HINKLE, COX, EATON, COFFIELD & HENSLEY

ATTORNEYS AT LAW
218 MONTEZUMA
POST OFFICE BOX 2068
SANTA FE, NEW MEXICO 87504-2068
(505) 982-4554

2800 CLAYDESTA NATIONAL BANK BUILDING
POST OFFICE BOX 3580
MIDLAND, TEXAS 79702
(915) 683-4691

1700 TEXAS AMERICAN BANK BUILDING
POST OFFICE BOX 9238
AMARILLO, TEXAS 79105
(806) 372-5569

700 UNITED BANK PLAZA
POST OFFICE BOX 10
ROSWELL, NEW MEXICO 88201
(505) 622-6510

LEWIS C. COX
PAUL W. EATON
CONRAD E. COFFIELD
HAROLD L. HENSLEY, JR.
STUART D. SHANOR
C. D. MARTIN
PAUL J. KELLY, JR.
OWEN M. LOPEZ
DOUGLAS L. LUNSFORD
T. CALDER EZZELL, JR.
WILLIAM B. BURFORD*
RICHARD E. OLSON
RICHARD A. SIMMS
RICHARD R. WILFONG*
STEVEN D. ARNOLD
JAMES J. WECHSLER
NANCY S. CUSACK
JEFFREY L. FORNACIARI
JEFFREY D. HEWETT*
JAMES BRUCE
JERRY F. SHACKELFORD*
JEFFREY W. HELLBERG*
ALBERT L. PITTS
THOMAS M. HNASKO
JOHN C. CHAMBERS*
FRED W. SCHWENDIMANN
THOMAS D. HAINES, JR.
FRANKLIN H. McCALLUM*
ALLEN G. HARVEY
GREGORY J. NIBERT
DAVID T. MARKETTE*
JAMES R. McADAMS*
JAMES M. HUDSON
MACDONNELL GORDON
REBECCA NICHOLS JOHNSON
PAUL R. NEWTON
WILLIAM P. JOHNSON
KAREN M. RICHARDSON*
ELLEN S. CASEY
JAMES C. BROCKMANN
SUSAN L. NIESER*
MARK A. WILSON*

OF COUNSEL
O. M. CALHOUN
MACK EASLEY
JOE W. WOOD
STEPHEN L. ELLIOTT

CLARENCE E. HINKLE (1901-1985)
W. E. BONDURANT, JR. (1913-1973)
ROY C. SNODGRASS, JR. (1915-1987)

*NOT LICENSED IN NEW MEXICO

February 22, 1988

RECEIVED
FEB
OIL CONSERVATION DIVISION

David Catanach
New Mexico Oil Conservation Division
State Land Office Building
Santa Fe, New Mexico

HAND DELIVERED

Re: Case No. 9129

Dear Mr. Catanach:

Enclosed is the brief of Applicants regarding the constitutional issues in this case, which you requested at the hearing in January 1988.

Very truly yours,

HINKLE, COX, EATON,
COFFIELD & HENSLEY

James Bruce

James Bruce

JGB:jr
Enclosure

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

APPLICATION OF VIRGINIA P. UHDEN, HELEN ORBESEN, and CARROLL O. HOLMBERG TO VACATE ORDER NOS. R-7588 and R-7588-A, AND TO ESTABLISH SIX NON-STANDARD SPACING AND PRORATION UNITS, SAN JUAN COUNTY, NEW MEXICO

No. 9129

BRIEF OF APPLICANTS

I. INTRODUCTION.

Applicants filed their application seeking: (1) to vacate, as to Applicants, Division Order Nos. R-7588 and R-7588-A, on the basis that notice to Applicants of the hearings in those cases was constitutionally deficient; and (2) to establish six non-standard spacing and proration units, based on technical considerations. The examiner has asked the parties to brief the constitutional issue; only that matter is addressed in this brief.

II. FACTS.

Applicants own oil and gas mineral rights in Section 28 and the W½ of Section 33, Township 32 North, Range 10 West, N.M.P.M., San Juan County, New Mexico. In late 1983, Amoco Production Company filed an application (Case No. 8014) to create the Cedar Hill-Fruitland Basal Coal Pool ("the Pool") and for special pool rules including 320 acre spacing. Applicants' acreage was included in the area covered by the application. At the time of Amoco's application, spacing for Fruitland formation wells was 160 acres.

