently pursued, if Olsen elects to pay his pro rata share of well costs, he should compensate Hartman for the use of his money with a reasonable interest charge.

(16) If Olsen elects to pay his share of the costs of the well, he should be entitled to receive his share of the proceeds of production together with a reasonable interest thereon.

(17) The reasonable rate of interest is the rate provided for in New Mexico statutes for interest on judgments.

As is discussed more fully hereinbelow, Olsen rejects the remainder of the Introduction. Rather than resting on "legalistic technicalities," Olsen's case is about Hartman's attempt to reap the substantive benefits conferred upon him by Order Nos. R-8031 and R-8091 ("the Force Pooling Orders") without discharging his substantive obligations as mandated by those Orders. Olsen did not "sleep on his rights." Instead, Hartman has failed to discharge his duty to inform Olsen what his rights were and to provide for an option to participate in the relevant wells with notice of the rights.

Olsen takes specific exception with the implicit suggestion that the November, 1987 audit of the relevant wells is somehow relevant to this action. Hartman's Memorandum at 4. By the time that audit took place, Olsen had filed his Applications which are now at issue. Olsen did not sneak up on Hartman by conducting the audit and then seek compliance with the Force Pooling Order's. While the Division's Orders regarding Olsen's Applications were not entered until long after that audit, this process had begun months before the audit was undertaken.

Otherwise, Hartman uses the audit as a red herring. Hartman correctly observes: "In the almost four years that have passed since Olsen's audit, Olsen has never objected to the OCD about the reasonableness of the well costs." Hartman's Memorandum at 8. While the Division reopened the Force Pooling Orders to allow Olsen to make an election within

30 days whether to participate in the well costs, it made no provision to reopen those Orders for purposes of objecting to the reasonableness of those well costs.

While Olsen sought full compliance with the Force Pooling Orders in his Application, after his Application was filed with the Division he had the opportunity to audit. By failing to reopen the Orders to allow Olsen to object to the reasonableness of the actual well charges, the Division was making the sensible judgment that Olsen should have voiced any such objections by now. What is not sensible is an attempt to equate Olsen's failure to object to the reasonableness of well charges with a desire not to participate in the wells. It is perfectly consistent for one to elect to participate in a well and to not have objections to actual well costs. By the time the audits took place, Olsen had filed his Applications with the Division to reopen the Force Pooling Orders manifesting a clear intent to be afforded the opportunity which he had not previously had, to participate in the wells knowing that a 200% risk penalty was the consequence of declining to participate.

ARGUMENTS AND AUTHORITIES

I. HARTMAN MISAPPREHENDS THE NATURE OF OLSEN'S APPLICATIONS

The linchpin of Hartman's argument, both for dismissal and in the case in chief, is that there have been harmless procedural errors. Olsen need not quarrel with the legal authorities cited by Hartman or the propositions for which they are cited, only their application to this case. By attempting to characterize his own omissions as "procedural" Hartman fails to apprehend the nature of Olsen's Applications and the nature of the Force Pooling Orders. The Force Pooling Orders confer certain substantive benefits and substantive obligations on Hartman. In return for receiving the guarantee that his co-

tenants will either participate or be force pooled with a risk penalty assessed, Hartman must discharge certain substantive obligations, namely providing notice to those co-tenants that a force pooling order has been entered assessing a certain risk penalty (200% in this case), an estimate of actual well costs, and an opportunity to participate within the specified deadlines.

Later Hartman would have been required to provide notice of actual well costs. Viewed in a light most favorable to Hartman, the evidence in this case only reflects that: (1) Olsen had notice that force pooling applications had been filed; (2) substantially prior to Hartman seeking force pooling, Olsen had received estimated well costs for the first of the two wells and an opportunity to participate; and, (3) after the initiation of these proceedings, Olsen had notice of the actual well costs as a result of his November, 1987 audit.

Because of Hartman's failure to comply with the Force Pooling Orders, Olsen did not receive notice that the force pooling applications had been granted and did not have opportunity to elect to participate knowing the percentage penalty assessed under the Force Pooling Orders.

As is discussed below, these omissions are clearly substantive and prejudicial. At this point, it is illuminating to understand what Olsen's rights in the subject wells would be absent force pooling. Hartman and Olsen are co-tenants in and to the mineral estate underlying the lands which are the subject of these proceedings. Absent force pooling, their respective rights and obligations would be governed by common law rules of co-tenancy.

At common law, the drilling of an oil and gas well is a speculative venture. If one co-tenant undertakes such a speculative venture without having obtained the agreement of those co-tenants to participate in the venture, that co-tenant would do so at his own risk. *See generally*, 2 Williams & Meyers Oil and Gas Law §504.1 (1990) (discussing rights and obligations of co-tenants); and *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App. 1987). Applied to this case, this principle would mean that Hartman would drill the subject wells at his own risk and cost without any right to seek reimbursement from Olsen if the venture proved to be unsuccessful.

Also under common law, if the co-tenant is successful in his speculative venture, he has the right to recoup the actual costs of undertaking the speculative venture from the profits, but after successfully recouping those costs, must account to the co-tenants for the remainder of the profits. *Williams & Meyers*, *supra*, at §504.1. Additionally, after such payout, the co-tenants would be liable for their pro rata share of operational expenses. *Id.*

Again applied to this case, that would mean that Hartman would have had the right to recoup his actual drilling costs from the income generated by sales of production from the wells, would have had to account to Olsen for Olsen's proportionate share of monies generated as profit (i.e. income in excess of actual drilling costs) and Olsen would have been responsible to Hartman for his proportionate share of operational expenses.

