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OIL CONSERVATION DIVISION

July 25, 1988

"Hand Delivered"

Mr. William J. LeMay
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

Mr. Erling A. Brostuen
Energy and Minerals Department
525 Camino de los Marquez
Santa Fe, New Mexico 87501

Mr. William R. Humphries
State Land Commissioner
Land Office Building
Santa Fe, New Mexico 87501

Re: Application of Virginia P. Uhden et al. to Vacate Order R-7588 and R-7588-A for portions of the Cedar Hills-Fruitland Basal Coal Pool, San Juan County, New Mexico

Gentlemen:

On July 14, 1988 the Commission took the referenced case under advisement and requested counsel to submit their written memorandums to the Commission.

On behalf of Meridian Oil Inc., I have enclosed a copy of our Brief filed on February 22, 1988 with Examiner David

Catanach of the Division. Also enclosed is our Memorandum dated July 25, 1988 which supplements our original Brief.

Very truly yours,

W. Thomas Kellahin

WTK/ans

Enclosures

cc: James G. Bruce, Esq.
William F. Carr, Esq.
Kent J. Lund, Esq.
Robert Stovall, Esq.
Randy Mundt, Esq.
Mr. Allen Alexander

BEFORE THE

OIL CONSERVATION COMMISSION

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

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

CASE NO. 9129

MEMORANDUM

In response to the Commission's request, Meridian Oil Inc. hereby submits the following memorandum to supplement its February 22, 1988 brief:

Applicants Uhden, Orbesen and Holmberg (hereinafter "Applicants") seek to have the Commission vacate its Division Order Nos. R-7588 and R-7588-A, which created special temporary and permanent rules, respectively, for the Cedar Hill-Fruitland Basal Coal Pool (hereinafter, the "Pool"), including 320-acre spacing. Applicants' grounds for vacating these Orders are that the New Mexico Oil Conservation Commission deprived them of certain property rights without due process of law. This deprivation allegedly occurred as a result of the Commission's Orders setting 320-acre spacing for the Pool. Applicants maintain that they did not receive notice of the hearing from which these

Orders resulted; that notice was by publication only and that personal notice was required.

The cases cited by Applicants to the Commission in support of their contention that their constitutional rights have been violated because no personal notice was given all have one thing in common: none of them are cases involving notice to royalty owners, except Olansen v. Texaco, Inc., 587 P.2d 976 (Okla. 1978). Olansen was decided under the Oklahoma "Unitized Management of Common Sources of Supply Act," 52 O.S. 1971, Sections 287.1, et seq., which requires notice to royalty owners. The comparative New Mexico statute is the Statutory Unitization Action (Section 70-7-1 NMSA-1978).

It is essential to remember that in New Mexico the spacing of a pool does not involve the royalty or overriding royalty owners' property rights. Such action does not serve to pool, unitize or consolidate their interests in the individual spacing units for that pool. Had this been a compulsory pooling case or a statutory unitization case, then in those types of proceedings, the property rights of the royalty owners are at risk and they are entitled to notification and participation.

The Applicants extensively rely upon certain Oklahoma cases which have no relevance to the subject case before the New Mexico Oil Conservation Commission. The Oklahoma cases which determined that royalty owners must be personally notified of spacing proceedings in Oklahoma exist only because the Oklahoma spacing order statute explicitly pools royalty interests and thereby directly affects those property interests.

In Oklahoma, a spacing order by its very terms also pools the royalty interest within the spacing unit in addition to establishing the size of the unit. Unlike Oklahoma, New Mexico's compulsory pooling orders and the establishment of spacing units as part of the pool rule hearing are separate procedures. An order of the New Mexico Oil Conservation Division establishing pool rules, including proration and spacing units, does not pool interests or affect the distribution of income from a well. Thus, the Oklahoma cases upon which Applicants place so much reliance have no application to the spacing order decision before this Commission.

Interestingly, the two New Mexico cases cited by Applicants for the proposition that they, as royalty owners, were entitled to personal notice are a tax assessment case

and a class action suit. The New Mexico Court of Appeals in Matter of Protest of Miller, 88 N.M. 492, 500, 542 P.2d 1182 (Ct. App. 1975), held that "notice as to the amount of taxation is an essential due process requirement in the collection of property taxes." The Court made no other holding regarding the issue of notice.