The hearing on Amoco's application was in January 1984, and the Division subsequently issued Order No. R-7588 (effective February 1, 1984) granting the relief sought by Amoco. In accordance with the Division's practice, the rules were temporary, and the case was heard again in February 1986. The Division subsequently issued Order No. R-7588-A, making permanent the Pool's rules. Amoco used the orders to pool interests in the Pool into 320 acre units.

It is undisputed that: (1) only publication notice was given of Case No. 8014 and Case No. 8014 (reopened); and (2) Amoco knew the addresses of Applicants. After Order No. R-7588 was issued, Amoco continued to pay royalties to Applicants based on 160 acre spacing. Amoco did not notify Applicants of the increase in spacing until approximately August 1986, when it made demand upon Applicants for "overpayment" of royalties. In the case of Virginia P. Uhden, the "overpayment" was approximately $130,000.00.

Applicants subsequently filed their application in Case No. 9129 seeking relief from Amoco's actions.

III. SUMMARY OF ARGUMENT.

Applicants' mineral rights are property rights which are protected by the state and federal constitutions. The proceedings in Case Nos. 8014 and 8014 (reopened) materially and adversely affected those property rights, and thus Applicants were entitled to reasonable notice of that case. Because notice by publication was unreasonable, the Division lacked jurisdiction to deprive Applicants of their property rights. Accordingly,

Applicants were denied due process of law in contravention of the New Mexico and United States Constitutions, and Order Nos. R-7588 and R-7588-A are void as to them.

IV. ARGUMENT.

A. The Applicants' Mineral Rights are Constitutionally Protected.

The federal and state constitutions provide that a state shall not deprive a persons's property rights without due process of law. U.S. Const., amend. XIV; N.M. Const., art. II, § 18. Mineral interests and royalty interests are real property in New Mexico. Terry v. Humphreys, 27 N.M. 564, 203 P. 539 (1922); Duvall v. Stone, 54 N.M. 27, 213 P.2d 212 (1949). Thus Applicants own property interests which are protected from state action by the state and federal constitutions.

B. The Increase in Spacing Unit Size Involved State Action.

The Division is empowered by the state's conservation laws to fix the spacing of wells. N.M. Stat. Ann. § 70-2-12(B)(10) (1987 Repl.). This is an exercise of the state's police power. See Armstrong v. High Crest Oil, Inc., 520 P.2d 1081 (Mont. 1974). As such, the Division's action, increasing the spacing and proration unit size in the Pool, involved state action. See Louthan v. Amoco Production Company, 652 P.2d 308 (Okla. App. 1982).

C. The Increase in Spacing and Proration Unit Size Deprived the Applicants of Their Property.

The fact that Applicants' royalties were substantially reduced as a result of the increase in spacing to 320 acres makes it clear that Applicants were deprived of their property by state

action. In fact, it has been universally held that spacing orders promulgated by oil and gas conservation bodies deprive mineral interest owners of property rights. For example, in Cravens v. Corporation Commission, 613 P.2d 442 (Okla. 1981), the commission increased well spacing from 80 to 160 acres, without notice to Cravens. Like the present case, the commission's action formed the basis of the lessee's attempt to pool 160 acre tracts and dilute Cravens' royalty interest. Relying on the principles of due process enunciated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Oklahoma Supreme Court voided the spacing order as to Cravens, since he was afforded no personal notice of the commission hearing. As a result of the voided order, the lessee's attempted pooling of 160 acre tracts, and the reduction of Cravens' interest in the well, was likewise ineffective.

Similarly, in Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. App. 1982), the court, at Amoco's request, voided a commission order purporting to increase well spacing from 160 to 640 acres. The court based its decision on the failure of the applicant to give Amoco notice of the proceedings. The court held that the order was "void as to Amoco." For other cases on point, see Union Texas Petroleum v. Corporation Commission, 651 P.21d 652 (Okla. 1982), cert. denied 103 S.Ct. 82 (1982); Olansen v. Texaco, Inc., 587 P.2d 976 (Okla. 1978) (reasonable notice must be given to royalty owners); Application of Koch Exploration Company, 387 N.W.2d 530 (S.D. 1986); Boyce v. Corporation Commission, 744 P.2d 985 (Okla. App. 1987).