Thus, the principle difference between force pooling and the common law of co-tenancy is that force pooling, when granted, allows the drilling co-tenant to obtain a specified penalty for the risk he undertakes in drilling the well. No such right exists in common law.

By failing to provide notice and opportunity to participate in the wells after the Orders were entered, Olsen clearly suffered prejudice and Hartman violated substantive provisions of the Orders. First, it was essential that Olsen receive notice that a force pooling order had been entered. The mere notice that a force pooling hearing had been scheduled is certainly inadequate in this regard. Force pooling applications are sometimes denied and often withdrawn or continued. The notice that a hearing was to take place cannot be equated with notice that an order had actually been entered. If Olsen had received proper notice that an order had been entered, he would have known that his common law rights as a co-tenant were being modified in that Hartman was going to be able to recoup some sort of risk penalty and addition to his actual costs if the wells were successful.

Second, notice of the actual risk penalty percentage and opportunity to participate would give Olsen notice of the extent of the modification of his common law rights as a co-tenant. For instance, an owner of a force pooled interest subject to a 50% risk penalty may be less likely to participate in a drilling of a well than an owner of the same interest subject to a 200% risk penalty.

In essence, Hartman's position in these proceedings is that he should be entitled to reap all of the benefits of the Force Pooling Orders without being subject to the obligations imposed on him by those Orders. Hartman cries crocodile tears when he complains that the Division essentially afforded Olsen the opportunity to elect to participate in the wells with 20/20 hindsight as to what happened with respect to drilling the wells and marketing the product therefrom. The only reason Olsen is to be afforded this opportunity is because

Hartman failed to comply with the terms of the Orders which he affirmatively sought. That is, he drilled the wells and wants Olsen to be assessed the risk penalty without affording Olsen any opportunity to participate in the wells knowing the consequences of failing to contribute (i.e. the 200% risk penalty). Hartman created his mess and it is only fair that he lie in it.

II. THE RELIEF SOUGHT BY OLSEN IS CONSISTENT WITH CASE LAW.

The only reported judicial decision regarding a force pooling applicant's failure to conform to the notice provisions of a force pooling order by the Division is from the Tenth Circuit. *Mountain States Natural Gas Corp. v. Petroleum Corp.*, 693 F.2d 1015 (10th Cir. 1982). In that case, Petco mailed notice to Mountain States, the owner of the force pooled interest, which notice contained all of the information required in the Division's force pooling order but was subsequently returned as undeliverable. Also, although the force pooling order at issue provided that the notice would be provided to Mountain States "'[a]fter the effective date of [the] order and within a minimum of thirty days prior to commencing a well,'" Petco commenced drilling the wells six days after it mailed the notice to Mountain States. *Id.* at 1017 (quoting the relevant order by the Division). The Tenth Circuit held as follows:

> The Division order provided that Petco was required to furnish to Mountain States "within a minimum of thirty days prior to commencing a well." The language of the order is clear. Despite Petco's argument that notification had been **within** thirty days of drilling, the plain language of the order is that Petco was required to provide Mountain States with at least thirty days notice **before** commencing drilling operations.

> We hold that Petco violated the terms of the Division order by failing to furnish Mountain States with notice at least thirty days before commencing the well. Accordingly, Mountain States was not allowed the opportunity accorded by Division's order to elect to pay the costs of drilling.

Id. at 1020-1021.

The facts in this case are obviously similar. First, there is no evidence in the record that Olsen received notice of the entry of the Force Pooling Order, estimated well costs or opportunity to participate after the Order was entered. Second, and much more importantly, the record is quite clear that as to Order R-8031, Hartman commenced drilling prior to the entry of that Order and, as to Order R-8091, Hartman commenced drilling four days after the entry of that Order.

The holding in *Mountain States* quoted above relies solely on the fact that drilling commenced prior to the expiration of the thirty day notice period. In this case, the notice language provides for a longer time frame than that in *Mountain States*. See Order R-8031 at ¶ 3 and Order R-8091 at ¶ 3 (both providing: "after the effective date of this Order and within 90 days prior to commencing said well . . . "). In this case, Hartman commenced one of the wells prior to the notice period commencing and the other, 86 days prior to the expiration of the notice period. Thus, under the ruling in *Mountain States*, the relief afforded by the Division to Olsen is perfectly justified.

