

KELLAHIN AND KELLAHIN

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

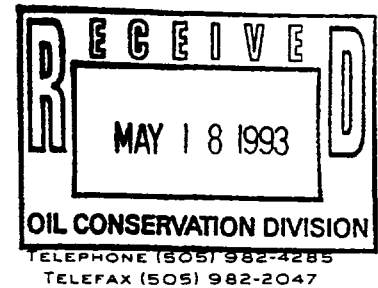
POST OFFICE BOX 2265

SANTA FE, NEW MEXICO 87504-2265

W. THOMAS KELLAHIN*

*NEW MEXICO BOARD OF LEGAL SPECIALIZATION
RECOGNIZED SPECIALIST IN THE AREA OF
NATURAL RESOURCES-OIL AND GAS LAW

JASON KELLAHIN (RETIRED 1991)



May 18, 1993

Mr. William J. LeMay
Oil Conservation Commission
310 Old Santa Fe Trail, Room 219
Santa Fe, New Mexico 87501

HAND DELIVERED

Mr. Gary Carlson
State Land Commissioner's Office
State Land Office Building, 1st Floor
310 Old Santa Fe Trail
Santa Fe, New Mexico 87501

HAND DELIVERED

Mr. William Weiss
New Mexico Petroleum Recovery
Research Center, Kelly Building
New Mexico Tech Campus
Socorro, New Mexico 87801

VIA TWO-DAY US MAIL

RE: APPLICATION FOR RE-HEARING
NMOCD Case No. 10507 DeNovo
Application of C & C Landfarm, Inc.
for a Commercial Surface Waste Disposal
Facility, Lea County, New Mexico

Gentlemen:

On behalf of Elsie Reeves and W. T. Stradley of S-W Cattle Company, we request that the enclosed Application for Rehearing be set for discussion at the next scheduled Commission hearing now set for May 27, 1993. Action taken on that date will comply with the ten-day action period set forth in Section 70-2-25 NMSA (1978).

Very truly yours

W. Thomas Kellahin

WTK/mg

Enclosure

cc: With Enclosure

Robert G. Stovall, Esq. (By Hand)

William F. Carr, Esq.

Elsie Reeves

W. T. Stradley

Gene Samberson, Esq.

LTR:514.647

ATTACHMENT
(May 20, 1992)

C & C LANDFARM INC. APPLICATION
OCD CONDITIONS OF APPROVAL

1. All soils received at the facility will be spread and disked within 72 hours of receipt.
2. Solids will be spread on the surface in six inch lifts or less.
3. Solids will be disked a minimum of one time every two weeks (biweekly) to enhance biodegradation of contaminants.
4. No solids will be spread on previously spread solids until a laboratory measurement of Total Petroleum Hydrocarbons (TPH) in the previous lift is less than 100 ppm and the sum of all aromatic hydrocarbons (BTEX) is less than 50 ppm, and benzene is less than 10 ppm. Comprehensive records of the laboratory analyses and the sampling locations will be maintained at the facility. Authorization from the OCD will be obtained prior to application of successive lifts.
5. Only solids that are non-hazardous by RCRA Subtitle C or by characteristic testing will be accepted at the facility. Solids from operations not currently exempt under RCRA Subtitle C or mixed exempt/non-exempt solids will be tested for appropriate hazardous constituents. Test results must be submitted to the OCD along with a request to receive the non-exempt solids, and a written OCD approval (case specific) must be obtained prior to disposal. Any non-oilfield wastes which are RCRA Subtitle C exempt will be accepted on a case-by-case basis and with OCD approval.
6. Comprehensive records of all material disposed of at the facility will be maintained at the facility. The records for each load will include: 1) the origin, 2) analysis for hazardous constituents if required, 3) transporter.
7. OCD approval must be obtained prior to the addition of any substances to enhance biodegradation of the soils landfarmed (ie. chemical additives, manure, nutrients, bugs, ect.).
8. No free liquids or soils with free liquids will be accepted at the facility.
9. If any monitor wells are constructed in the future the drilling and completion plans will be submitted for OCD approval prior to conducting operations.
10. A redbed dike will be installed on the south, west, and north edges of the property as proposed in the C & C correspondence dated March 2, 1992.

TYPE: CIVIL STATUS: PENDING
REEVES, ELSIE M. VS. OIL CONSERVATION

-----JUDGE-----
CURRENT: GALLINI, RALPH W.
RECU 1/20/94: FRANCOEUR, PATRICK J.
EXCU 2/01/94: JOHNSON, LARRY

--PARTY #--

000
000

-----ATTORNEYS-----

PL 001: REEVES, ELSIE M.

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

PL 002: STRADLEY, TRENT

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

PL 003: S-W CATTLE COMPANY

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

VS.

DF 004: OIL CONSERVATION COMMISSION, STATE CARROLL, RAND L.
SPENCER, SCOTT D.

INAC

DF 005: C & C LANDFARM INC LOVE, ROBERT L.
CARR, WILLIAM F.

ISSUES

ISSUE 1: CV OTHER-CIVIL

CV C1-04-10

MAJOR EVENTS

6/1/93 PETITION	CHERRI	000
6/24/93 RESPONSE	CONNIE	000
6/24/93 RESPONSE	CHERRI	004
1/10/94 JUDGE RECUSED	CONNIE	000
1/20/94 JUDGE ASSIGNMENT	CONNIE	000
1/28/94 JUDGE EXCUSE/DISQUAL	CONNIE	000
2/01/94 JUDGE ASSIGNMENT	CONNIE	000
3/07/94 RESPONSE	CONNIE	000
3/17/94 RESPONSE	CONNIE	000

FILING PROCEEDINGS
DATE EVENT COMMENT EVENT DATE ENTRY PERSON/PARTY

6/01/93 PETITION	CHERRI	000
EVENT JUDGE: FRANCOEUR, PATRICK J. for Review of Decision of the Oil Conservation Com- mission og New Mexico - Kellahin & Samberson		
6/01/93 SUMMONS ISSUED (3) issued	CHERRI	000

FIFTH JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF LEA

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN MY OFFICE

94 JUL 29 AM 9:09

DOCKETING ORDER

JANE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

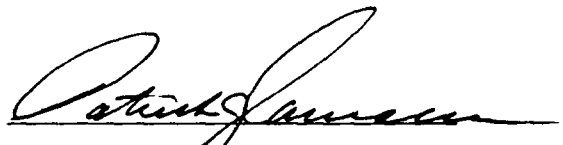
The Civil Docket for September, October, November, December 1994, will be called in Lea County at the Lea County Courthouse in Lovington beginning at 9:00 A.M. on Friday, August 12, 1994. All Civil cases at issue (all answers filed) thru August 1, 1994 will be called before Judge Patrick J. Francoeur at 9:00 A.M. followed by Judge R. W. Gallini and Judge Larry Johnson. (Cases will be set for trial during the months of September through December). Entry of appearance does not constitute an answer.

CASES WHICH HAVE BEEN CALLED AT A PRIOR DOCKET CALL SHALL NOT BE PASSED WITHOUT (a) A SHOWING OF GOOD CAUSE, AND (b) A WRITTEN CONSENT TO PASS, PERSONALLY SIGNED BY EACH LITIGANT AND FILED AT LEAST 5 DAYS PRIOR TO DOCKET CALL.

All trial attorneys involved in cases on the docket shall attend the docket call or arrange to be represented there by another attorney. The trial attorney or his representative shall know the dates the trial attorney, client, or witnesses are unavailable; the status of discovery and the estimated length of trial.

This requirement applies to all resident as well as out-of county attorneys. Opposing counsel may serve as a representative.

Attorneys are requested to notify the District Court Clerk's office at least one week prior to docket call of cases settled or tried, and cases presently set for trial; stayed by bankruptcy; or cases at issue omitted from your list.


JUDGE PATRICK J. FRANCOEUR


JUDGE R. W. GALLINI


JUDGE LARRY JOHNSON

7/6/94 [TCW Janie Hernandez, Clerk]

✓ Docket call → August 12th

✓ Opposing counsel → agree

✓ Local counsel to appear

FIFTH JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF LEA

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED IN CLERK'S OFFICE

94 JUN 20 PM 1:20

DOCKETING ORDERJ. P. FRANCOEUR
CLERK OF DISTRICT COURT

The Civil Docket for March, April, May, June, 1994, will be called in Lea County at the Lea County Courthouse in Lovington beginning at 9:00 A.M. on Friday, February 4, 1994. All civil cases at issue (all answers filed) thru December 31, 1993 will be called before Judge Patrick J. Francoeur at 9:00 A.M. followed by Judge R. W. Gallini and Judge Larry Johnson. (Cases will be set for trial during the months of March, through June). Entry of appearance does not constitute an answer.

CASES WHICH HAVE BEEN CALLED AT A PRIOR DOCKET CALL SHALL NOT BE PASSED WITHOUT (a) A SHOWING OF GOOD CAUSE, AND (b) A WRITTEN CONSENT TO PASS, PERSONALLY SIGNED BY EACH LITIGANT AND FILED AT LEAST 5 DAYS PRIOR TO DOCKET CALL.

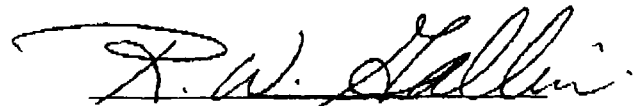
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JUDGE PATRICK J. FRANCOEUR



JUDGE R. W. GALLINI



JUDGE LARRY JOHNSON

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,
Petitioners,

vs.

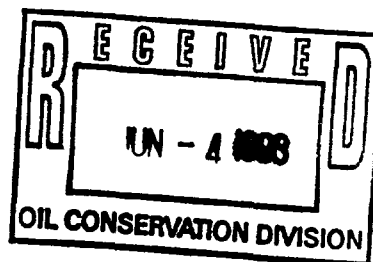
No. CIV 93-247 (Fr)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO AND
C & C LANDFARM INC.

Respondents.

SUMMONS

TO: Oil Conservation Commission
State Land Building
310 Old Santa Fe Trail
Santa Fe, New Mexico 87501



GREETINGS:

You are hereby directed to serve a pleading or motion in response to the complaint within thirty (30) days after service of this summons, and file the same, all as provided by law.

You are notified that, unless you serve and file a responsive pleading or motion, the Petitioners will apply to the court for the relief demanded in the complaint.

Attorneys for the Petitioners:

W. Thomas Kellahin
KELLAHIN AND KELLAHIN
Post Office Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285

[] (to _____, (parent) (guardian) of Defendant Plaintiff _____) (used when Defendant Plaintiff is a minor or incompetent person)

[] (to _____, (name) _____, (title of person authorized to receive service) (used when Defendant Plaintiff is corporation or association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision)

Fees:

Signature of Person Making Service

Title (if any)

*Subscribed and sworn to before me this _____ day of _____, 1993.

Judge, Notary of Other Officer
Authorized to Administer Oaths

My Commission Expires:

*If service is made by the sheriff or a deputy sheriff of a New Mexico county, the signature of the sheriff or deputy sheriff need not be notarized.

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

FIFTH JUDICIAL DISTRICT
COUNTY OF LEA

1993 APR 15

90 Bob Smith

ELSIE M. REEVES, W.
and S-W CATTLE COMPANY

Petitioners,

v.

No. CIV 93-247(Fr)

OIL CONSERVATION COMMISSION
THE STATE OF NEW MEXICO
C&C LANDFARM, INC

Respondents.

RESPONSE OF RESPONDENT
OIL CONSERVATION COMMISSION OF NEW MEXICO
TO PETITION FOR REVIEW

Respondent Oil Conservation Commission of New Mexico ("Commission") by and through its attorneys of record and in response to Petitioners' Petition for Review of Decision of the Oil Conservation Commission of New Mexico states:

1. The assertions in paragraphs 1 through 7 with respect to the parties and the jurisdiction of this Court are correct, and the NMOCC admits the same.

2. The assertions contained in paragraph 8, including the points in argument in Exhibit "1" to said Petition are incorrect and the NMOCC denies the same. The NMOCC further states that it has denied rehearing in this matter because the order entered was supported by substantial evidence after hearing properly conducted.

3. This case comes to this Court as an appellate review of a decision of the NMOCC. Section 70-2-25, N.M.S.A. 1978, provides that "The commission action

complained of shall be *prima facie* valid and the burden shall be on the party or parties seeking review to establish the invalidity of such action of the commission." This appeal is based solely upon the record made at the hearing before the NMOCC.

WHEREFORE, NMOCC prays that this Court deny the relief requested by Petitioners and affirm the order of the Commission.

NMOCC further requests that this Court establish a procedural schedule for the filing of the record made before the NMOCC, for the filing of briefs and responsive briefs and for oral argument before the Court.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Carol Leach', is written over a horizontal line.

Carol Leach
Scott Spencer
Lyn Hebert
Special Assistant Attorneys General
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950
Attorneys for the New Mexico Oil
Conservation Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was served on counsel of record by mailing the same on this ____ day of _____, 1993 to:

W. Thomas Kellahin, Esq.
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, NM 87504-2265

C. Gene Samberson, Esq.
P.O. Drawer 1599
Lovington, NM 88260

William F. Carr
P.O. Box 2208
Santa Fe, NM 87504-2208



COPY

RECEIVED
93-1-11-13
JAN 11 1993

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No CIV 93-247 (Fr)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO AND
C & C LANDFARM INC.
Respondents.

PETITION FOR REVIEW OF DECISION
OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO

COMES NOW, Elsie M. Reeves, W. Trent Stradley and S-W Cattle Company, pursuant to the provisions of Section 70-2-25, N.M.S.A. (1978), as amended, and respectfully petitions the Court for review of the actions of the Oil Conservation Commission of New Mexico in Case No 10507 (DeNovo) on the Commission's docket, and its Order R-9769-A entered therein.