D. Due Process Required Reasonable Notice of Case No. 8014 to be Given to the Applicants. Since Proper Notice Was Not Given, Order Nos. R-7588 and R-7588-A Are Void as to Applicatnts.

The Division, in deciding spacing cases or other matters within its jurisdiction, acts in a judicial or quasi-judicial fashion. Moore Oil v. Snakard, 150 F.Supp. 250, 260 (W.D. Okla. 1957); 1951-52 Op. Att'y Gen. 75. The basic requirements of due process in such proceedings are notice and an opportunity to be heard. Robertson v. The Mine and Smelter Supply Company, 15 N.M. 606 (1910). Where due process requirements are not met, the judgment or order is void as against the persons not receiving notice of the proceedings. Id.; Macaron v. Associates Capital Services Corp., 105 N.M. 380, 733 P.2d 11 (N.M. App. 1987); Ford v. Willits, 688 P.2d 1230 (Kan. 1984).

Commission Case Nos. 8014 and 8014 (reopened) were preceded only by notice in the form of publication. Notice by publication is insufficient as a matter of law to deprive a person of property rights. The leading case on this issue is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In that case, a New York statute permitted trust companies to pool small trusts into a common fund for administrative purposes. The statute provided for notice by publication to interested beneficiaries of trust accounts. In rejecting the sufficiency of notice by publication, the Supreme Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

> and afford them an opportunity to present their objections....
>
> * * *
>
> It would be idle to pretend that publication alone...is a reliable means of acquainting interested parties of the fact that their rights are before the courts....

339 U.S. at 314-15. The Court then held that notice by publication is not sufficient to deprive a person of property rights when that person's whereabouts are known or easily ascertained. Id. at 315. See also Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) (reaffirming and expanding upon the Mullane requirements of due process).

The Mullane principles have been adopted in New Mexico. Eastham v. Public Employees Retirement Ass'n Bd., 89 N.M. 403, 553 P.2d 679 (1976). Furthermore, even before Eastham, the New Mexico courts recognized that administrative proceedings (such as Division hearings) must conform to the requirements of due process. Matter of Protest of Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975). The requirements of due process in the administrative setting require, at the minimum, a diligent effort to personally inform the person whose property may be taken. Id.

As noted above in Part IV(C), the cases involving proceedings before state oil and gas conservation commissions have uniformly held that publication notice is sufficient to deprive a person of a property right. In Cravens v. Corporation Commission, 613 P.2d 442 (Okla. 1981), the applicants obtained an order from the Commission which increased spacing from 80 acres to 160 acres in a certain pool. Notice of the application was by

publication only. Cravens was unaware of the application until after the order was issued. The Oklahoma Supreme Court reversed the Commission's decision and vacated the order as to Cravens. The Court held that publication notice was insufficient, and stated:

> Regardless of statutory provisions for publication alone, applicants were required to use due diligence in notifying [Cravens] of their application under the principles of ... Mullane.

613 P.2d at 444 (emphasis added.)

Similarly, in Louthan v. Amoco Production Company, 652 P.2d 308 (Okla. App. 1982), certain mineral owners applied to the Oklahoma Corporation Commission to increase well spacing from 160 acres to 640 acres. Again, the only type of notice required by statute, and the only type given, was by publication. After entry of the increased spacing order, Amoco filed suit to vacate the order. The trial court upheld the validity of the spacing order. The appellate court reversed, holding that the order was void as to Amoco.

> Was Amoco denied due process of law? We hold it was.
>
> Statutorily authorized deprivation of property solely on the basis of publication service is constitutionally deficient in situations where, with use of due diligence, actual notice is possible. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Cravens v. Corporation Commission, Okla. 613 P.2d 442 (1980).
>
> In the situation here it was even more important that all mineral interest owners in section 20 be constitutionally notified since a producing well existed

> on it -- a well that Cherokee knew or should have known about. It could easily have discovered the names and addresses of some if not all owners of both the working as well as the royalty interests of Lawton "A", as well as other areas of section 20.
>
> The 1970 spacing and drilling order of the corporation commission is, therefore, void as to Amoco.