III. THE COMMISSION SHOULD DECLINE HARTMAN EQUITABLE RELIEF FROM THE FORCE POOLING ORDERS SINCE HE HAS UNCLEAN HANDS.

In seeking dismissal, Hartman is really relying on the Commission to grant him equitable relief from the provisions of the Force Pooling Orders. Hartman's Memorandum

at 6-9. It is a fundamental provision of equity that equity is not granted to the person with unclean hands, that is to say, one who has engaged in improper conduct. It is completely undisputed that, in one instance Hartman did not even wait for the Division to enter an order granting force pooling before commencing drilling the well and, in the other, commenced drilling four days after the Order despite the 90 day notice provisions in both Orders. Additionally, it is also undisputed that Hartman provided Olsen with no notice of the penalty provisions of the Force Pooling Orders after they had been entered. Hartman's actions do not reflect that he did not attempt to comply with the spirit of the Force Pooling Orders. He completely ignored his substantive obligations thereunder to provide notice to Olsen after they had been entered. Nothing in the Force Pooling Orders suggest that estimated costs provided prior to the entry of the Orders was sufficient. Hartman would have no reasonable basis for believing that such notice was sufficient. Additionally, such notice clearly did not contain notice of the penalty provisions Olsen would have to bear if he declined to participate. Indeed, when the one estimate was provided to Olsen, as is discussed above, if Hartman had gone ahead and drilled the wells, there would have been no penalty provisions for Olsen under common law of co-tenancy.

IV. HARTMAN'S ARGUMENTS REGARDING THE PRICE OF GAS RECEIVED ARE OF NO MOMENT.

In an argument made at the hearing before the Commission and alluded to briefly in his Memorandum, Hartman contended that Olsen would not have been entitled to the price which Hartman received from El Paso so that payout should not be calculated on the price Hartman actually received but on the price Olsen would have received. This argument is pure speculation. Olsen has never had opportunity to negotiate with El Paso regarding

his interests in these wells since, at no time since the entry of the Force Pooling Orders, has Hartman afforded him the opportunity to participate. Indeed, Olsen can postulate scenarios in which he might have received higher prices than Hartman received. Any postulations by Hartman or Olsen as to what price Olsen would have or could have received, are mere fantasy. All the Commission has to go on is reality, that is the price which Hartman actually received for production. All calculations relevant to Olsen's Applications should be made on the prices actually received rather than fictions concocted by the parties.

CONCLUSION

As is reflected in the Division's Orders resulting from Olsen's Applications, Olsen is merely seeking the one opportunity which he has been denied by Hartman since the Force Pooling Orders were entered: the opportunity to elect to participate in the wells knowing the consequences (i.e. the 200% risk penalty) of failure to participate. While, as to one of the two wells, Olsen did receive estimated well costs substantially prior to Hartman initiating force pooling proceedings, those estimates are clearly deficient as attempts to discharge Hartman's obligation under Order R-8031 since Olsen's refusal to elect to participate at that time simply meant if Hartman proceeded to drill the well, he would only be able to recoup his actual costs and no penalty from production. There is a substantial and material difference between those two scenarios.

Additionally, as to Order R-8091, there is no evidence in the record that Olsen received estimated well costs or opportunity to participate at any time before or after the entry of that Order. Olsen does not dispute the policies behind force pooling. However, force pooling clearly contemplates that prior to assessing a risk penalty against an owner of

a concurrent interest in and to the relevant mineral estate, that owner must be afforded the opportunity to participate in the contemplated well knowing the risk penalty he would bear if he declines to participate. Olsen readily acknowledges that affording him the opportunity to participate in the wells at the present time, if he elects to do so, would have a net effect of forcing Hartman to bear the risk of drilling the well without compensation for risk or distributing the risk to Olsen. However, this is a problem of Hartman's own creation since he failed to comply with the Force Pooling Orders. Additionally, Hartman often notes in his Memorandum that it has been over five years since the Force Pooling Orders were entered. However, it has been over three years since Olsen's Applications were filed with the Division. Since the Force Pooling Orders were entered, except for the brief period of time in which the Division's Orders reopening the Force Pooling Orders were in effect (they have now been stayed), Olsen has never had any opportunity to elect to participate in the Wells knowing the risk penalty.

As a final matter, Hartman has consistently maintained that Olsen has never indicated a willingness to participate. In dong so, Hartman manages to ignore Olsen's initiation of these proceedings. More importantly, Hartman's contention turns the Force Pooling Orders on their head. Hartman is required to afford Olsen the opportunity to participate, at which time Olsen has the right to elect whether to participate. Throughout these proceedings Hartman has contended that Olsen was validly force pooled, but would require Olsen to engage in the futile act of electing to participate when Hartman refused to recognize a right to do so. After the Division's Orders were entered, Olsen did indicate

a willingness to participate. See Letter to Robert Stovall from T. Calder Ezzell, Jr., dated February 6, 1991 attached as Exhibit "A".

For the reasons set forth above, Olsen urges that the Commission reopen the Force Pooling Order, granting Olsen the thirty days to elect to participate in the wells at issue.

Respectfully submitted,

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: _____

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Attorneys for Howard Olsen

I hereby certify that on the 8 day of March, 1991, a true and correct copy of the foregoing Memorandum was hand-delivered to the following:

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CLARENCE E. HINKLE (1901-1985)
W. E. BONDURANT, JR. (1913-1973)
ROY C. SNODGRASS, JR. (1914-1987)

February 6, 1991

Oil Conservation Division
State Land Office Building
P. O. Box 2088
Santa Fe, New Mexico 87504

ATTENTION: Mr. Robert Stovall
General Counsel

Re: Case No. 8688 (Reopened)
Case No. 8769 (Reopened)

Dear Mr. Stovall:

Please find enclosed the request of Howard R. Olsen for stays of Order Nos. R-8031-A and R-8091-A pending the outcome of Mr. Hartman's Application for Hearing De Novo in each case.