PARTIES:

1. Petitioners, Elsie Reeves, W. Trent Stradley and S-W Cattle Company, (collectively the "Opponents") each of whom is a property owner in the affected area and a party of record in all of the proceedings before the Commission in this matter and each is adversely affected by the Commission Order R-9769-A entered in Case 10507 (DeNovo).

2. The Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

3. C & C Landfarm, Inc. ("Applicant") is a party of record in all of the proceedings before the Commission in this matter being the applicant before the Commission in Case 10507 and sought approval of a surface waste disposal facility located in the SW/4NE/4 of Section 2, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico which is opposed by the Opponents and which was approved by Commission Order R-9769-A.

JURISDICTION:

4. The Commission held a public Hearing in Case 10507(DeNovo) on February 25, 1993 and by a 2-1 majority entered Order R-9769-A on April 29, 1993.

5. On May 18, 1993, Petitioners filed their Application for Rehearing, a copy of which is attached as Exhibit "1" and incorporated herein, which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

6. Petitioners have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25 N.M.S.A. (1978), as amended.

7. The Fifth Judicial District, Lea County, New Mexico, has jurisdiction of this case pursuant to the provisions of Section 70-2-25 N.M.S.A. (1978), because the property affected Commission Order R-9769-A is located within Lea County, New Mexico.

RELIEF SOUGHT:

8. Petitioners complain of Commission Order R-9769-A and assert that said Order is arbitrary, capricious, unreasonable, not supported by substantial evidence and is contrary to law as set forth in its Application for Rehearing (Exhibit "1") and further state:

POINT I:

THE COMMISSION IGNORED THE
ULTIMATE ISSUE IN DISPUTE

POINT II:

ORDER R-9769-A WAS ADOPTED BY A
MAJORITY OF THE COMMISSION BASED
UPON AN INCORRECT UNDERSTANDING OF
"BURDEN OF PROOF"

POINT III:

THE COMMISSION VIOLATED EVIDENCE
RULE 703 WHEN IT REJECTED EXPERT
OPINIONS NOT BASED UPON PERSONAL
KNOWLEDGE OF THE EXPERT

POINT IV:

THE COMMISSION BASED ITS ORDER R-9769-A
UPON FINDING (11) WHICH IS CONTRARY TO
THE EVIDENCE AND CONTAINS AN IRRELEVANT
FINDING

POINT V:

THE COMMISSION ERRONEOUSLY BASED ITS
DECISION ON A "VISUAL INSPECTION OF
THE SURFACE OF THE SITE" AND IGNORED
THE ABSENCE OF A SCIENTIFIC HYDROLOGIC STUDY

POINT VI:

THERE IS NO SUBSTANTIAL EVIDENCE TO
SUPPORT FINDING (12) CONCERNING A
NEED FOR THIS WASTE FACILITY

POINT VII:

THE ADMINISTRATIVE PROCESS OF
THIS CASE AND ORDER R-9796-A
VIOLATE PROCEDURAL DUE PROCESS

POINT VIII:

THE COMMISSION FAILED TO PROPERLY AMEND
THE OCD-EB PROPOSED CONDITIONS DATED
JANUARY 6, 1993 AND THEREFORE ORDER
R-9769-A IS ARBITRARY, CAPRICIOUS AND
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

POINT IX:

THE COMMISSION VIOLATED THE FASKEN,
THE VIKING PETROLEUM AND THE
CONTINENTAL OIL CASES WHEN IT
FAILED TO ADDRESS AND DECIDE THE
OPPONENTS' ISSUES AND OBJECTIONS

COPY

FILED
1993-1-13
CIVIL DISTRICT

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No CIV 93-247 (Fr)

OIL CONSERVATION COMMISSION
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C & C LANDFARM INC.
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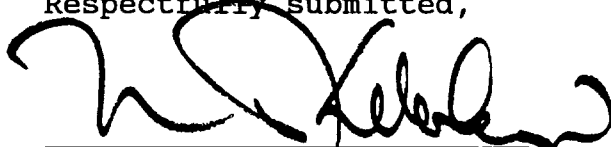
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CONTINENTAL OIL CASES WHEN IT
FAILED TO ADDRESS AND DECIDE THE
OPPONENTS' ISSUES AND OBJECTIONS


Petion for Review
Reeves, Stradley and S-W
Page 6

WHEREFORE, Petitioners pray that the Court review
New Mexico Oil Conservation Commission Case 10507 (DeNovo)
and Commission Order R-9769-A and hold said order
unlawful, invalid and void, and for such other and
further relief as may be proper in the premises.

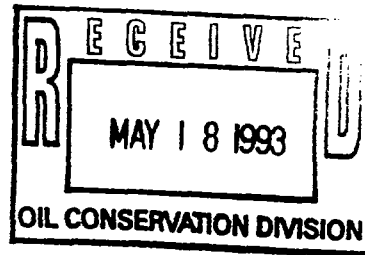
Respectfully submitted,



W. THOMAS KELLAMIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285



C. GENE SAMBERSON, Esq.
P. O. Drawer 1599
Lovington, New Mexico 88260
(505) 396-5303
ATTORNEYS FOR
ELSIE M. REEVES,
W. TRENT STRADLEY AND
S-W CATTLE COMPANY



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. 10507 (DeNovo)
ORDER NO. R-9769-A

APPLICATION OF C & C LANDFARM INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY,
NEW MEXICO

APPLICATION FOR REHEARING
BY
ELSIE REEVES AND W. TRENT STRADLEY

This Application for Re-Hearing is submitted by W. Thomas Kellahin, Esq. and C. Gene Samberson, Esq. on behalf of W. T. (Trent) Stradley and S-W Cattle Co. and by W. Thomas Kellahin on behalf of Elsie M. Reeves (hereinafter collectively the Opponents").

In accordance with the provisions of Section 70-2-25 NMSA (1978), the Opponents request the New Mexico Oil Conservation Commission grant this Application for

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. 10507 (De Novo)
Order No. R-9769-A

APPLICATION OF C & C LANDFARM, INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY,
NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on February 25, 1993, at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 29th day of April, 1993, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises.

FINDS THAT:

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

(2) Sections 70-2-12.B(21) and (22) N.M.S.A. (1978) Compilation, also known as the New Mexico Oil and Gas Act, authorizes the New Mexico Oil Conservation Commission ("Commission") to regulate the disposition of non-domestic wastes resulting from various oil and gas activities and operations and to protect public health and the environment.

(3) The applicant, C & C Landfarm, Inc. (C & C) filed an application, pursuant to General Rule 711 with the Division on October 8, 1991 seeking authorization to construct and operate a commercial landfarm facility for the remediation of non-hazardous and exempt hydrocarbon contaminated soils. C & C proposes to utilize biodegradation process on a site located in the SW/4 NE/4 (Unit G) of Section 2, Township 20 South, Range 37

EXHIBIT A TO APPLICATION
FOR HEARING

Application for Re-Hearing
Case No. 10507 (DeNovo)
Page 2

ReHearing in Case 10507 (DeNovo) to correct erroneous findings and conclusions set forth in Order R-9769-A, attached as Exhibit "A" and to substitute Opponents' proposed Commission Order attached as Exhibit "B" hereto, and IN SUPPORT THEREOF OPPONENTS STATE:

INTRODUCTION

On April 27, 1993, the New Mexico Oil Conservation Commission met at a public meeting to enter its decision in this case. During that public deliberation, Commissioner Carlson, the only attorney on the Commission, correctly applied his legal training and concluded that C & C Landfarm Inc. ("Applicant") had failed to meet its "burden of proof."

Commissioner Weiss concluded that the Opponents had failed to meet their "burden of proof" because the Opponents' hydrologist had not visited the site and had not presented any site specific scientific data proving the probable contamination of ground water.

Commission LeMay made no public comments but voted with Commissioner Weiss to approve the Applicant's request.

GROUND FOR REHEARING

**POINT I: THE COMMISSION IGNORED THE ULTIMATE
ISSUE IN DISPUTE**

This is a simple case. The ultimate factual issue is whether this surface waste facility creates a risk of contamination to the fresh water aquifer from which Trent Stradley's well has produced continuously in excess of forty-five (45) years and is the only fresh water supply for cattle in some nine sections and is referred to herein as the "Stradley Aquifer."

To answer that issue, it is essential for the Commission to have proper scientific evidence about the Stradley Aquifer including its size, shape and recharge mechanics. The Applicant's failure to submit that evidence is fatal to its case and is what Commissioner

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Carlson meant when he said the Applicant had failed to meet its "Burden of Proof."

The fact that the Applicant did not find the Stradley Aquifer with some five shallow monitor wells drilled on the proposed facility does not substitute for a proper hydrologic study to determine the risk to the Stradley Aquifer. Contaminates can be introduced on the surface and with the introduction of rain will percolate into the ground both vertically and horizontally and migrate into the Stradley Aquifer.

Nobody knows how the Stradley Aquifer is recharged and from what source. Nobody knows the size and shape of the Stradley Aquifer. The Commission ignored that absence of evidence and in doing so, failed to decide the ultimate issue in this case.

POINT II: ORDER R-9769-A WAS ADOPTED BY A
 MAJORITY OF THE COMMISSION BASED
 UPON AN INCORRECT UNDERSTANDING OF
 "BURDEN OF PROOF"

The Commission improperly placed the "Burden of Proof" on the Opponents to demonstrate that the waste facility would harm the fresh water aquifer. During public deliberations Commissioner Weiss commented that he had specifically edited Finding (13) of Order R-9769-A to place emphasis upon the Opponent's hydrologist's failure to visit the site and take samples and conduct tests.

The Commission missed the purpose of Mr. Kelly's testimony. As the only qualified hydrologic expert presented to the Commission on this matter, Mr. Kelly's testimony was to show the Commission what should be required of the Applicant (not the Opponents) before a proper decision could be made about this waste facility.

It is not the Opponents' burden to prove that this surface waste facility will contaminate the Stradley Aquifer. To the contrary, it is the Applicant's Burden of Proof to persuade the Commission that it will not.

The following is presented to guide the Commission in understanding the legal concept of "Burden of Proof." The term "proof" is the end result of conviction or persuasion produced by the evidence. The term encompasses two separate burdens of proof: one is the burden of producing evidence and the second is the burden of persuading the trier of fact that the alleged fact is true.

In this case, the alleged fact is that the approval of this facility will not pose a risk to ground water, human health and the environment. The Applicant always retains the ultimate burden of producing evidence AND the burden of persuasion that the facility would not pose a risk to the Stradley

Aquifer. The Applicant's failure to provide evidence of the size, shape and hydrology of the Stradley Aquifer from which the Stradley windmill produces fresh water is a failure of the Applicant to meet its "Burden of Proof."

All that the Opponents needed to do, they did by introducing evidence of the location of the fresh water sources in the Stradley Aquifer in close proximity to the waste facility. It then was the Applicant's Burden of Proof to produce the hydrologic study of the Stradley Aquifer which must provide convincing evidence that no risk was being imposed upon the Stradley Aquifer by this waste facility.

While the Applicant introduced evidence of five monitor wells having failed to encounter the Stradley Aquifer, the Applicant failed to provide evidence as to any of the following:

- (1) composition samples and tests
- (2) soil samples and tests
- (3) compaction tests
- (4) permeability tests

- (5) Cation Exchange capacity tests
- (6) liquid and plastic tests of the redbeds
- (7) any soil properties tests and data
- (8) any hydrology studies
- (9) any groundwater studies
- (10) any percolation tests or data
- (11) any ground water migration tests/data
- (12) any contaminant mobility tests/data

It is improper to put the Applicant's failure of proof on the Opponents.

POINT III: THE COMMISSION VIOLATED EVIDENCE
 RULE 703 WHEN IT REJECTED EXPERT
 OPINIONS NOT BASED UPON PERSONAL
 KNOWLEDGE OF THE EXPERT

The Commission accepted the opinions of the Division's Environmental Bureau ("NMOCD-EB") even though its witness was not a hydrologist because she had made a personal visual inspection of the site. The Commission rejected the expert opinions of Mr. Kelly, the Opponent's qualified hydrologist, because he had not made a recent personal visual inspection of the site. The Commission ignored the fact that Mr. Kelly

had been present for and reviewed all of the transcripts and exhibits of the Division Examiner hearing of this case including the various topographical maps and testimony of others concerning the appearance of the facility and the site.

New Mexico Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Apparently, the Commission failed to remember the testimony of Mr. Stradley who had repeatedly been over every part in this "White Breaks" area for decades. Mr. Stradley testified that the surface waste facility was located on the northeast edge of a natural topographical depression with his fresh water windmill located in the bottom of that depression and in excess of 30 feet lower than the surface waste facility. As an expert witness, Mr. Kelly does not have to

personally visit the site. He is entitled to rely upon the observations of Mr. Stradley and others and did so to support his expert opinions.

Mr. Kelly concluded that the likely direction of contaminant movement from the waste facility will be down gradient along the redbed surface. But there have been no hydrologic studies of the area to determine gradients and therefore no way to know the length of time and distance of travel of the contaminants. There has been no scientific study of the redbeds and the movement cannot be predicted. His point was that the Commission cannot approve this facility until that determination is made.

While a visual inspection of the surface of the facility is hardly scientific and does not allow the observer to divine the subsurface conditions in the area, the only inference for the Commission to have drawn from site inspection was that the surface topography would increase the risk of contamination to the Stradley Aquifer.

As an apparent excuse for disregarding the lack of technical data by the Applicant, the Commission decided this case based upon what witness had made a personal visual inspection of the site and thereby rejected the expert opinions of the Opponent's witness because he had not made a personal inspection of the site. Although the Commission enjoys the ability to relax the rules of evidence they should not decide cases based upon an erroneous application of those rules.