In Eastham v. Public Employees Retirement Ass'n Bd., 89 N.M. 403, 553 P.2d 679 (1976), the New Mexico Supreme Court held that failure to notify class members, as required by Rule 1-023(c)(2), N.M.R. Civ. P., which deals exclusively with class actions, mandated dismissal of the Complaint.

Applicants request that the Commission Orders be voided only as to Applicants or, in the alternative, that the effective dates of the Orders be either the date Amoco notified Applicants of 320-acre spacing or the date Applicants filed their application in this case.

Meridian's position on the issue of notice, is that no notice to applicants, either by publication or personal service, was required because (1) the cases involved were spacing cases, dealing with rulemaking in a particular pool and involved the parties holding the operating rights in the Pool. Commission rules have never required notice to royalty owners in such cases; (2) Applicants assigned their

operating rights to Amoco, retaining only a royalty interest; (3) Applicants' lease with Amoco expressly allowed for the creation of spacing units, up to 640 acres in size, without prior notice and/or prior approval of Applicants and Amoco's conduct in obtaining 320-acre spacing was proper (Banks v. Mecom, 410 S.W.2d 300 (Tex. Civ. App. 1966)), (Expando Production Company v. Marshall, 407 S.W.2d 254 (Tex. Civ. App. 1966)); and (4) if any defect resulted from Applicants not participating in earlier hearings, it has been cured by Applicants' appearance before and presentation of their position to the Commission in the instant case.

In the interest of time, Meridian will not reiterate its earlier arguments regarding Applicants' entitlement to notice, but rather refers the Commission to Meridian's February 22, 1988 brief, Paragraph I, pages 3-6 and to Amoco's February 16, 1988 brief, Paragraph V, pages 7-8.

On June 3, 1987 and January 20, 1988, examiner hearings were held in this case, at which Applicants appeared and presented their evidence in support of the subject application. The evidence presented at these hearings did not support 160-acre spacing. The record clearly supports 320-acre spacing.

Meridian's position on the issue of violation of Applicants' constitutional rights is (1) that if Applicants were deprived of any property, it was the result of the contractual agreement entered into between Applicants and Amoco, to which Applicants freely consented and unless the terms thereof undermine the public interest, the Commission has no jurisdiction over such agreement (Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 835-836 (10th Cir. 1986)); (2) the Fourteenth Amendment applies only to state action against a private individual (Mountain States Natural Gas v. Petroleum Corp., 693 F.2d 1015, 1020 (10th Cir. 1982)); (3) no state action vis-a-vis Applicants' property is involved in this case (Id., at 1020); and (4) the proper forum for any challenge to Amoco's fulfillment of its contractual obligations to Applicants is district court. (Tenneco Oil Co. v. El Paso Natural Gas, 687 P.2d 1049 (Okla. 1984)).

The action taken by Amoco, that of obtaining 320-acre spacing in the Pool, was clearly authorized by the lease between Applicants and Amoco. The action taken by the Commission was one of approving the most effective method of developing the Pool to conserve resources; not one of adjudicating property rights. The State did not deprive

Applicants of any property rights. The New Mexico statutes charge the Commission with the protection of the public interest and its rulemaking in the Pool is clearly consistent with this statutory mandate. Settlement of contractual disputes is clearly outside the jurisdiction of this Commission and Applicants may not convert an administrative forum into a judicial one.

As to the effective dates of the Orders, the effective dates should be the dates on which the Commission determined that 320-acre spacing was necessary, in the public interest, to prevent waste. Such dates are those on the original orders.

If the Commission decides in this case that royalty owners now must be given personal notice in cases involving pool rules, then such ruling should be applied prospectively only. Com'rs of the Land Office v. Corp. Com'n, 747 P.2d 306 (Okla. 1987), at 308.

CONCLUSION

For the reasons stated herein, and in Meridian's brief, filed with the Commission on February 22, 1988, Applicants' application should be denied and the 320-acre spacing of the

Pool retained, as established by Commission Order Nos. R-7588 and R-7588-A.

Respectfully submitted:

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