Mr. Howard R. Olsen has elected to participate in the Carlson Federal No. 4 and Carlson Federal No. 5 wells, pursuant to the terms of the above referenced Orders, and by copy of this letter to Mr. Gene Gallegos, Doyle Hartman's attorney, we are confirming that election to participate. However, in light of Mr. Hartman's Applications for Rehearing before the full Commission, currently set for hearing on February 28, 1991, we are requesting stays of the Orders so that the 30 day time period within which we must evidence our election to participate by the payment to Mr. Hartman of our pro rata well costs, plus interest, will not expire. While we feel that the full Commission will not reverse the Hearing Examiner's Decision, Mr. Olsen would suffer extremely negative consequences if forced to pay Mr. Hartman in

excess of $300,000 before the matter is even heard by the full Commission.

Yours very truly,

HINKLE, COX, EATON, COFFIELD & HENSLEY

T. Calder Ezzell, Jr.

TCE/tw
Enclosures

cc: Mr. J. E. Gallegos
Mr. Howard Olsen

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

RECEIVED
MAR 19 1991
OIL CONSERVATION DIVISION

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. <u>There Is No Legal Power In the Commission For Reopening.</u>

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. <u>Armijo v. Save 'N Gain,</u> 108 N.M. 281, 771 P.2d 989 (App. 1989); <u>Kennecott Copper Corp. v. Employment Security Comm.</u>, 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.

CONCLUSION

For overwhelming factual reasons and because of controlling principals of law, the Application of Howard Olsen to reopen Case Nos. 8668 and 8769 must be dismissed.

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Attorneys for Respondent Doyle Hartman

CERTIFICATE OF MAILING

I hereby certify that I did on 18th day of March, 1991, a true and correct copy of the foregoing Reply Memorandum of Doyle Hartman In Support of Dismissal of the Applications was mailed to opposing counsel of record. T. Calder Ezzell, Jr., Esq., Hinkle, Cox, Eaton, Coffield & Hensley, P. O. Box 10, Roswell, New Mexico 88202, by first class mail, postage prepaid.

_____
J. E. GALLEGOS

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATION OF HOWARD OLSEN
TO REOPEN CASE NOS. 8668 and
8769, LEA COUNTY, NEW MEXICO.

RECEIVED
AUG 17 1987
OIL CONSERVATION DIVISION

Case 8668

APPLICATION

Howard Olsen, in support of his Application to Reopen Case Nos. 8668 and 8769, would show that:

1. The Division has continuing jurisdiction over Case Nos. 8668 and 8769 pursuant to its retention of jurisdiction as stated in the orders issued therein.

CASE NO. 8668
ORDER NO. R-8031

2. Doyle Hartman applied in Case No. 8668 for an order force pooling all mineral interests from the surface to the base of the Langlie-Mattix Pool underlying all of Section 23, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico. Applicant herein was one of the mineral interest owners who Doyle Hartman sought to force pool. The Division entered Order No. R-8031 on September 27, 1985 granting the application.

3. Order No. R-8031 required, among other things, that:

> PROVIDED FURTHER THAT,
>
> . . .(3) After the effective date of this 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.. . .
>
> (5) The operator shall furnish the Division and each known working interest owner an

itemized schedule of actual well costs within 90 days following completion of the well; if no objection to the actual well costs is received by the Division and the Division has not objected within 45 days following receipt of said schedule, the actual well costs shall be the reasonable costs; provided however, if there is an objection to the actual well costs within said 45-day period the Division will determine reasonable well costs after public notice and hearing.. . .

The well contemplated by Order No. R-8031 was spudded on September 10, 1985 and completed on October 4, 1985.

4. Despite the express requirements of Order No. R-8031, specifically set forth in Paragraph 4 above, Applicant did not receive an itemized schedule of estimated well costs following the effective date of Order No. R-8031, and prior to the commencement of the well, as contemplated by the Order. Furthermore, following the completion of the well, Applicant did not receive an itemized schedule of actual well costs as required by the Order.

CASE NO. 8769
ORDER NO. R-8091

5. Doyle Hartman applied in Case No. 8769 for an order force pooling all mineral interests from the surface to the base of the Langlie-Mattix Pool underlying all of Section 26, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico. Applicant herein was one of the mineral interest owners who Doyle Hartman sought to force pool. The Division enters Order No. R-8091 on December 6, 1985 granting the application.

6. Order No. R-8091 required, among other things, that:

PROVIDED FURTHER THAT,

> . . .(2) After the effective date of this 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.. . .
>
> (5) The operator shall furnish the Division and each known working interest owner an itemized schedule of actual well costs within 90 days following completion of the well; if no objection to the actual well costs is received by the Division and the Division has not objected within 45 days following receipt of said schedule, the actual well costs shall be the reasonable well costs; provided however, if there is an objection to actual well costs within said 45-day period, the Division will determine reasonable well costs after public notice and hearing.. . .

The well contemplated by Order No. R-8091 was spudded on December 10, 1985 and completed on January 5, 1986.

7. Despite the express requirements of Order No. R-8091, specifically set forth above, Applicant did not receive an itemized schedule of estimated well costs following the effective date of Order No. R-8091, and prior to the commencement of the well, as stated by the Order. Following the completion of the well, Applicant did not receive an itemized schedule of actual well costs as required by the Order.