POINT IV: THE COMMISSION BASED ITS ORDER R-9769-A
 UPON FINDING (11) WHICH IS CONTRARY TO
 THE EVIDENCE AND CONTAINS AN IRRELEVANT
 FINDING.

Finding (11)(a):

"There is no fresh water under the disposal site because there is no Ogalalla aquifer present."

At the hearing the Commission raised the irrelevant issue of the location of the Ogalalla

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aquifer and then used that irrelevant fact as a basis for approval of the Application. See Finding (11)(a). The aquifer at risk and for which the Commission failed to address any findings was the Stradley Aquifer in the shallow alluvium down slope from the proposed waste facility. The issue is where are the vertical and horizontal limits of that aquifer and its recharge system.

It is of no consequence whether the Ogalalla aquifer is present under the waste facility. However, if the Commission wants to decide this case based upon the presence or absence of the Ogalalla aquifer under the facility, it has made a fundamental error in finding the Ogalalla aquifer absent. In fact, the Ogalalla aquifer IS PRESENT UNDER this surface waste facility. See Exhibit "C" attached hereto and incorporated by reference.

To decide this case based upon location of an aquifer not at issue in this case is to wrongly decide this case.

Finding (11)(b):

"The berm to be constructed and maintained and operational requirements will be adequate to prevent precipitation run-off and run-on for the treatment portion of the facility"

This finding makes no grammatical sense. But more importantly, this finding is contrary to the evidence. There are no scientific data introduced on soils tests and therefore no compaction data, no composition data, and permeability data from which to determine the construction and maintenance standards for the berm. Further the order does not detail the constructions, maintenance or operations requirements for the berm.

This finding is simply an assumption without proper basis and cannot be supported by the record in this case.

**POINT V: THE COMMISSION ERRONEOUSLY BASED ITS
DECISION ON A "VISUAL INSPECTION OF THE
SURFACE OF THE SITE" AND IGNORED THE
ABSENCE OF A SCIENTIFIC HYDROLOGIC
STUDY**

The Commission erroneously based its decision on a visual inspection of the surface of the facility by a non-hydrologist staff member of the Oil Conservation Division's Environmental Bureau ("OCD-EB"). See Finding (14). The Commission also in error found it significant that the Opponents' hydrologist had not made a personal inspection of the surface of the facility.

The Commission ignored the testimony of Mr. Stradley about the slope of the topography and the fact the facility was some 35 feet higher in elevation to his down slop fresh water well. The Commission ignored the testimony of Opponent Reeves who had located and identified some forty-six (46) water wells in the area.

The Commission failed to explain how that surface inspection could substitute for a scientific hydrologic study of the potential contamination of Mr. Stradley's fresh water well.

**POINT VI: THE IS NO SUBSTANTIAL EVIDENCE TO
SUPPORT FINDING (12) CONCERNING A
NEED FOR THIS WASTE FACILITY**

Finding (12) states:

"There is a need for landfarms to
remediate oil contaminated soils in
the oil fields of Southeast New Mexico."

Contrary to this finding, the uncontested evidence was that the location of the facility was arbitrary; that the applicant had not conducted any economic analysis to justify this facility or establish its need; that there was nothing introduced about the capacity of existing OCD approved waste facilities or their location or inability to meet the "needs" of the industry; there was no testimony from any operator of oil & gas wells in this area supporting this application.

The Commission made an error. The need for this facility at this site was NOT established by substantial evidence.

**POINT VII: THE ADMINISTRATIVE PROCESS OF
THIS CASE AND ORDER R-9796-A
VIOLATE PROCEDURAL DUE PROCESS**

On October 8, 1991, the Applicant, C&C Landfarm, Inc. filed its application with the Division seeking authority to construct and operate a commercial "landfarm" facility ONLY for the remediation of soils contaminated with hydrocarbon substances which are exempt from the Federal Resources Conservation and Recovery Act (RCRA) on a 40-acre site owned by Jimmie T. Cooper. On November 27, 1991, notice concerning the original Application was published in The Lovington Daily Leader, a newspaper of general circulation in Lea County, New Mexico. No published notification was made of any of the amendments to the application.

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The Commission granted the Applicant more than Applicant sought. While the Applicant only sought to construct and operate a commercial "landfarm" facility specifically limited to the remediation of non-hazardous hydrocarbon contaminated soils, the OCD Conditions appended to the Order R-9769-A as Exhibit "A" also authorize other contaminants to be received into the facility.

Specifically, OCD Conditions #1 and #10 set up a process for the Applicant to expand its waste facility to accept other contaminants and to do so without public notice or public hearing.

Since April, 1992, the Opponents have complained about receiving inadequate notice of about this Application, including the NMOCD-EB approving this facility and the various amendments to that Application without notice to Opponents. The public notice in this case is flawed and continues to violate due process. The Commission has perpetuated that violation of procedural due process by approving an order which

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allows amendments to take place without public notice
or hearing.

**POINT VIII: THE COMMISSION FAILED TO PROPERLY AMEND
THE OCD-EB PROPOSED CONDITIONS DATED
JANUARY 6, 1993 AND THEREFORE ORDER
R-9769-A IS ARBITRARY, CAPRICIOUS AND
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Should the Commission disagree with the other
Points raised by the Opponents in this Application for
Rehearing, Order R-9769-A is still legally deficient
because certain conditions adopted by the Commission
are directly contrary to the uncontested evidence in
this case:

(1) Condition (2):

"No disposal or remediation of contaminated soils
will occur within one hundred (100) feet of your
property boundary."

The 100 foot horizontal setback ("buffer") was recommended by Kathy Brown of the OCD-EB. On cross examination, she admitted that there is no scientific basis for the distance being 100 feet.

A Buffer Zone is essential but the proper distance must be based upon some site specific scientific reasons to determine that distance is adequate. The Commission has adopted an arbitrary distance for the Buffer Zone without any scientific basis.

(2) Treatment Zone Monitoring:

The Commission has made a mistake when it adopted the OCD-EB proposed conditions concerning the Treatment Zone and its Monitoring. The OCD-EB speculates that the first three feet of native soils will be an adequate "Treatment Zone" and with monitoring will protect ground water.

Again, Kathy Brown, testifying in support of the adoptions of the OCD-EB conditions was not a qualified expert hydrologist and did not undertake an adequate scientific study to justify its Treatment Zone Monitoring.

The proposed monitoring of the Treatment Zone has no scientific basis for determining its reliability. There is no data from which to determine that the location of the cells in which the contaminated soils will be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property. Nobody knows how frequently to sample and how many samples per acre to take in order to detect contamination in the Treatment Zone. The OCD-EB Revised Recommendations are inadequate to detect any leaching process of movement of contaminants that could cause the pollution of nearby fresh water supplies.

In summary, while the OCD-EB recommendations are well intended, they are inadequate to provide reasonable protection of the valuable groundwater present in the immediate adjacent tracts.

POINT IX: THE COMMISSION VIOLATED THE FASKEN,
THE VIKING PETROLEUM AND THE CONTINENTAL
OIL CASES WHEN ITS FAILED TO ADDRESS AND
DECIDE THE OPPONENTS' ISSUES AND
OBJECTIONS

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975). Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962).

Likewise, in Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 453, 672 P.2d 280 (1983), the

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New Mexico Supreme Court reiterated its opinions in Continental Oil and Fasken, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

It is not enough in this case for the Commission to simply adopted the OCD-EB revised Conditions of Approval and to then append those conditions to Order R-9769-A as Exhibit "A." The Commission needs to articulate its decision on each of the conditions which were opposed by the Opponents.

The Commission failed to explain why it found it important to summarize the disputed Applicant's evidence but omitted a summary of the Opponent's evidence.

A rehearing is required, if for no other reason than for the Commission to adopt an adequate order

which complies with state law. An adequate order would specifically address the issues described in the Opponents' Pre-Hearing Statement and which are summarized as follows:

Opponent Stradley stated he has fresh water in the immediate vicinity of the subject project which he currently uses and which is at risk of contamination if this project is approved as outlined by the "OCD Conditions of Approval" notice dated May 20, 1992 or as outlined in "OCD Recommendations" dated January 6, 1993.

Opponent Reeves, after extensive personal search of the State Engineer's records concerning fresh water wells in the area introduced evidence of the presence of some forty-six (46) water wells in the area. The Commission, with no explanation, ignored that evidence.

The Applicant had some 240 contiguous acres from which to select a possible site for the facility. The Commission could have and should have required that

this facility be located farther north within the same tract of land controlled by the Applicant. Instead the Commission chose to avoid this solution and approved a facility on the southern end of the Applicant's tract adjacent to Mr. Stradley's tract. That puts the risk of contamination directly upon Mr. Stradley and not upon the Applicant.

The procedure applied by the Division in processing this case violated procedural due process. This was a make it up as you go process.

The NMOCD "Conditions of Approval" notice dated May 20, 1992 and "OCD Recommendations" dated January 6, 1993 contain substantial errors and fail to protect ground water, human health and the environment.

The subject facility is being designed by the OCD and not the Applicant and is being permitted without any science or experience to know that it will work and prior to the OCD adopting guidelines for such a facility.

The Opponents presented evidence that the granting of the application by the Commission failed to protect human health and the environment and constitutes a risk of contamination of ground water, including the following:

(a) The Applicant's proposed plan will place at risk shallow water wells located down-dip from the proposed landfarm which will be subject to contamination from seepage of leachate contaminants.

(b) The Applicant's plans to prevent migration of contaminants down gradient along the redbed surface is inadequate.

(c) The proposed monitor wells are improperly located and will not afford adequate assurance of detection of contaminants.

(d) The proposed dike identified in OCD Condition (10) in said Order is insufficient and conditions on compaction and verification are inadequate to stop the mobility of the leachate contaminants.

(e) The composition of the berm is not environmentally safe.

(f) Additional soil tests should be performed on the redbed soil including:

- (1) Falling head permeability tests,
- (2) Soil property tests,
- (3) Cation Exchange Capacity tests,

(g) Applicant needs to perform liquid and plastic tests on the redbeds.

(h) The Applicant's proposed barrier is inadequate for its proposed landfarm.

(i) Applicant's geology is inadequate and fails to include an east-west cross section.

The OCD-Environmental Bureau's (OCD-EB) January 6, 1993 Recommendations assume that the contaminated soils will be kept from any shallow fresh water because of about 10 feet of native soil being used as a "treatment zone."

There is no characterization of the "redbeds." In this area there are the Triassic deposits, probably the Chinle shale, and referred to as the "redbeds." The integrity of this landfarm system is dependent upon the impermeability of the redbeds, but the Applicant has presented no data about the physical characteristics of these deposits, such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc. All of these are critical factors that ensure that there would be no migration of leachate along the top of or through the redbeds.

There are inadequate horizontal and vertical buffer zones surrounding this proposed facility. The configuration of the upper surface of the redbeds in the 40-acre tract has not been defined.

Commission Order R-9769-A is fatally flawed and should be withdrawn and a Rehearing granted to address all of the issues set forth in this Application for Rehearing.

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CONCLUSION

The Commission should withdraw Order R-9769-A and substitute Order R-9697-B which is attached hereto as Exhibit A and incorporated herein by reference. In order to preserve Opponents' right to further appeals of this matter, all of the issues set forth in our proposed Order R-9697-B are made a part of this Application for Rehearing.

Respectfully submitted,

KELLAHIN AND KELLAHIN,

A large, stylized handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', is written over the printed name and address.

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ATTORNEYS FOR OPPOSITION-
W.T. STRADLEY (S-W CATTLE CO.)
AND ELSIE M. REEVES

East, NMPM, Lea County, New Mexico, which is located approximately two miles southeast of **Monument, New Mexico**. The term "non-hazardous and exempt" is synonymous as defined in the Resource Conservation and Recovery Act (RCRA) Subtitle C Regulations.

(4) This application was reviewed by the Environmental Bureau of the Oil Conservation Division and determined to be approvable.

(5) A Division Examiner hearing was scheduled to provide to interested parties an opportunity to present technical evidence why this application should not be approved pursuant to the applicable rules of the Division.

(6) Within the time frame authorized by Division rule, certain parties of interest filed written objections to the proposed facility including Elsie M. Reeves and W. T. Stradley, President of S-W Cattle Company.

(7) An Examiner hearing was held on September 1, 1992 at which time Elsie M. Reeves and W. T. Stradley presented evidence in opposition to this application.

(8) On November 16, 1992 the Division entered Order No. R-9769 approving this application and thereafter Elsie M. Reeves, S-W Cattle Company and W. T. Stradley timely filed for a hearing De Novo.

(9) Properly managed landfarming is an excellent method to manage contaminated soil, because those soils are remediated to a useful condition and contaminants can be contained and any movement observed and stopped before they cause any harm.

(10) The proposed landfarm is to be located on a forty-acre tract of land, as described in Finding Paragraph No. (3) which is bordered on the east by Lea County Road No. 58. Oil field contaminated soils will be trucked to the site and deposited within cells in six inch lifts; these soils will be tilled or plowed to ensure proper aeration and bioremediation to proper government standards. Prior to any soil being deposited in a cell, the soil in the cell or "treatment zone" will be sampled and tested. Six months after the first oil field contaminated soil is deposited in the cell and quarterly thereafter the treatment zone will be tested again to assure that no contamination is occurring.

(11) Applicant presented factual evidence that supports the following conclusions:

- (a) There is no fresh water under the disposal site because there is no Ogallala aquifer present.
- (b) The berm to be constructed and maintained and operational

requirements will be adequate to prevent precipitation run-off and run-on for the treatment portion of the facility.