Id. at 310 (emphasis added).

In a similar case, the District Court of Rio Arriba County held that publication notice was insufficient, resulting in the subject order (Order No. R-7407, involving the Gavilan-Mancos Oil Pool) being void as to the plaintiffs. Edwards v. McHugh, et al., Cause No. RA 85-373(C). At the Division's request, copies of the relevant pleadings will be provided. It should also be noted that the above cases were all decided regardless of the technical (as opposed to constitutional) merits of the respacing decisions.

In the present case, Amoco knew the Applicants' whereabouts, since Amoco had been paying royalties to them, and it certainly knew where to send those payments. Nonetheless, Amoco failed to give constitutionally sufficient notice of a hearing which significantly and adversely affected the Applicants' property rights. [1/] We have no idea why Amoco decided to act in that fashion. However, the conclusion remains that the Division lacked jurisdiction to deprive Applicants of their property

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1 Amoco seems to think that it must be given personal notice in spacing cases, but no one else is entitled to such notice.

rights, and Order Nos. R-7588 and R-7588-A are void as against them.

Claims that Amoco merely followed current Division statutes and rules in giving only publication notice are without merit. The pertinent statute (N.M. Stat. Ann. § 70-2-7 (1978)) permitted notice by publication or by personal service. Amoco chose to forego personal service and rely solely on publication notice. Reliance on statutory provisions for publication notice will not validate notice which is otherwise unconstitutional. Mullane, supra; Olansen v. Texaco Inc., supra; Cravens v. Corporation Commission, supra. Thus some type of actual notice is required, regardless of the terms of the statute or the Divisions rules. 2/

E. 320 Acre Spacing is Void Only As to Applicants.

Applicants seek to void the 320 acre spacing provisions of Order Nos. R-7588 and R-7588-A only as to themselves. They do not seek to affect other persons' rights. The case law provides that it is proper to void spacing orders only as to those persons who had no notice of the re-spacing proceedings. See, e.g., Louthan v. Amoco Production Company, supra; Boyce v. Corporation Commission, supra; Application of Koch Exploration Co., supra. Of course, any party who had notice and did not protest is bound by the spacing provisions of the subject orders.

The practical effect is that Amoco may have to forego collecting what it considers to be "overpaid" royalties. But that is only fair, since Amoco is the party responsible for the

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2 Most courts approve of notice by mailing.

deprivation of Applicants' constitutional rights. No other party will be affected.

F. Effective Date of Spacing.

Applicants presented a case for non-standard 160 acre spacing and proration units covering the units in which their interests are located. However, if the Division decides that 320 acre spacing is proper, the problem arises as to what date 320 acre spacing should be effective as to Applicants. Applicants suggest two dates: either the date Amoco notified Applicants of 320 acre spacing (August 1986), or the date Applicants filed their application (April 1987). See Boyce v. Corporation Commission, supra. Either date would be fair.

V. CONCLUSION.

For the foregoing reasons, Applicants request the Division to enter its order voiding, as to Applicants, the 320 acre spacing provisions of Order Nos. R-7588 and R-7588-A. If the Division decides that 320 acre spacing is proper, the effective date of spacing as against Applicants should be August 1986 or April 1987.

Respectfully submitted,

HINKLE, COX, EATON,
COFFIELD & HENSLEY

By James Bruce

James Bruce
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were mailed this 22nd day of February, 1988, to:

Kent J. Lund
Amoco Production Company
Post Office Box 800
Denver, Colorado 80201

William F. Carr, Esq.
Campbell & Black, P.A.
Post Office Box 2208
Santa Fe, New Mexico 87504-2208

W. Thomas Kellahin, Esq.
Kellahin, Kellahin & Aubrey
Post Office Box 2265
Santa Fe, New Mexico 87504-2265

James Bruce

James Bruce