WHEREFORE, Applicant, Howard Olsen, requests that the Division:

(a) Reopen Case Nos. 8868 and 8769 to determine whether Doyle Hartman has complied with the express requirements of Order Nos. R-8031 and R-8091 entered therein.

(b) Order complete compliance with Order Nos. R-8031 and R-8091.

(c) In the alternative to Request (b) above, order that Order Nos. R-8031 and R-8091 be withdrawn in their entirety.

(d) Issue such Orders as may be necessary to protect Applicant's interests in the subject property and to achieve justice as the Division may deem appropriate.

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATION OF HOWARD OLSEN
TO REOPEN CASE NOS. 8668 and
8769, LEA COUNTY, NEW MEXICO

ACCEPTANCE OF SERVICE

COMES NOW, ATWOOD, MALONE, MANN & TURNER (Robert H. Strand) and hereby accepts service of the Application on behalf of Defendant, Doyle Hartman.

ATWOOD, MALONE, MANN & TURNER

By: 

Robert H. Strand
P.O. Box 700
Roswell, NM 88201
(505) 622-6221

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

APPLICANT'S MEMORANDUM IN RESPONSE TO MEMORANDUM OF DOYLE HARTMAN IN SUPPORT OF DISMISSAL OF APPLICATIONS

Applicant Howard Olsen submits this Memorandum in Response to the Memorandum presented at the Commission's hearing of February 28, 1991 by Doyle Hartman in support of his contention that the Applications should be dismissed.

INTRODUCTION

Olsen joins in Hartman's Introduction through the point which Hartman quotes portions of the Oil Conservation Division's Order R-8091-A. Hartman's Memorandum at 1-4 (lines 1 and 2). However, Hartman has quoted selectively from Order R-8091-A, ignoring those portions of the Order which reflect adversely upon him. The remaining findings of the Order are as follows:

> (14) It is not clear from the evidence that Olsen had a reasonable opportunity to participate in drilling the well, and he should be afforded the opportunity at this time to pay his pro rata share of the well costs and receive his pro rata share of the proceeds of production, if he so elects to participate.
>
> (15) Hartman has incurred and paid those costs attributable to Olsen's interest, and, considering the time that has passed because this matter has not been diligently pursued, if Olsen elects to pay his pro rata share of well costs, he should compensate Hartman for the use of his money with a reasonable interest charge.

(16) If Olsen elects to pay his share of the costs of the well, he should be entitled to receive his share of the proceeds of production together with a reasonable interest thereon.

(17) The reasonable rate of interest is the rate provided for in New Mexico statutes for interest on judgments.

As is discussed more fully hereinbelow, Olsen rejects the remainder of the Introduction. Rather than resting on "legalistic technicalities," Olsen's case is about Hartman's attempt to reap the substantive benefits conferred upon him by Order Nos. R-8031 and R-8091 ("the Force Pooling Orders") without discharging his substantive obligations as mandated by those Orders. Olsen did not "sleep on his rights." Instead, Hartman has failed to discharge his duty to inform Olsen what his rights were and to provide for an option to participate in the relevant wells with notice of the rights.

Olsen takes specific exception with the implicit suggestion that the November, 1987 audit of the relevant wells is somehow relevant to this action. Hartman's Memorandum at 4. By the time that audit took place, Olsen had filed his Applications which are now at issue. Olsen did not sneak up on Hartman by conducting the audit and then seek compliance with the Force Pooling Order's. While the Division's Orders regarding Olsen's Applications were not entered until long after that audit, this process had begun months before the audit was undertaken.

Otherwise, Hartman uses the audit as a red herring. Hartman correctly observes: "In the almost four years that have passed since Olsen's audit, Olsen has never objected to the OCD about the reasonableness of the well costs." Hartman's Memorandum at 8. While the Division reopened the Force Pooling Orders to allow Olsen to make an election within

30 days whether to participate in the well costs, it made no provision to reopen those Orders for purposes of objecting to the reasonableness of those well costs.

While Olsen sought full compliance with the Force Pooling Orders in his Application, after his Application was filed with the Division he had the opportunity to audit. By failing to reopen the Orders to allow Olsen to object to the reasonableness of the actual well charges, the Division was making the sensible judgment that Olsen should have voiced any such objections by now. What is not sensible is an attempt to equate Olsen's failure to object to the reasonableness of well charges with a desire not to participate in the wells. It is perfectly consistent for one to elect to participate in a well and to not have objections to actual well costs. By the time the audits took place, Olsen had filed his Applications with the Division to reopen the Force Pooling Orders manifesting a clear intent to be afforded the opportunity which he had not previously had, to participate in the wells knowing that a 200% risk penalty was the consequence of declining to participate.

ARGUMENTS AND AUTHORITIES

I. HARTMAN MISAPPREHENDS THE NATURE OF OLSEN'S APPLICATIONS

The linchpin of Hartman's argument, both for dismissal and in the case in chief, is that there have been harmless procedural errors. Olsen need not quarrel with the legal authorities cited by Hartman or the propositions for which they are cited, only their application to this case. By attempting to characterize his own omissions as "procedural" Hartman fails to apprehend the nature of Olsen's Applications and the nature of the Force Pooling Orders. The Force Pooling Orders confer certain substantive benefits and substantive obligations on Hartman. In return for receiving the guarantee that his co-

tenants will either participate or be force pooled with a risk penalty assessed, Hartman must discharge certain substantive obligations, namely providing notice to those co-tenants that a force pooling order has been entered assessing a certain risk penalty (200% in this case), an estimate of actual well costs, and an opportunity to participate within the specified deadlines.