- (c) Quarterly testing within the treatment zone will determine if there has been downward migration of contaminants.
- (d) The process of bio-remediation to be employed at the proposed landfarm is a proven, cost effective technology for treatment of oil contaminated soils.

(12) There is a need for landfarms to remediate oil contaminated soils in the oil fields of Southeast New Mexico.

(13) Elsie M. Reeves and W. T. Stradley, property owners in the area, appeared in opposition to the application and expressed concern that the proposed facility could contaminate fresh water. They called a hydrologist who testified that additional requirements might be necessary to assure there was no contamination of fresh water supplies but admitted that such requirements would need to be developed based on inspection of the facility and sampling and testing of the water and soil in the area. He stated he had not been to the site and had taken no samples nor conducted any tests at the proposed facility. His expert opinion was based upon general hydrologic information from the literature and not upon specific knowledge at the site and the type of operation and therefore was not useful in this case.

(14) The Division's Environmental Bureau has reviewed the proposed facility, inspected the site and made specific permit recommendations for this facility which it requests be incorporated into and made part of a Commission Order approving this application. These "Conditions of Approval" should be adopted to assure safe operations and to provide for a monitoring system to detect any leaching or movement of contaminants that could cause the pollution of nearby underground fresh water supplies.

(15) If contaminant migration occurs, the Division should immediately order the operator to stop taking additional contaminated soils and implement steps to remediate the contaminated zone and provide a procedure to prevent future contamination migration.

(16) Approval of this application and operation of the proposed landfarm in accordance with the Environmental Bureau's proposed "Conditions of Approval" will not impair fresh water supplies in the area, will have no adverse effect on human health nor on the environment, will not cause waste and should be approved.

IT IS THEREFORE ORDERED THAT:

(1) The applicant, C & C Landfarm, Inc. is hereby authorized to construct and operate a commercial "landfarm" facility for the remediation of non-hazardous hydrocarbon contaminated soils utilizing an enhanced biodegradation process on a site located in the SW/4 NE/4 (Unit G) of Section 2, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico.

PROVIDED HOWEVER THAT: the proposed facility shall be constructed and operated in accordance with the permit conditions attached hereto as Exhibit "A" which are incorporated herein and made a part of this order, and in accordance with such additional conditions and requirements as may be directed by the Division Director, and shall be operated and maintained in such a manner as to preclude spills, fires, limit emissions and protect persons, livestock and the environment.

PROVIDED FURTHER THAT, prior to initiating operations, the facility shall be inspected by a representative of the Hobbs District Office of the Oil Conservation Division in order to determine the adequacy of fences, gates and cattle guards necessary to preclude livestock and unauthorized persons from entering and/or utilizing said facility, and also to determine the adequacy of berms to assure safe facility operations.

(2) Prior to commencing operations on said facility, the applicant shall submit to the Santa Fe Office of the Division, a surety or cash bond pursuant to General Rule 711, in the amount of \$25,000 in a form approved by the Division.

(3) The Director of the Division shall be authorized to administratively grant approval for the expansion or modification of the proposed disposal facility after notice to interested parties.

(4) Authority for operation of the landfarm shall be transferrable only upon written application and approval by the Division Director.

(5) Authority for operation of the landfarm facility shall be suspended or rescinded whenever such suspension or rescission appears necessary to protect human health or property, to protect fresh water supplies from contamination, to prevent waste, or for non-compliance with the terms and conditions of this order or Division Rules and Regulations.

(6) The permit granted by this order shall become effective only upon acceptance by the applicant of the "Conditions of Approval" attached hereto as Exhibit A.

(7) The Division shall have the authority to administratively change any condition

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of this permit to protect fresh water, human health and the environment. Applicant may request a hearing upon any change which materially affects the operation of the facility.

(8) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

Bill Weiss

WILLIAM W. WEISS, Member

William J. Lemay

WILLIAM J. LEMAY, Chairman

I Dissent

Gary Carlson

GARY CARLSON, Member

S E A L

dr/

Exhibit "A"
Case No. 10507 De Novo
Order No. R-9769-A

**C & C LANDFARM, INC. APPLICATION
OCD CONDITIONS OF APPROVAL**

LANDFARM OPERATIONS

1. Remediation of contaminated soils will occur only on the native ground surface. The caliche pit present on the facility will not be used for the disposal, storage or remediation of **any materials** without the case-by-case approval of the OCD.
2. No disposal or remediation of contaminated soils will occur within one hundred (100) feet of your property boundary.
3. Disposal will only occur when an attendant is on duty. The facility will be secured when attendant is not present.
4. The facility will be fenced and have a sign at the entrance. The sign will be legible from at least fifty (50) feet and contain the following information: 1) name of the facility, b) location by section, township and range, and c) emergency phone number.
5. An adequate berm will be constructed and maintained to prevent run-off and run-on for that portion of the facility containing contaminated soils.
6. All contaminated soils received at the facility will be spread and disked within 72 hours of receipt.
7. Soils will be spread on the surface in six inch lifts or less.
8. Soils will be disked a minimum of one time every two weeks (biweekly) to enhance biodegradation of contaminants.
9. Successive lifts of contaminated soils will not be spread until a laboratory measurement of Total Petroleum Hydrocarbons (TPH) in the previous lift is less than 100 parts per million (ppm), and the sum of all aromatic hydrocarbons (BTEX) is less than 50 ppm, and the benzene is less than 10 ppm. Comprehensive records of the laboratory analyses and the sampling locations will be maintained at the facility. Authorization from the OCD will be obtained prior to application of successive lifts.
10. Only oilfield wastes which are exempt from RCRA Subtitle C regulations or non-hazardous by characteristic testing will be accepted at the facility. Solids from operations not currently exempt under RCRA Subtitle C or mixed exempt/non-exempt solids will be tested for appropriate hazardous constituents. Test results must

be submitted to the OCD along with a request to receive the non-exempt solids, and a written OCD approval (case specific) must be obtained prior to disposal. Any non-oilfield wastes which are RCRA Subtitle C exempt or are non-hazardous by characteristic testing will only be accepted on a case-by-case basis and with prior OCD approval. Comprehensive records of all laboratory analyses and sample locations will be maintained by the operator.

11. Moisture will be added as necessary to enhance bio-remediation and to control blowing dust. There will be no ponding, pooling or run-off of water allowed. Any ponding of precipitation will be removed within seventy-two (72) hours of discovery.
12. Enhanced bio-remediation through the application of microbes (bugs) and/or fertilizers will only be permitted after prior approval from the OCD. Request for application of microbes must include the location of the area designated for the bio-remediation program, composition of additives, and the method, amount and frequency of application.
13. No free liquids or soils with free liquids will be accepted at the facility.
14. Comprehensive records of all material disposed of at the facility will be maintained at the facility. The records for each load will include: 1) the origin, 2) date received, 3) quantity, 4) exempt or non-exempt status and analysis for hazardous constituents if required, 5) transporter, and 6) exact cell location and any addition of microbes, moisture, fertilizers, etc.
15. The monitor wells will be inspected for the presence of fluids on a quarterly basis on the same schedule as the treatment zone monitoring. If fluids are discovered the OCD will be notified immediately.

TREATMENT ZONE MONITORING

1. One (1) background soil sample will be taken from the center portion of the landfarm two (2) feet below the native ground surface. The sample will be analyzed for total petroleum hydrocarbons (TPH), general chemistry, and heavy metals using approved EPA methods.
2. A treatment zone not to exceed three (3) feet beneath the landfarm will be monitored. A minimum of one random soil sample will be taken from each individual cell, with no cell being larger than five (5) acres, six (6) months after the first contaminated soils are received in the cell and then quarterly thereafter. The sample will be taken at two to three (2-3) feet below the native ground surface.
3. The soil samples will be analyzed using approved EPA methods for TPH and BTEX quarterly, and for general chemistry and heavy metals annually.
4. After obtaining the soil samples the boreholes will be filled with an impermeable

material such as bentonite cement.

REPORTING

1. Analytical results from the treatment zone monitoring will be submitted to the OCD Santa Fe Office within thirty (30) days of receipt from the laboratory.
2. The OCD will be notified of any break, spill, blow out, or fire or any other circumstance that could constitute a hazard or contamination in accordance with OCD Rule 116.

BOND

Pursuant to OCD Rule 711 a surety or cash bond in the amount of \$25,000, in a form approved by the Division, is required prior to commencing construction of the commercial surface disposal facility.

CLOSURE

The operator will notify the Division of cessation of operations. Upon cessation of disposal operations for six (6) consecutive months, the operator will complete cleanup of constructed facilities and restoration of the facility site within the following six (6) months, unless an extension for time is granted by the Director. When the facility is to be closed no new material will be accepted. Existing soils will be remediated until they meet the OCD standards in effect at the time of closure. The area will then be reseeded with natural grasses and allowed to return to its natural state. Closure will be pursuant to all OCD requirements in effect at the time of closure, and any other applicable state and/or federal regulations.

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. 10507 (DENOVO)
ORDER NO. R-9769-B

APPLICATION OF C & C LANDFARM, INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY, NEW MEXICO.

ELSIE REEVES AND W. TRENT STRADLEY'S
PROPOSED
ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 AM on Thursday, February 25, 1993, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter the "Commission."

NOW, on this 20th day of May, 1993, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

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

(2) The New Mexico Oil and Gas Act, Section 70-2-12.B(21) and (22), NMSA (1978) authorizes the New Mexico Oil Conservation Division ("Division") to regulate the disposition of non-domestic wastes resulting from various oil and gas activities and operations and to protect public health and the

environment.

(3) Pursuant to that authority the Division has adopted regulations governing the operation of commercial surface waste disposal facilities (Rule 711 of the Rules and Regulations of the Oil Conservation Division, hereinafter "OCD Rules").

(4) On October 8, 1991, the Applicant, C & C Landfarm, Inc. ("C&C"), filed its Application with the Division seeking authority to construct and operate a commercial "landfarm" facility ONLY for the remediation of soils contaminated with hydrocarbon substances which are exempt from the Federal Resource Conservation and Recovery Act (RCRA), (42 USA 6921-6939b), Subtitle C regulations (40 CFR Parts 260-272) on a 40-acre site, owned by Jimmie T. Cooper and located in the SW/4NE/4 (Unit G) of Section 3, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico, which is approximately two miles southeast of Monument, New Mexico.

(5) In its original Application, C&C applied for approval to excavate the native soil within the facility down to the Triassic formation ("redbeds") (about 10-16 feet) and then to fill the excavated pit with hydrocarbon contaminated soils.

(6) C&C asserted it had drilled five "monitor" wells within the 40-acre site and did not encounter groundwater under the facility.

(7) The Oil Conservation Division's Environmental Bureau ("OCD-EB") commenced processing the C&C application pursuant to Division Rule 711 which provides among other things that "If there is objection by owners or occupants of adjacent lands, the Director of the Division may set any application for a surface waste disposal permit for public hearing."

(8) On November 27, 1991 public notice concerning the subject Application was published in The Lovington Daily Leader, a newspaper of general circulation in Lea County, New Mexico.

(9) Within the 30-day public notice provision set forth in OCD Rule 711(B), written objections were filed with the Division by Elsie M. Reeves and W. T. "Trent" Stradley of S-W Cattle Company, each of whom is an adjoining land owner and unless otherwise stated are referred herein collectively as "Opponents."

(10) Despite receiving timely objections from the Opponents, the OCD did not set the C&C Application for hearing, but rather continued with its administrative processing.

(11) On February 21, 1992, the OCD-EB wrote to C&C expressing, among other things, concern for the "possibility of contaminants migrating off of your property along the surface of the redbed" and requested a detailed description of how C&C planned to prevent the migration of contaminants down gradient along the redbed surface.

(12) On March 2, 1992, C&C submitted to OCD-EB a schematic for the excavated pit now showing a proposal to install a "redbed dike" on the south, west and north edges of the facility with the south edge of the dike touching the north edge of the Stradley property.

(13) On April 3, 1992, OCD-EB notified the Opponents that, "The application at this time is administratively approvable since it meets all of the technical requirements to protect ground water, human health and the environment." and informs the Opponents that they had 30-days to submit comments which responded with "substantive technical information."

(14) The Opponents renewed their protest and filed objections which raised the following issues:

(a) That the OCD-EB "Conditions of Approval" contained substantial errors and failed to protect ground water, human health and the environment;

(b) That C&C's proposed facility would place at risk shallow water wells located down-dip from the facility which will be subject to contamination from seepage of leachate contaminants;

(c) That there was inadequate notice of the C&C Application and of the various amendments to that Application and that the Application, as amended, should be dismissed;

(d) That the administrative processing by the OCD-EB had violated procedural due process and did not comply with the rules of the OCD;

(e) That the Application requested approval of a 40-acre tract but proposed to use only 2 acres;

(f) That the OCD-EB proposed to grant C&C significantly greater disposal authority than the C&C had requested;

(g) That C&C's plan to prevent migration of contaminants down gradient along the redbed surface was inadequate;

(h) That there was no scientific data submitted by the Applicant to support its Application; and

(i) That the design of the facility was grossly inadequate.

(15) On May 20, 1992, the OCD-EB notified the Opponents that the OCD-EB, without a hearing, would grant the C&C application subject to the "Conditions of Approval" dated May 20, 1992.

(16) Prior to June 9, 1992, the Opponents again requested a public hearing.

(17) Finally the OCD set a hearing not for C&C to present its case but rather for the limited purpose of hearing the Opponents' technical evidence in opposition to the OCD-EB conditional approval of May 20, 1992.

(18) The limited Hearing was held before OCD Examiner Michael Stogner on September 1, 1992.