Later Hartman would have been required to provide notice of actual well costs. Viewed in a light most favorable to Hartman, the evidence in this case only reflects that: (1) Olsen had notice that force pooling applications had been filed; (2) substantially prior to Hartman seeking force pooling, Olsen had received estimated well costs for the first of the two wells and an opportunity to participate; and, (3) after the initiation of these proceedings, Olsen had notice of the actual well costs as a result of his November, 1987 audit.

Because of Hartman's failure to comply with the Force Pooling Orders, Olsen did not receive notice that the force pooling applications had been granted and did not have opportunity to elect to participate knowing the percentage penalty assessed under the Force Pooling Orders.

As is discussed below, these omissions are clearly substantive and prejudicial. At this point, it is illuminating to understand what Olsen's rights in the subject wells would be absent force pooling. Hartman and Olsen are co-tenants in and to the mineral estate underlying the lands which are the subject of these proceedings. Absent force pooling, their respective rights and obligations would be governed by common law rules of co-tenancy.

At common law, the drilling of an oil and gas well is a speculative venture. If one co-tenant undertakes such a speculative venture without having obtained the agreement of those co-tenants to participate in the venture, that co-tenant would do so at his own risk. *See generally*, 2 Williams & Meyers Oil and Gas Law §504.1 (1990) (discussing rights and obligations of co-tenants); and *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App. 1987). Applied to this case, this principle would mean that Hartman would drill the subject wells at his own risk and cost without any right to seek reimbursement from Olsen if the venture proved to be unsuccessful.

Also under common law, if the co-tenant is successful in his speculative venture, he has the right to recoup the actual costs of undertaking the speculative venture from the profits, but after successfully recouping those costs, must account to the co-tenants for the remainder of the profits. *Williams & Meyers*, *supra*, at §504.1. Additionally, after such payout, the co-tenants would be liable for their pro rata share of operational expenses. *Id.*

Again applied to this case, that would mean that Hartman would have had the right to recoup his actual drilling costs from the income generated by sales of production from the wells, would have had to account to Olsen for Olsen's proportionate share of monies generated as profit (i.e. income in excess of actual drilling costs) and Olsen would have been responsible to Hartman for his proportionate share of operational expenses.

Thus, the principle difference between force pooling and the common law of co-tenancy is that force pooling, when granted, allows the drilling co-tenant to obtain a specified penalty for the risk he undertakes in drilling the well. No such right exists in common law.

By failing to provide notice and opportunity to participate in the wells after the Orders were entered, Olsen clearly suffered prejudice and Hartman violated substantive provisions of the Orders. First, it was essential that Olsen receive notice that a force pooling order had been entered. The mere notice that a force pooling hearing had been scheduled is certainly inadequate in this regard. Force pooling applications are sometimes denied and often withdrawn or continued. The notice that a hearing was to take place cannot be equated with notice that an order had actually been entered. If Olsen had received proper notice that an order had been entered, he would have known that his common law rights as a co-tenant were being modified in that Hartman was going to be able to recoup some sort of risk penalty and addition to his actual costs if the wells were successful.

Second, notice of the actual risk penalty percentage and opportunity to participate would give Olsen notice of the extent of the modification of his common law rights as a co-tenant. For instance, an owner of a force pooled interest subject to a 50% risk penalty may be less likely to participate in a drilling of a well than an owner of the same interest subject to a 200% risk penalty.

In essence, Hartman's position in these proceedings is that he should be entitled to reap all of the benefits of the Force Pooling Orders without being subject to the obligations imposed on him by those Orders. Hartman cries crocodile tears when he complains that the Division essentially afforded Olsen the opportunity to elect to participate in the wells with 20/20 hindsight as to what happened with respect to drilling the wells and marketing the product therefrom. The only reason Olsen is to be afforded this opportunity is because

Hartman failed to comply with the terms of the Orders which he affirmatively sought. That is, he drilled the wells and wants Olsen to be assessed the risk penalty without affording Olsen any opportunity to participate in the wells knowing the consequences of failing to contribute (i.e. the 200% risk penalty). Hartman created his mess and it is only fair that he lie in it.

II. THE RELIEF SOUGHT BY OLSEN IS CONSISTENT WITH CASE LAW.

The only reported judicial decision regarding a force pooling applicant's failure to conform to the notice provisions of a force pooling order by the Division is from the Tenth Circuit. *Mountain States Natural Gas Corp. v. Petroleum Corp.*, 693 F.2d 1015 (10th Cir. 1982). In that case, Petco mailed notice to Mountain States, the owner of the force pooled interest, which notice contained all of the information required in the Division's force pooling order but was subsequently returned as undeliverable. Also, although the force pooling order at issue provided that the notice would be provided to Mountain States "'[a]fter the effective date of [the] order and within a minimum of thirty days prior to commencing a well,'" Petco commenced drilling the wells six days after it mailed the notice to Mountain States. *Id.* at 1017 (quoting the relevant order by the Division). The Tenth Circuit held as follows:

> The Division order provided that Petco was required to furnish to Mountain States "within a minimum of thirty days prior to commencing a well." The language of the order is clear. Despite Petco's argument that notification had been **within** thirty days of drilling, the plain language of the order is that Petco was required to provide Mountain States with at least thirty days notice **before** commencing drilling operations.