(19) On November 16, 1992, the OCD issued Order R-9769 approving the disposal of contaminated soils and solids into the excavated pit subject to the May 20, 1992 conditions proposed by the OCD-EB.

(20) The Opponents timely filed for a DeNovo hearing of Case 10507 before the Commission.

(21) On January 6, 1993, the OCD-EB issued newly proposed "Revised Recommendations" which provided for the disposal of the contaminated soils within the facility but precluded disposal into the excavated pits.

(22) At the Commission Hearing, C&C presented the following in support of its Application:

(a) That out of the 200 acres controlled by Jimmie Cooper, C&C proposed to use a 40-acre tract the southern boundary of which is immediately adjacent to a tract controlled by Trent Stradley;

(b) That C&C had not examined any other site in this area or any other portion of the Cooper tract as a possible site;

(c) That it had drilled five "monitor" wells within the 40-acre site and did not encounter groundwater under the facility;

(d) That it proposed to limit the material taken into the facility to oil field contaminated soils; and

(e) That it would adopt and abide by all of the OCD-EB Revised Recommendations dated January 6, 1993.

(23) At the Commission Hearing, the Opponents presented the following in opposition to the Application:

(a) That C&C failed to present a qualified expert hydrologist and did not undertake an adequate scientific study to justify its Application;

(b) That Stradley's fresh water windmill well some 1,700 feet to the southwest of the facility is at risk of contamination if the project was approved as outlined by the OCD-EB;

(c) The location of the facility within this proposed 40-acres within the Cooper tract is arbitrary;

(d) C&C failed to provide any reasonable reasons for selecting this site over available sites within the Cooper property which would be farther away from Stradley and Reeves;

(e) The need for this facility at this site was not established;

(f) The design of the facility is flawed and will not provide adequate protection for ground water, public health or the environment;

(g) The 100 foot buffer recommended by the OCD-EB is arbitrary and inadequate;

(h) The proposed monitoring of the treatment zone has no scientific basis for determining its reliability;

(i) There is no data from which to determine that the location of the cells in which the contaminated soils will be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property;

(j) The OCD-EB recommendations, while well intended, are inadequate to provide reasonable protection of the valuable groundwater present in the immediately adjacent tract;

(k) The facility is an environmental accident waiting to happen;

(l) The \$25,000 Bond recommended by the OCD-EB is grossly inadequate;

(m) The Applicant failed to undertake any scientific study and allowed the OCD-EB to attempt to design the facility for the Applicant based upon the OCD-EB's best guess; and

(n) The January 6, 1993 OCD-EB Revised Recommendations are inadequate to detect any leaching process or movement of contaminants that could cause the pollution of nearby underground fresh water supplies.

(24) At the Commission Hearing, the OCD-EB presented the following in support of its January 6, 1993 Revised Recommendations:

(a) Although the OCD-EB originally approved the C&C request to place contaminated soils into the excavated pits, the OCD-EB now (January 6, 1993) recommends against such a request;

(b) C&C originally sought to put the facility and contaminated soils right up to the property line common with Trent Stradley. The OCD-EB May 20, 1992 conditions approved the facility without a set back or "buffer zone." The OCD Order approved the application also without a buffer zone. Now, the OCD-EB proposes a 100 foot setback from the property line as a "buffer zone."

(c) The OCD-EB admitted that the 100 foot buffer was an arbitrary distance without any scientific basis;

(d) The integrity of the proposed landfarm is dependent upon the impermeability of the redbeds and the apparent absence of shallow groundwater at five locations under the facility;

(e) The OCD-EB proposes that the first three feet of native soils will be an adequate "treatment zone" and proper monitoring will protect ground water;

(f) The OCD-EB January 6, 1993 Recommendations are predicated upon the assumption that the contaminated soils will be kept from any shallow ground water by monitoring for potential contaminant in a "treatment zone" consisting of the first three feet of native soil upon which the contaminated soils have been placed; and

(g) The OCD-EB proposes that a single soil sample can be taken at the center of the facility and provide a background soil sample.

(25) It is of significance to the Commission, which must rely upon expert witnesses, to judge the creditability and expertise of each such witness.

(26) In this case, the Opponents presented a well-recognized geohydrologist with both bachelor and master degrees in hydrology who had specific knowledge of the immediate subject area and who has testified before this Commission on a number of prior occasions.

(27) C&C relied upon a petroleum geologist without expertise in hydrology who had not undertaken any hydrology studies and who was unable to express any expert opinions concerning this matter.

(28) The OCD-EB relied upon the testimony of a petroleum geologist, who had in fact designed the facility for C&C, but who had no hydrology degrees and no experience with the actual operation of this type of facility.

(29) Based upon the foregoing and upon the entire record in this case, the Commission finds that:

(a) The redbeds are the first layer which will divert shallow ground water but they have not been mapped in this area and their characteristics are unpredictable;

(b) the Applicant presented no data about the physical characteristics of the redbeds such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc., all of which would be critical factors to ensure that there is no migration of leachate along the top of or through the redbeds;

(c) Although the OCD-EB on February 21, 1992 expressed its concern about the potential migration of contaminants down gradient along the redbed surface, there is no evidence of any hydrologic studies of the area to determine the direction of migration of contaminants;

(d) There was no scientific data presented to support the OCD-EB conclusion that the disposal of contaminated soils on top of undisturbed native soil constitutes an adequate vertical buffer between the contaminants and the potential source of ground water recharge to the Stradley windmill water well;

(e) Although a monitoring procedure of the treatment zone is proposed, there is no assurance that such a monitoring procedure will timely detect potential contaminants and the facility should be substantially removed from any potential ground water both horizontally and vertically so as not to pose a risk;

(f) The OCD-EB proposed monitoring system for the "treatment zone" is inadequate and not based upon either experience with similar sites nor upon published scientific literature;

(g) An adequate horizontal "buffer zone" is essential but there is no evidence, scientific data, experience or anything else presented to determine what that distance should be;

(h) C&C's proposed facility is the 40-acre tract at the SE corner of a 200 acre tract owned by Jimmie Cooper. The NE/4 40-acre tract appears to be sufficiently removed from the Stradley tract so as not to pose a risk to his groundwater but no effort was made by C&C to investigate the feasibility of any alternative sites;

(i) While C&C expressed a "need" for this facility there was no economic justification for this facility presented;

(j) There was no evidence presented as to the risk to public health and the environment when contaminated soils are concentrated at this facility rather than leaving those contaminants at the well sites;

(k) The OCD-EB January 6, 1993 Recommendations propose that one soil sample of the treatment zone be taken quarterly for not more one sample for a 50-acre tract.

(l) The Applicant did not present any soil samples or analysis for the facility;

(m) There have been no studies to determine if a single soil sample will be representative of the soil conditions and characteristics over the entire 40-acre tract;

(n) There was no evidence introduced from which to determine how frequently to sample and how many samples per how many acres should be taken;

(o) A single soil sample monitoring procedure is inadequate;

(p) The OCD-EB proposed sampling assumes the ability to detect contaminants percolating into the native soil treatment zone but is not based upon anything more than speculation;

(q) There are no published scientific reports or OCD-EB experience about any similar facilities from which to determine the potential success or failure of the proposed treatment zone monitoring;

(r) That while the C&C application sought approval ONLY for disposal of oil field contaminated soils, the OCD-EB proposed to allow the disposal of oil field solids and other contaminants;

(s) That the OCD-EB Revised Recommendations provide a method for future modification of the C&C facility which fails to provide adequate public notice and will violate procedural due process; and

(t) That the OCD-EB Rules and Regulations fail to provide adequate protection for ground water, public health or the environment.

(30) The Commission finds that the Application should be DENIED.

IT IS THEREFORE ORDERED THAT:

(1) This application is hereby DENIED.

(2) Order No. R-9769, entered in this matter on November 16, 1992, and Order R-9769-A entered in this matter on April 29, 1993 are hereby rescinded and are of no effect.

NMOCD ~~Case~~ No. 10507 (DeNovo)
ORDER NO. R-9769-B
Page 12

(3) Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

GARY CARLSON
Member

WILLIAM W. WEISS
Member

WILLIAM J. LeMAY
Chairman

Geohydrology Associates, Inc.

May 17, 1993

W. Thomas Kellahin, Esq.
P. O. Box 2265
Santa Fe, New Mexico 87501

RE: C & C LANDFARM

Dear Tom:

By FAX I am sending copies of a portion of a map prepared by Nicholson and Clebsch, which clearly shows that the C & C Landfarm facility is located well within the outcrop area of the Ogallala formation. Also listed below are four other references, all of which have mapped the site within the outcrop area of the Ogallala.

Conover, C. S. and Akin, P. D., 1942, Progress report on the ground water supply of northern Lea County, New Mexico: New Mexico State Engineer Biennial Report.

Bretz, J. H., 1949, The Ogallala formation west of the Llano Estacado: Journal of Geology.

Judson, S. S., Jr., 1950, Depressions of the northern portion of the southern High Plains of eastern New Mexico: Geological Society of America Bulletin.

Dane, C. H. and Bachman, G. O., 1965, Geologic map of New Mexico: U. S. Geological Survey and New Mexico Bureau of Mines.

Hopefully this information will be of use to you.

Sincerely,

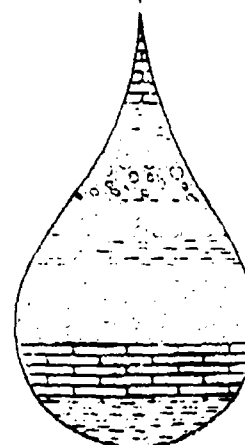
GEOHYDROLOGY ASSOCIATES, INC.

T. E. Kelly
T. E. Kelly
President

attachment

TEK/kc

EXHIBIT C TO APPLICATION
FOR REHEARING



GEOHYDROLOGY ASSOC., INC.

GROUND-WATER REPORT 6

Geology and Ground-Water
Conditions in Southern
Lea County, New Mexico

by *ALEXANDER NICHOLSON, Jr.*
and *ALFRED CLEBSCH, JR.*

UNITED STATES GEOLOGICAL SURVEY

Prepared in cooperation with the
New Mexico Institute of Mining and Technology,
State Bureau of Mines and Mineral Resources Division
and the New Mexico State Engineer

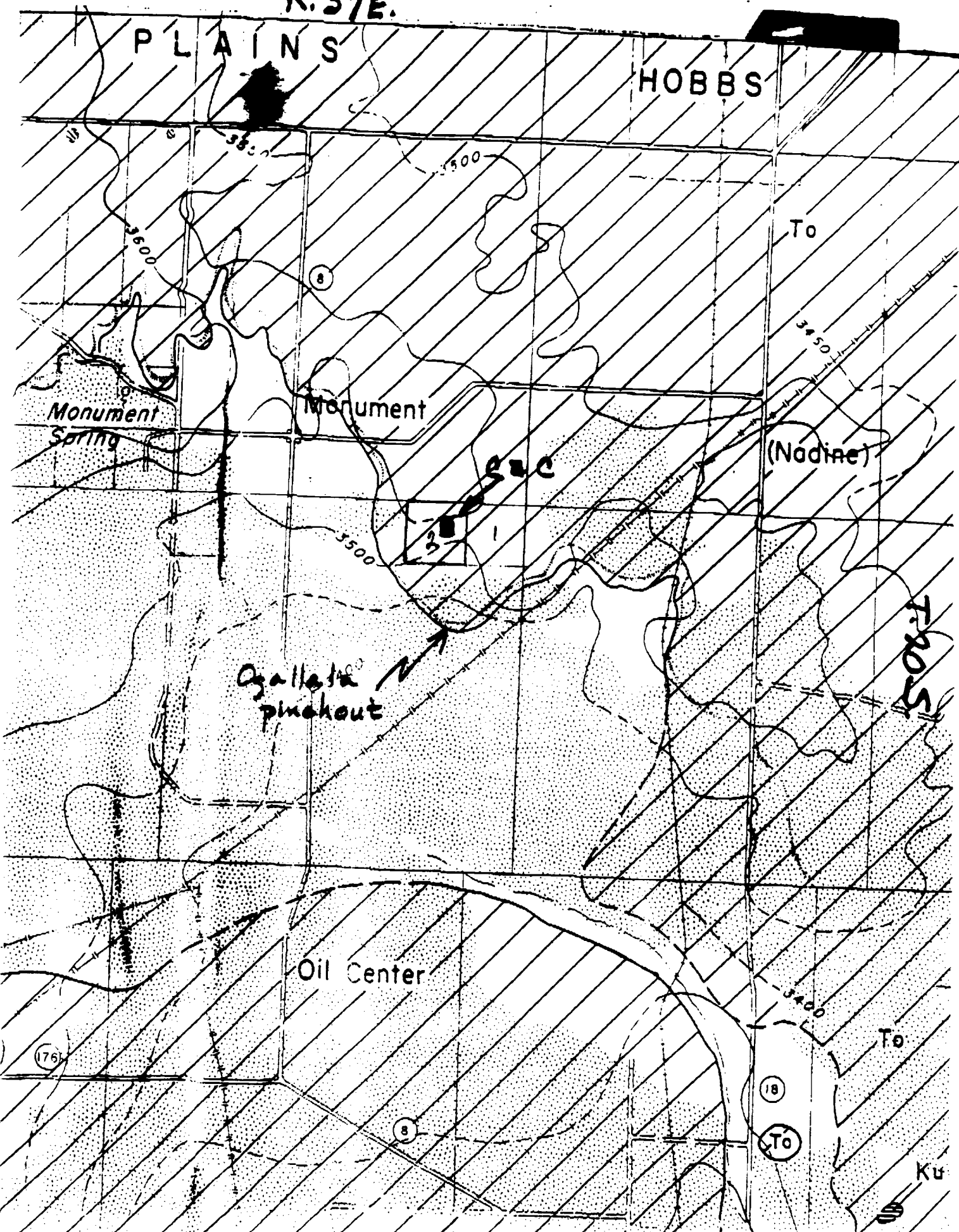
1961

STATE BUREAU OF MINES AND MINERAL RESOURCES
NEW MEXICO INSTITUTE OF MINING & TECHNOLOGY
CAMPUS STATION SOCORRO, NEW MEXICO

R. 37E.

PLAINS

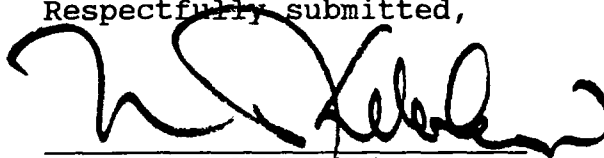
HOBBS



Petition for Review
Reeves, Stradley and S-W
Page 6

WHEREFORE, Petitioners pray that the Court review
New Mexico Oil Conservation Commission Case 10507 (DeNovo)
and Commission Order R-9769-A and hold said order
unlawful, invalid and void, and for such other and
further relief as may be proper in the premises.

Respectfully submitted,



W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285



C. GENE SAMBERSON, Esq.
P. O. Drawer 1599
Lovington, New Mexico 88260
(505) 396-5303
ATTORNEYS FOR
ELSIE M. REEVES,
W. TRENT STRADLEY AND
S-W CATTLE COMPANY

ROBERT L. LOVE & ASSOCIATES

Robert L. Love, J.D., LL.M.

Attorneys at Law

P. O. Box 1099

C. Calvin Carstens, J.D.

HOBBS, NEW MEXICO 88240

NEW MEXICO LAND DIVISION
RECEIVED
Phone
(505) 397-7461

'94 FEB 2 AM 8 35

January 31, 1994

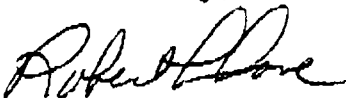
Carol Leach
 Scott Spencer
 Lyn Hebert
 New Mexico Oil Conservation Commission
 P. O. Box 2088
 Santa Fe, New Mexico 87504-2088

Re: Elsie M. Reeves, W. Trent Stradley, and S-W Cattle Company
 v. Oil Conservation of the State of New Mexico and
 C & C Landfarm, Inc.

Dear Ms. Leach, Mr. Spencer, and Ms. Hebert:

Enclosed please find a copy our Entry of Appearance for your records.

Yours truly,



Robert L. Love

RLL/tjn

Enclosure: as stated.

Post-It™ brand fax transmittal memo 7671

of pages 6

To	Bob Starall	From	Scott Spencer
Co.		Co.	
Dept.		Phone #	
Fax #		Fax #	

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY,
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No. CIV-93-247-J

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO AND
C & C LANDFARM, INC.
Respondents.

ENTRY OF APPEARANCE

NOW COMES, WILLIAM F. CARR of the firm of CAMPBELL, CARR,
BERGE & SHERIDAN, P.A., and ROBERT L. LOVE of ROBERT L. LOVE &
ASSOCIATES, and enter their appearance on behalf of C & C LANDFARM,
INC., Respondents.

William F. Carr
Campbell, Carr, Berge & Sheridan, P.A.
P. O. Box 2208
Santa Fe, New Mexico 87504
Telephone No. 505-988-4421
Attorney for Respondent,
C & C LANDFARM, INC.

and

ROBERT L. LOVE & ASSOCIATES

By Robert L. Love
ROBERT L. LOVE
P. O. Box 1099
Hobbs, New Mexico 88240
(505) 397-7461
Attorney for Respondent,
C & C LANDFARM, INC.

I hereby certify that I have mailed a copy of the foregoing Entry of Appearance to W. Thomas Kellahin of Kellahin & Kellahin and C. Gene Samberson, Attorneys for Petitioner, and to Carol Leach, Scott Spencer, and Lyn Hebert, Special Assistant Attorneys General, Attorneys for the New Mexico Oil Conservation Commission, this 31st day of January, 1994.

By 
ROBERT L. LOVE

FIFTH JUDICIAL DISTRICT
COUNTY OF LEA
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED
94 JAN 31 AM 11:14
JAMES H. HARRIS
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,

Petitioners,

vs.

CV 93-247 J
No. CIV 93-247(Fr)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.

Respondents.

APPLICATION FOR DEFAULT JUDGMENT

Petitioners hereby apply to this Court for entry of a Default Judgment against the Respondent, C & C Landfarm, Inc., barring said Respondent from appearing or otherwise participating in this case. As grounds therefor, Petitioner state:

1. This is an appeal to the District Court pursuant to the provisions of Section 70-2-25 NMSA (1978) of an order issued by the New Mexico Oil Conservation Commission ("Commission").

2. Respondent, C & C Landfarm, Inc. is a party of record in all of the proceedings before the Commission in this matter and is the applicant before the Commission having sought and obtained Commission approval for a surface waste disposal facility in Lea County New Mexico.

3. Petitioners are parties of record in all of the proceedings before the Commission in this case and are adversely affected by the Commission order.

COPY

4. Petitioners have timely and properly appeal the Commission order to this Court.

5. On November 1, 1993, and in accordance with Section 70-2-25(B) NMSA (1978), Petitioners served upon Respondent C & C Landfarm, Inc. a properly issued summons to which was attached a true copy of the "Petition for Review."

6. As of January 27, 1994, no answer has been filed by Respondent C & C Landfarm Inc and this Respondent has not otherwise appeared in this case. See District Court Clerk Certificate of Non-Appearance attached as Exhibit "A"

7. This case is now scheduled for a docket call on February 4, 1994.

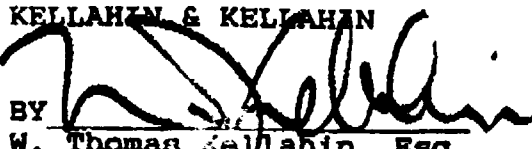
8. Section 70-2-25 NMSA (1978) requires that appeals of Commission orders to the District Court shall be "expedited to the fullest possible extent."

9. Respondent, C & C Landfarm Inc., has had a full and complete opportunity to appear in this appeal and has elected not to do so.

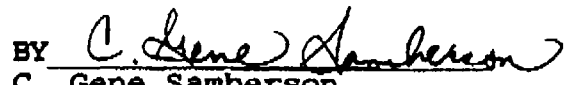
WHEREFORE, Petitioners request a Default Judgment against C & C Landfarm Inc barring said Respondent from appear in this matter or otherwise participating in this appeal.

Respectfully submitted,

KELLAHAN & KELLAHAN

BY 
W. Thomas Kellahan, Esq.
P. O. Box 2265
Santa Fe, New Mexico 87504
telephone (505) 982-4285

HEIDEL, SAMBERSON & NEWELL

BY 
C. Gene Samberson
P. O. Box 1599
Lovington, New Mexico 88260
(505) 396-5303

COPY

COPY

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,

Petitioners

vs.

OIL CONSERVATION COMMISSION OF THE
STATE OF NEW MEXICO AND C & C
LANDFARM, INC.,

Respondents

RECEIVED DISTRICT COURT
LEA COUNTY NEW MEXICO
FILED

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Janie G. Hernandez
CLERK OF THE DIST. COURT

NO. CV93-247-FR

CERTIFICATE AS TO THE STATE OF THE RECORD AND NON-APPEARANCE

I, the undersigned, Clerk of the District Court of the Fifth Judicial District of the State of New Mexico, within and for the County of Lea, do hereby certify that a Petition For Review of Decision of the Oil Conservation Commission of New Mexico in the above entitled cause was filed in my Office on the 1st day of June, 1993, that process was issued on the 1st day of June, 1993, that it appears from the return made by Gilbert A. Nielsen of Lea County, New Mexico, that the process was served on Respondent C & C Landfarm, Inc., through its NM Registered Agent, Jimmie T. Cooper, on the 1st day of November, 1993, by independent process server.

I further certify that no appearance or Answer for the said Respondent C & C Landfarm, Inc. has been filed in my Office or of record.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Court this

8th day of December, 1993.

(Seal)

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURTBy Janie G. Hernandez
Deputy

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing pleading was mailed on this 2/5 day of January 1994, to the following:

Scott D. Spencer,
Special Assistant Attorney General
Attorney for State of New Mexico
Energy, Minerals and Natural Resources Department
2040 S. Pacheco St.
Santa Fe, New Mexico 87505

C. Gene Samberson
C. Gene Samberson

COPY

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN MY OFFICE

94 FEB -1 PM 12:00

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

JANE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY,
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No. CIV-93-247-*E*

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO AND
C & C LANDFARM, INC.

Respondents.

MOTION TO SET ASIDE ENTRY OF
CERTIFICATE AS TO THE STATE OF THE RECORD AND
NON-APPEARANCE OF C & C LANDFARM, INC.
AND PERMIT FILING OF ANSWER BY C & C LANDFARM, INC.

COMES NOW, C & C LANDFARM, INC., Respondent, by and through William F. Carr of the firm of Campbell, Carr, Berge & Sheridan, P.A., and Robert L. Love of Robert L. Love & Associates, Attorneys for Respondent, and pursuant to Rule 1-055, Rules of Civil Procedure for the District Courts, moves the Court for an Order permitting filing of the Answer attached hereto as "Exhibit A" and in support of said Motion, states as follows:

1. The Petition herein was filed on the 1st day of June, 1993, and Respondent, C & C LANDFARM, INC., was not served with service of process until November 1, 1993 when J. T. Cooper, President, was served.

2. Mr. Cooper, President of the corporation, contacted the Oil Conservation Commission prior to November 5, 1993, and was advised by

representatives of the Oil Conservation Commission in a telephone conference that the document pertained to the Application for Rehearing filed on May 18, 1993 and that no action was necessary by C & C LANDFARM, INC., Respondent herein.

3. Based upon said conversation with the Oil Conservation Commission, the Respondent, C & C LANDFARM, INC., took no further action in this matter.

4. Petitioners have taken no action other than entry of a Certificate as to the State of the Record and Non-Appearance showing the default of Respondent, C & C LANDFARM, INC., on December 8, 1993.

5. The Court has not entered a Judgment of Default or taken any further action on this matter or entered any orders herein.

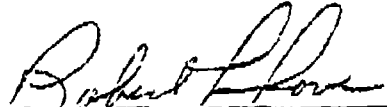
6. C & C LANDFARM, INC. should be permitted to file the Answer attached hereto as "Exhibit A" in order to permit a full and fair adjudication upon the facts alleged in the Petition for Review of Decision of the Oil Conservation Commission of New Mexico.

WHEREFORE, C & C LANDFARM, INC., Respondent, prays the Court for an Order permitting filing of the Answer attached hereto as Exhibit "A", and setting aside the Certificate as to the State of the Record of Non-Appearance filed on the 8th day of December, 1993, showing the default of C & C LANDFARM, INC., Respondent.

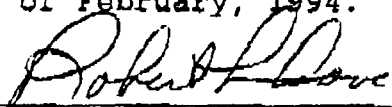
William F. Carr
Campbell, Carr, Berge & Sheridan, P.A.
P. O. Box 2208
Santa Fe, New Mexico 87504
Telephone No. 505-988-4421
Attorney for Respondent,
C & C LANDFARM, INC.

and

ROBERT L. LOVE & ASSOCIATES

By 
ROBERT L. LOVE
P. O. Box 1099
Hobbs, New Mexico 88240
(505) 397-7461
Attorney for Respondent,
C & C LANDFARM, INC.

I hereby certify that I have mailed a copy of the foregoing Motion to Set Aside Entry of Certificate as to the State of the Record and Non-Appearence of C & C LANDFARM, INC. to W. Thomas Kellahin of Kellahin & Kellahin and C. Gene Samberson, Attorneys for Petitioner, and to Carol Leach, Scott Spencer, and Lyn Hebert, Special Assistant Attorneys General, Attorneys for the New Mexico Oil Conservation Commission, this 1st day of February, 1994.

By 
ROBERT L. LOVE

State of New Mexico
ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT
Santa Fe, New Mexico 87505



January 31, 1994



BRUCE KING
GOVERNOR

ANITA LOCKWOOD
CABINET SECRETARY

Honorable Larry Johnson
District Judge
P.O. Box 2585
Hobbs, NM 88241

Re: Reeves v. Oil Conservation Commission,
Lea County No. 05-06 CV-93-0000247 Docket Call

Dear Judge Johnson:

I am attorney of record for the Oil Conservation Commission. Bob Stovall, another attorney with our department, has discussed the case with Mr. Gene Samberson, attorney for the plaintiffs. It is my understanding that Mr. Samberson has agreed to represent the case before you at the docket call on February 4, 1994. Because we are up to our necks in legislators here in Santa Fe, I was not planning to attend the docket call. This is an appeal from a Commission decision based upon the record. The parties will submit a briefing and oral argument schedule for your approval. There will be no need for a trial. Thank you for your consideration. Please have your clerk let me know if my absence will create a problem.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott D. Spencer".