> We hold that Petco violated the terms of the Division order by failing to furnish Mountain States with notice at least thirty days before commencing the well. Accordingly, Mountain States was not allowed the opportunity accorded by Division's order to elect to pay the costs of drilling.

Id. at 1020-1021.

The facts in this case are obviously similar. First, there is no evidence in the record that Olsen received notice of the entry of the Force Pooling Order, estimated well costs or opportunity to participate after the Order was entered. Second, and much more importantly, the record is quite clear that as to Order R-8031, Hartman commenced drilling prior to the entry of that Order and, as to Order R-8091, Hartman commenced drilling four days after the entry of that Order.

The holding in *Mountain States* quoted above relies solely on the fact that drilling commenced prior to the expiration of the thirty day notice period. In this case, the notice language provides for a longer time frame than that in *Mountain States*. See Order R-8031 at ¶ 3 and Order R-8091 at ¶ 3 (both providing: "after the effective date of this Order and within 90 days prior to commencing said well . . . "). In this case, Hartman commenced one of the wells prior to the notice period commencing and the other, 86 days prior to the expiration of the notice period. Thus, under the ruling in *Mountain States*, the relief afforded by the Division to Olsen is perfectly justified.

III. THE COMMISSION SHOULD DECLINE HARTMAN EQUITABLE RELIEF FROM THE FORCE POOLING ORDERS SINCE HE HAS UNCLEAN HANDS.

In seeking dismissal, Hartman is really relying on the Commission to grant him equitable relief from the provisions of the Force Pooling Orders. Hartman's Memorandum

at 6-9. It is a fundamental provision of equity that equity is not granted to the person with unclean hands, that is to say, one who has engaged in improper conduct. It is completely undisputed that, in one instance Hartman did not even wait for the Division to enter an order granting force pooling before commencing drilling the well and, in the other, commenced drilling four days after the Order despite the 90 day notice provisions in both Orders. Additionally, it is also undisputed that Hartman provided Olsen with no notice of the penalty provisions of the Force Pooling Orders after they had been entered. Hartman's actions do not reflect that he did not attempt to comply with the spirit of the Force Pooling Orders. He completely ignored his substantive obligations thereunder to provide notice to Olsen after they had been entered. Nothing in the Force Pooling Orders suggest that estimated costs provided prior to the entry of the Orders was sufficient. Hartman would have no reasonable basis for believing that such notice was sufficient. Additionally, such notice clearly did not contain notice of the penalty provisions Olsen would have to bear if he declined to participate. Indeed, when the one estimate was provided to Olsen, as is discussed above, if Hartman had gone ahead and drilled the wells, there would have been no penalty provisions for Olsen under common law of co-tenancy.

IV. HARTMAN'S ARGUMENTS REGARDING THE PRICE OF GAS RECEIVED ARE OF NO MOMENT.

In an argument made at the hearing before the Commission and alluded to briefly in his Memorandum, Hartman contended that Olsen would not have been entitled to the price which Hartman received from El Paso so that payout should not be calculated on the price Hartman actually received but on the price Olsen would have received. This argument is pure speculation. Olsen has never had opportunity to negotiate with El Paso regarding

his interests in these wells since, at no time since the entry of the Force Pooling Orders, has Hartman afforded him the opportunity to participate. Indeed, Olsen can postulate scenarios in which he might have received higher prices than Hartman received. Any postulations by Hartman or Olsen as to what price Olsen would have or could have received, are mere fantasy. All the Commission has to go on is reality, that is the price which Hartman actually received for production. All calculations relevant to Olsen's Applications should be made on the prices actually received rather than fictions concocted by the parties.

CONCLUSION

As is reflected in the Division's Orders resulting from Olsen's Applications, Olsen is merely seeking the one opportunity which he has been denied by Hartman since the Force Pooling Orders were entered: the opportunity to elect to participate in the wells knowing the consequences (i.e. the 200% risk penalty) of failure to participate. While, as to one of the two wells, Olsen did receive estimated well costs substantially prior to Hartman initiating force pooling proceedings, those estimates are clearly deficient as attempts to discharge Hartman's obligation under Order R-8031 since Olsen's refusal to elect to participate at that time simply meant if Hartman proceeded to drill the well, he would only be able to recoup his actual costs and no penalty from production. There is a substantial and material difference between those two scenarios.

Additionally, as to Order R-8091, there is no evidence in the record that Olsen received estimated well costs or opportunity to participate at any time before or after the entry of that Order. Olsen does not dispute the policies behind force pooling. However, force pooling clearly contemplates that prior to assessing a risk penalty against an owner of

a concurrent interest in and to the relevant mineral estate, that owner must be afforded the opportunity to participate in the contemplated well knowing the risk penalty he would bear if he declines to participate. Olsen readily acknowledges that affording him the opportunity to participate in the wells at the present time, if he elects to do so, would have a net effect of forcing Hartman to bear the risk of drilling the well without compensation for risk or distributing the risk to Olsen. However, this is a problem of Hartman's own creation since he failed to comply with the Force Pooling Orders. Additionally, Hartman often notes in his Memorandum that it has been over five years since the Force Pooling Orders were entered. However, it has been over three years since Olsen's Applications were filed with the Division. Since the Force Pooling Orders were entered, except for the brief period of time in which the Division's Orders reopening the Force Pooling Orders were in effect (they have now been stayed), Olsen has never had any opportunity to elect to participate in the Wells knowing the risk penalty.

As a final matter, Hartman has consistently maintained that Olsen has never indicated a willingness to participate. In dong so, Hartman manages to ignore Olsen's initiation of these proceedings. More importantly, Hartman's contention turns the Force Pooling Orders on their head. Hartman is required to afford Olsen the opportunity to participate, at which time Olsen has the right to elect whether to participate. Throughout these proceedings Hartman has contended that Olsen was validly force pooled, but would require Olsen to engage in the futile act of electing to participate when Hartman refused to recognize a right to do so. After the Division's Orders were entered, Olsen did indicate

a willingness to participate. See Letter to Robert Stovall from T. Calder Ezzell, Jr., dated February 6, 1991 attached as Exhibit "A".

For the reasons set forth above, Olsen urges that the Commission reopen the Force Pooling Order, granting Olsen the thirty days to elect to participate in the wells at issue.

Respectfully submitted,

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: _____

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I hereby certify that on the 8 *day of March, 1991, a true and correct copy of the foregoing Memorandum was hand-delivered to the following:*

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February 6, 1991

Oil Conservation Division
State Land Office Building
P. O. Box 2088
Santa Fe, New Mexico 87504

ATTENTION: Mr. Robert Stovall
General Counsel

Re: Case No. 8688 (Reopened)
Case No. 8769 (Reopened)

Dear Mr. Stovall:

Please find enclosed the request of Howard R. Olsen for stays of Order Nos. R-8031-A and R-8091-A pending the outcome of Mr. Hartman's Application for Hearing De Novo in each case.

Mr. Howard R. Olsen has elected to participate in the Carlson Federal No. 4 and Carlson Federal No. 5 wells, pursuant to the terms of the above referenced Orders, and by copy of this letter to Mr. Gene Gallegos, Doyle Hartman's attorney, we are confirming that election to participate. However, in light of Mr. Hartman's Applications for Rehearing before the full Commission, currently set for hearing on February 28, 1991, we are requesting stays of the Orders so that the 30 day time period within which we must evidence our election to participate by the payment to Mr. Hartman of our pro rata well costs, plus interest, will not expire. While we feel that the full Commission will not reverse the Hearing Examiner's Decision, Mr. Olsen would suffer extremely negative consequences if forced to pay Mr. Hartman in

excess of $300,000 before the matter is even heard by the full Commission.

Yours very truly,

HINKLE, COX, EATON, COFFIELD & HENSLEY

T. Calder Ezzell, Jr.

TCE/tw
Enclosures

cc: Mr. J. E. Gallegos
Mr. Howard Olsen

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

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING;

Case No. 8668 (Reopened)
ORDER NO. R-8031-A

APPLICATION OF DOYLE HARTMAN FOR
COMPULSORY POOLING, LEA COUNTY,
BEING REOPENED UPON THE APPLICATION
OF HOWARD OLSEN TO RECONSIDER THE
PROVISIONS OF DIVISION ORDER NO. R-8031

RECEIVED
FEB 25 1991
OIL CONSERVATION DIV.
SANTA FE

PRE-HEARING STATEMENT

This prehearing statement is submitted by Howard Olsen as required by the Oil Conservation Division.

APPEARANCES

APPLICANT

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(602) 951-9774

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OTHER PARTY

Doyle Hartman, Oil Operator
500 North Main
Midland, Texas 79701

ATTORNEY

J. E. Gallegos
Gallegos Law Firm
141 East Palace Avenue
Santa Fe, N.M. 87501

STATEMENT OF CASE

APPLICANT

Howard Olsen filed an Application to reopen Case No. 8668 (along with Case No. 8769) seeking enforcement of Order R-8031 and R-8091. The leasehold interest of Howard Olsen in the SE¼SE¼

Section 23, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico, had been forced pooled by Doyle Hartman, Oil Operator and, contrary to the Order of the Division, Olsen was not submitted a schedule of estimated well costs and given an opportunity to participate in the drilling of the well.

The Division entered Order R-8031-A giving Olsen the opportunity to participate in the drilling of the Carlson Federal No. 4 well by the payment of his pro rata share of well costs, plus interest. Doyle Hartman, Oil Operator filed an application for a de novo hearing before the full Oil Conservation Commission.

PROPOSED EVIDENCE

Howard Olsen will rely upon the stipulated Chronological Statement of Key Facts and the Exhibits presented to the Hearing Examiner at the September 6, 1989 Examiner's Hearing. There is no new evidence relative to this matter, and therefore Mr. Olsen will not need to call witnesses to testify or submit additional exhibits.

PROCEDURAL MATTERS

Howard Olsen requests that the record from the September 6, 1989 Examiner's Hearing in Reopened Case No. 8668 be incorporated into the record of the Hearing De Novo.

HINKLE, COX, EATON, COFFIELD & HENSLEY

By _____

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ATTORNEYS FOR HOWARD OLSEN

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Pre-Hearing Statement was hand delivered to J. E. Gallegos, attorney for Doyle Hartman, this 25th day of February, 1991.