Scott D. Spencer
Deputy General Counsel

SDS:dz

cc: Bob Stovall
Gene Samberson
Thomas Kellahin
William Carr

VILLAGRA BUILDING - 408 Galisteo
Forestry and Resources Conservation Division
P.O. Box 1948 87504-1948
827-5830
Park and Recreation Division
P.O. Box 1147 87504-1147
827-7465

2040 South Pacheco
Office of the Secretary
827-5950
Administrative Services
827-5925
Energy Conservation & Management
827-5900
Mining and Minerals
827-5970

LAND OFFICE BUILDING - 310 Old Santa Fe Trail
Oil Conservation Division
P.O. Box 2088 87504-2088
827-5800



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



CERTIFIED - RETURN RECEIPT

BRUCE KING
GOVERNOR

ANITA LOCKWOOD
CABINET SECRETARY

January 26, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

Mr. Jimmie T. Cooper
C&C Landfarm, Inc.
Box 55
Monument, NM 88265

Re: Reeves v. OCC & C&C Landfarm, Inc.
Lea County District Court
Case CV 93-247

Dear Mr. Cooper:

Elsie Reeves, Trent Stradling and S-W Cattle Company have filed in the above case a petition for review of the Oil Conservation Commission order which approved your permit to operate a land farm in Lea County. You were served with a summons in that appeal in November of 1993.

The Commission filed its response on June 24, 1993. As of this date you have not filed a response to the petition. Apparently you have not even contacted Mr. Carr, or anyone else, to represent you in the case.

C&C Landfarm, Inc., is the real party in interest in this case. If you do not respond to the petition, the Commission will not spend its time and resources to defend the decision. The District Court has set a docket call for February 4, 1994 in Lovington. **You must enter an appearance through counsel and respond to the petition by that date, and your attorney must appear at the docket call, or the Commission will advise the Court that it does not intend to further participate in the proceeding.**

If you do not act, it is likely that the Court will reversing the Commission order, in which case your permit will be withdrawn, and you will be required to close the landfarm. Therefore it is very important that you participate in this case.

If you retain an attorney, please have him contact the Division immediately.

Sincerely,

Robert G. Stovall,
Division Counsel

xc: W. Thomas Kellahin, Esq.
C. Gene Samberson, Esq.
William F. Carr, Esq.

PGM ID-DSPDOC

"DISTRICT V, THE COUNTY OF LEA"

PAGE 1

DATE 1/20/94

CASE#: 05 06 CV-CV-93-0000247

TIME 15:22

TYPE: CIVIL

STATUS: PENDING

REEVES, ELSIE M. VS. OIL CONSERVATION

-----JUDGE-----

--PARTY #--

CURRENT: JOHNSON, LARRY

RECU 1/20/94: FRANCOEUR, PATRICK J.

000

-----ATTORNEYS-----

PL 001: REEVES, ELSIE M.

KELLAHIN, W. THOMAS

SAMBERSON, C. GENE

PL 002: STRADLEY, TRENT

KELLAHIN, W. THOMAS

SAMBERSON, C. GENE

PL 003: S-W CATTLE COMPANY

KELLAHIN, W. THOMAS

SAMBERSON, C. GENE

VS.

DF 004: OIL CONSERVATION COMMISSION, STAT SPENCER, SCOTT D.

DF 005: C & C LANDFARM INC

NONE

ISSUES

ISSUE 1: CV OTHER-CIVIL

CV

C1-04-10

MAJOR EVENTS

6/01/93 PETITION

Post-It™ brand fax transmittal memo 7671		# of pages > 3
To Bob Stovall	From Scott Spencer	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	

CHERRI 000

6/24/93 RESPONSE

CONNIE 000

6/24/93 RESPONSE

CHERRI 004

1/10/94 JUDGE RECUS

CONNIE 000

1/20/94 JUDGE ASSIGNMENT

CONNIE 000

FILING DATE	EVENT	COMMENT	EVENT DATE	ENTRY PERSON/PARTY
6/01/93	PETITION			CHERRI 000
	EVENT JUDGE: FRANCOEUR, PATRICK J.			
		for Review of Decision of the Oil Conservation Commission of New Mexico - Kellahin & Samberson		
6/01/93	SUMMONS ISSUED			CHERRI 000
	(3) issued			
6/21/93	ENTRY OF APPEARANCE			DEBRA 000
		SCOTT D. SPENCER, for Energy, Minerals and Natural Res.		
6/24/93	RESPONSE			CONNIE 000
		of Respondent Oil Conservation Commission of New Mexico to Petition for Review - Spencer		
6/24/93	RESPONSE			CHERRI 004
11/02/93	RETURN OF SERVICE			DEBRA 000

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN BY OFFICE

91 JAN 20 PM 3:28

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

REEVES, ELSIE M.
ET AL,

PLAINTIFFS,

VS.

OIL CONSERVATION COMMISSION, STATE OF NM
ET AL,

NO. CV-CV-93-0000247

DEFENDANTS.

NOTICE OF JUDGE ASSIGNMENT

Please be advised that the HONORABLE PATRICK J. FRANCOEUR, having been RECUSAL in the above matter, the case has been reassigned to the HONORABLE LARRY JOHNSON, District Judge, FIFTH Judicial District.

JANIE G. HERNANDEZ
Clerk of the District Court

By: Connie Garcia
Deputy

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel on this day, January 20, 1994.

JANIE G. HERNANDEZ
Clerk of the District Court

By: Connie Garcia
Deputy

scd

SCOTT D. SPENCER
1201 Calle Luna
Santa Fe, NM 08750-10000

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN MY OFFICE

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

94 JAN 28 PM 2:58

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,

Petitioners,

vs.

NO. CV93-247-J

OIL CONSERVATION COMMISSION OF THE
STATE OF NEW MEXICO and C & C
LANDFARM, INC.,

Respondents.


NOTICE OF EXCUSAL

The undersigned hereby notifies the court that she is exercising her right to excuse the Honorable Larry Johnson from presiding over the above captioned case.

DATED January 28, 1994.


ELSIE M. REEVES, Petitioner

I hereby certify that a true and correct copy of the above and foregoing was mailed on the 28 th day of January, 1994, to the following: W. Thomas Kellahin, Esq., of Kellahin & Kellahin, Attorneys for Petitioners, P.O. Box 2265, Santa Fe, NM 87504; C. Gene Samberson, Esq., of Heidel, Samberson, Newell & Cox, Attorneys for Petitioners, P.O. Drawer 1599, Lovington, NM 88260; and Scott D. Spencer, Special Assistant Attorney General, Attorney for State of New Mexico, Energy, Minerals and Natural Resources Department, 2040 South Pacheco Street, Santa Fe, NM 87505.


ELSIE M. REEVES, Petitioner

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN MY OFFICE

94 FEB -1 AM 9:34

REEVES, ELSIE M.
ET AL,

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

PLAINTIFFS,

VS.

OIL CONSERVATION COMMISSION, STATE OF NM
ET AL,

NO. CV-CV-93-0000247

DEFENDANTS.

NOTICE OF JUDGE ASSIGNMENT

Please be advised that the HONORABLE LARRY
JOHNSON, having been disqualified/recused himself in the above
matter, the case has been reassigned to the HONORABLE RALPH W.
GALLINI, District Judge, FIFTH Judicial District.

JANIE G. HERNANDEZ
Clerk of the District Court

By:

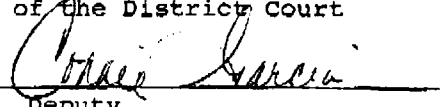

Deputy

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing
was mailed to counsel on this day, February 1, 1994.

JANIE G. HERNANDEZ
Clerk of the District Court

By:


Deputy

SCOTT D. SPENCER
1201 Calle Luna
Santa Fe, NM 0875010000

Post-It™ brand fax transmittal memo 7671		# of pages > 2
To	Bob Stovall	From Scott Spencer
Co.		Co.
Dept.		Phone #

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN CLERK'S OFFICE

94 FEB -1 PM 12:00

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

JANE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY,
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No. CIV-93-247-XG

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO AND
C & C LANDFARM, INC.
Respondents.

NOTICE OF HEARING

The above matter will be heard before the District Judge at
the Lea County Courthouse at Lovington, New Mexico at 9:00
o'clock a.m. on the 17th day of March, 1994, for
hearing on a Motion to Set Aside Entry of Certificate of Default
and Permit Filing of An Answer by C&C Landfarm, Inc.

William F. Carr
Campbell, Carr, Berge & Sheridan, P.A.
P. O. Box 2208
Santa Fe, New Mexico 87504
Telephone No. 505-988-4421
Attorney for Respondent,
C & C LANDFARM, INC.

and

ROBERT L. LOVE & ASSOCIATES

ORIGINAL SIGNED BY

ROBERT L. LOVE

By

ROBERT L. LOVE
P. O. Box 1099
Hobbs, New Mexico 88240
(505) 397-7461
Attorney for Respondent,
C & C LANDFARM, INC.

I hereby certify that I have mailed a copy of the foregoing Notice of Hearing to W. Thomas Kellahin of Kellahin & Kellahin and C. Gene Samberson, Attorneys for Petitioner, and to Carol Leach, Scott Spencer, and Lyn Hebert, Special Assistant Attorneys General, Attorneys for the New Mexico Oil Conservation Commission, this _____ day of February, 1994.

By _____
ROBERT L. LOVE

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY,
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No. CIV-93-247-J

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO AND
C & C LANDFARM, INC.
Respondents.

ANSWER TO PETITION FOR REVIEW OF DECISION
OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO

COMES NOW, C & C LANDFARM, INC., Respondent, by and through their attorneys of record, William F. Carr of the firm of Campbell, Carr, Berge & Sheridan, P. A., Santa Fe, New Mexico, and Robert L. Love of Robert L. Love & Associates, Hobbs, New Mexico, and for its Answer to Petition for Review of Decision of the Oil Conservation Commission of New Mexico, states as follows:

1. Admits that W. TRENT STRADLEY is a property owner in the affected area and that ELSIE REEVES and S-W CATTLE COMPANY are parties of record in the proceedings before the Commission and is without sufficient information to admit or deny the remaining allegations of Paragraph 1 and therefore denies the same.

2. Admits the allegations contained in Paragraphs 2, 3, 4, 5, and 7 of said Petition for Review of Decision of the Oil Conservation Commission of New Mexico.

3. Respondent, C & C LANDFARM, INC., denies the allegations contained in Paragraphs 6 and 8 of the Petition for Review of Decision of the Oil Conservation Commission of New Mexico.

4. Respondent, C & C LANDFARM, INC., denies the allegations contained in the Application for Rehearing by ELSIE REEVES and W. TRENT STRADLEY in Case No. 10507 (De Novo), Order No. R-9769-A, State of New Mexico, Energy, Minerals, and Natural Resources Department, Oil Conservation Commission.

WHEREFORE, C & C LANDFARM, INC., Respondent, prays the Court deny the relief requested by Petitioners herein and affirm the Order of the Oil Conservation Commission, for its attorneys' fees and costs expended herein and for such other and further relief as the Court may deem just and proper.

William F. Carr
Campbell, Carr, Berge & Sheridan, P.A.
P. O. Box 2208
Santa Fe, New Mexico 87504
Telephone No. 505-988-4421
Attorney for Respondent,
C & C LANDFARM, INC.

and

ROBERT L. LOVE & ASSOCIATES

By



ROBERT L. LOVE
P. O. Box 1099
Hobbs, New Mexico 88240
(505) 397-7461
Attorney for Respondent,
C & C LANDFARM, INC.

VERIFICATION

STATE OF NEW MEXICO)) ss
COUNTY OF LEA)

I, EDDIE W. SEAY, being duly sworn upon oath, do hereby depose and state that I have read the foregoing Answer to Petition for Review of Decision of the Oil Conservation Commission of New Mexico, find that the statements contained therein to be true and correct to the best of my knowledge, and hereby verify the same.

C & C LANDFARM, INC.

BY Eddie W. Seay
EDDIE W. SEAY, Vice President

SUBSCRIBED AND SWORN TO before me this 31st day of January, 1994, by EDDIE W. SEAY, Vice President of C & C LANDFARM, INC., a New Mexico corporation, duly authorized and acting on behalf of said corporation.

L. Thorne
NOTARY PUBLIC

My Commission Expires:

September 26, 1995

I hereby certify that I have mailed a copy of the foregoing Answer to Petition for Review of Decision of New Mexico Oil Conservation Commission to W. Thomas Kellahin of Kellahin & Kellahin and to C. Gene Samberson, Attorneys for Petitioner, and to Carol Leach, Scott Spencer, and Lyn Hebert, Special Assistant Attorneys General, Attorneys for the New Mexico Oil Conservation Commission, this _____ day of February, 1994.

By _____

ROBERT L. LOVE



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



CERTIFIED - RETURN RECEIPT

BRUCE KING
GOVERNOR

ANITA LOCKWOOD
CABINET SECRETARY

January 26, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

Mr. Jimmie T. Cooper
C&C Landfarm, Inc.
Box 55
Monument, NM 88265

Re: Reeves v. OCC & C&C Landfarm, Inc.
Lea County District Court
Case CV 93-247

Dear Mr. Cooper:

Elsie Reeves, Trent Stradling and S-W Cattle Company have filed in the above case a petition for review of the Oil Conservation Commission order which approved your permit to operate a land farm in Lea County. You were served with a summons in that appeal in November of 1993.

The Commission filed its response on June 24, 1993. As of this date you have not filed a response to the petition. Apparently you have not even contacted Mr. Carr, or anyone else, to represent you in the case.

C&C Landfarm, Inc., is the real party in interest in this case. If you do not respond to the petition, the Commission will not spend its time and resources to defend the decision. The District Court has set a docket call for February 4, 1994 in Lovington. **You must enter an appearance through counsel and respond to the petition by that date, and your attorney must appear at the docket call, or the Commission will advise the Court that it does not intend to further participate in the proceeding.**

If you do not act, it is likely that the Court will reversing the Commission order, in which case your permit will be withdrawn, and you will be required to close the landfarm. Therefore it is very important that you participate in this case.

If you retain an attorney, please have him contact the Division immediately.

Sincerely,

Robert G. Stovall,
Division Counsel

xc: W. Thomas Kellahin, Esq.
C. Gene Samberson, Esq.
William F. Carr, Esq.

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery (Extra charge)

3. Article Addressed to:
Mr. Jimmie T. Cooper
C&C Landfarm Inc
Box 55
Monument, N.M. 88265

4. Article Number
P918 402 095

Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Address
X

6. Signature - Agent
X

7. Date of Delivery
1-30-94

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Mar. 1988

* U.S.G.P.O. 1988-212-865

DOMESTIC RETURN RECEIPT

P 918 402 095

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, June 1985

Sent to
Jimmie C. Cooper C&C

Street and No.
Box 55 Landfarm

P.O. State and ZIP Code
Monument, N.M. 88265

Postage	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	
Postmark or Date	

FAX TRANSMITTAL SHEET
OIL CONSERVATION DIVISION - FAX NO. (505) 827-5741

TO: Scott Spencer

FR: Randy Carroll

PAGES w/cover:

2

DATE:

6/20/94

FYI

If there are any problems with this transmission, please call (505) 827-5806.

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED IN MY OFFICE

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

94 JUN 16 AM 11:03

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents,

**ORDER SUBSTITUTING COUNSEL OF RECORD AND ALLOWING WITHDRAWAL
OF COUNSEL**

Upon the Motion For Substitution of Counsel and Application for Withdrawal of Counsel filed by Scott D. Spencer, Attorney for the OIL CONSERVATION COMMISSION, and the Entry of Appearance filed by Rand Carroll as Attorney for the OIL CONSERVATION COMMISSION, IT IS HEREBY ORDERED that Scott D. Spencer is withdrawn and Rand Carroll is substituted as counsel of record for the Respondent OIL CONSERVATION COMMISSION. The official service list shall be amended accordingly.

IT IS SO ORDERED


R.W. GALLINI, District Judge



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



BRUCE KING
GOVERNOR

June 3, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

ANITA LOCKWOOD
CABINET SECRETARY

Janie Hernandez, Clerk
Division III, IV and VII - Lea County
100 N. Main, Box 6-C
Lea County Courthouse
Lovington, New Mexico 88260

Re: Reeves et al. vs. Oil Conservation Commission of the State of New Mexico, et al.
No. CV 93-247-G

Dear Ms. Hernandez:

Enclosed are originals and two copies of: (1) an Entry of Appearance for Rand Carroll as counsel for the Oil Conservation Commission; and (2) a Motion for Substitution of Counsel and Application for Withdrawal of Counsel by Scott D. Spencer with an accompanying draft order. Please file these pleadings on behalf of the Oil Conservation Commission and send me file-stamped copies in the enclosed self-addressed, stamped envelope. Thank you for your help in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Rand Carroll".

Rand Carroll
Special Assistant Attorney General
Oil Conservation Commission

Encl.

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

94 JUN 16 AM 11:03

JANIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

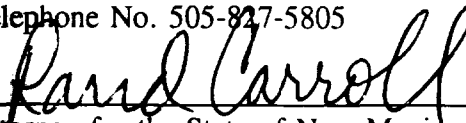
No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents.

ENTRY OF APPEARANCE

Now comes RAND CARROLL, Special Assistant Attorney General, who enters his appearance on behalf of the NEW MEXICO OIL CONSERVATION COMMISSION, Respondents.

Rand Carroll
Special Assistant Attorney General
Energy, Minerals & Natural Resources Department
State of New Mexico
P.O.Box 2088
Santa Fe, NM 87504
Telephone No. 505-827-5805



Attorney for the State of New Mexico
Oil Conservation Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.

Scott D. Spencer by Paul Carroll
Scott D. Spencer

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED

94 JUN 16 AM 11:03

JANE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

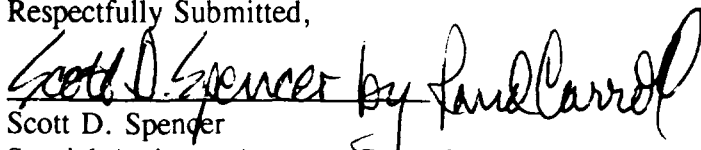
No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents,

**MOTION FOR SUBSTITUTION OF COUNSEL AND AND APPLICATION FOR
WITHDRAWAL OF COUNSEL**

Comes now Scott D. Spencer, Special Assistant Attorney General, and moves the Court for an Order substituting Rand Carroll, Special Assistant Attorney General, as counsel of record for Respondent OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and allowing the withdrawal of Scott D. Spencer as counsel of record for the OIL CONSERVATION COMMISSION.

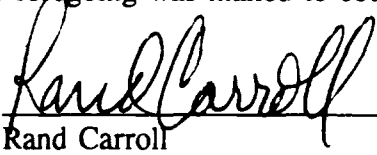
Respectfully Submitted,


Scott D. Spencer

Special Assistant Attorney General
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.


Rand Carroll



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



BRUCE KING
GOVERNOR

June 3, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE NEW MEXICO 87504
(505) 827-5800

ANITA LOCKWOOD
CABINET SECRETARY

Janie Hernandez, Clerk
Division III, IV and VII - Lea County
100 N. Main, Box 6-C
Lea County Courthouse
Lovington, New Mexico 88260

Re: Reeves et al. vs. Oil Conservation Commission of the State of New Mexico, et al.
No. CV 93-247-G

Dear Ms. Hernandez:

Enclosed are originals and two copies of: (1) an Entry of Appearance for Rand Carroll as counsel for the Oil Conservation Commission; and (2) a Motion for Substitution of Counsel and Application for Withdrawal of Counsel by Scott D. Spencer with an accompanying draft order. Please file these pleadings on behalf of the Oil Conservation Commission and send me file-stamped copies in the enclosed self-addressed, stamped envelope. Thank you for your help in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Rand Carroll".

Rand Carroll
Special Assistant Attorney General
Oil Conservation Commission

Encl.

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED

94 JUN 16 AM 11:03

JAMIE C. HERNANDEZ
CLERK OF THE DISTRICT COURT

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents.

ENTRY OF APPEARANCE

Now comes RAND CARROLL, Special Assistant Attorney General, who enters his appearance on behalf of the NEW MEXICO OIL CONSERVATION COMMISSION, Respondents.

Rand Carroll
Special Assistant Attorney General
Energy, Minerals & Natural Resources Department
State of New Mexico
P.O.Box 2088
Santa Fe, NM 87504
Telephone No. 505-827-5805



Attorney for the State of New Mexico
Oil Conservation Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.

Scott D. Spencer by Paul Carrol
Scott D. Spencer

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED

94 JUN 16 AM 11:03

JAMIE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

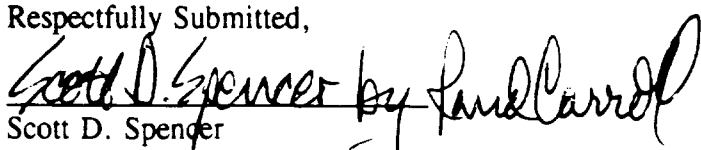
No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents,

**MOTION FOR SUBSTITUTION OF COUNSEL AND AND APPLICATION FOR
WITHDRAWAL OF COUNSEL**

Comes now Scott D. Spencer, Special Assistant Attorney General, and moves the Court for an Order substituting Rand Carroll, Special Assistant Attorney General, as counsel of record for Respondent OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and allowing the withdrawal of Scott D. Spencer as counsel of record for the OIL CONSERVATION COMMISSION.

Respectfully Submitted,


Scott D. Spencer

Special Assistant Attorney General
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.


Rand Carroll

FIFTH JUDICIAL DISTRICT
LEA COUNTY
FILED

94 JUN 16 AM 11:03

JANE G. HERNANDEZ
CLERK OF THE DISTRICT COURT

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
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No. CV-93-247-G

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C&C LANDFARM, INC.
Respondents,

**ORDER SUBSTITUTING COUNSEL OF RECORD AND ALLOWING WITHDRAWAL
OF COUNSEL**

Upon the Motion For Substitution of Counsel and Application for Withdrawal of Counsel filed by Scott D. Spencer, Attorney for the OIL CONSERVATION COMMISSION, and the Entry of Appearance filed by Rand Carroll as Attorney for the OIL CONSERVATION COMMISSION, IT IS HEREBY ORDERED that Scott D. Spencer is withdrawn and Rand Carroll is substituted as counsel of record for the Respondent OIL CONSERVATION COMMISSION. The official service list shall be amended accordingly.

IT IS SO ORDERED

P. W. GALLINI

R.W. GALLINI, District Judge

FIFTH JUDICIAL DISTRICT
LEA COUNTY
FILED

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

94 JUN 16 AM 11:03

JANE G. FERNANDEZ
CLERK OF THE DISTRICT COURT

ELSIE M. REEVES, W. TRENT STRADLEY
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vs.

No. CV-93-247-G

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IT IS SO ORDERED


R.W. GALLINI, District Judge

SERVICE LIST
REEVES, ET AL. VS. OIL CONSERVATION COMMISSION
NO. CV-93-247-G

W. Thomas Kellahin, Esq.
KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, NM 87504

Scott D. Spencer, Esq.
Special Assistant Attorney General
Energy, Minerals & Natural Resources
Department
2040 S. Pacheco Street
Santa Fe, NM 87505

Robert L. Love, Esq.
P.O. Box 1099
Hobbs, NM 88240

C. Gene Samberson, Esq.
HEIDEL, SAMBERSON & NEWELL
P.O. Drawer 1599
Lovington, NM 88260

William F. Carr, Esq.
CAMPBELL, CARR, BERGE & SHERIDAN, P.A.
P.O. Box 2208
Santa Fe, NM 87504



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



BRUCE KING
GOVERNOR

June 3, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

ANITA LOCKWOOD
CABINET SECRETARY

Janie Hernandez, Clerk
Division III, IV and VII - Lea County
100 N. Main, Box 6-C
Lea County Courthouse
Lovington, New Mexico 88260

Re: Reeves et al. vs. Oil Conservation Commission of the State of New Mexico, et al.
No. CV 93-247-G

Dear Ms. Hernandez:

Enclosed are originals and two copies of: (1) an Entry of Appearance for Rand Carroll as counsel for the Oil Conservation Commission; and (2) a Motion for Substitution of Counsel and Application for Withdrawal of Counsel by Scott D. Spencer with an accompanying draft order. Please file these pleadings on behalf of the Oil Conservation Commission and send me file-stamped copies in the enclosed self-addressed, stamped envelope. Thank you for your help in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Rand Carroll".

Rand Carroll
Special Assistant Attorney General
Oil Conservation Commission

Encl.

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

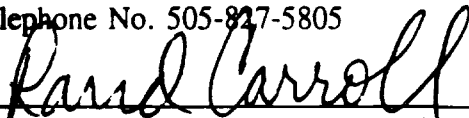
No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents.

ENTRY OF APPEARANCE

Now comes RAND CARROLL, Special Assistant Attorney General, who enters his appearance on behalf of the NEW MEXICO OIL CONSERVATION COMMISSION, Respondents.

Rand Carroll
Special Assistant Attorney General
Energy, Minerals & Natural Resources Department
State of New Mexico
P.O.Box 2088
Santa Fe, NM 87504
Telephone No. 505-827-5805



Attorney for the State of New Mexico
Oil Conservation Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.

Scott D. Spencer by Paul Carroll
Scott D. Spencer

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

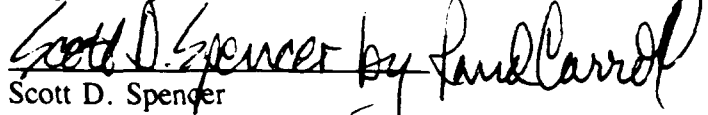
No. CV-93-247-G

OIL CONSERVATION COMMISSION
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Comes now Scott D. Spencer, Special Assistant Attorney General, and moves the Court for an Order substituting Rand Carroll, Special Assistant Attorney General, as counsel of record for Respondent OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and allowing the withdrawal of Scott D. Spencer as counsel of record for the OIL CONSERVATION COMMISSION.

Respectfully Submitted,



Scott D. Spencer
Special Assistant Attorney General
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-5950

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on this 13th day of June, 1994.


Rand Carroll

IN THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,
Petitioners,

vs.

No. CV-93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.
Respondents,

**ORDER SUBSTITUTING COUNSEL OF RECORD AND ALLOWING WITHDRAWAL
OF COUNSEL**

Upon the Motion For Substitution of Counsel and Application for Withdrawal of Counsel filed by Scott D. Spencer, Attorney for the OIL CONSERVATION COMMISSION, and the Entry of Appearance filed by Rand Carroll as Attorney for the OIL CONSERVATION COMMISSION, IT IS HEREBY ORDERED that Scott D. Spencer is withdrawn and Rand Carroll is substituted as counsel of record for the Respondent OIL CONSERVATION COMMISSION. The official service list shall be amended accordingly.

IT IS SO ORDERED

R.W. GALLINI, District Judge

SERVICE LIST
REEVES, ET AL. VS. OIL CONSERVATION COMMISSION
NO. CV-93-247-G

W. Thomas Kellahin, Esq.
KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, NM 87504

Scott D. Spencer, Esq.
Special Assistant Attorney General
Energy, Minerals & Natural Resources
Department
2040 S. Pacheco Street
Santa Fe, NM 87505

Robert L. Love, Esq.
P.O. Box 1099
Hobbs, NM 88240

C. Gene Samberson, Esq.
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P.O. Drawer 1599
Lovington, NM 88260

William F. Carr, Esq.
CAMPBELL, CARR, BERGE & SHERIDAN, P.A.
P.O. Box 2208
Santa Fe, NM 87504

CdC
~~Landfarm~~

Docket Call, in
Hobbs/Houghton

Entering appearances
Week from tomorrow

Memo

From

WILLIAM LEMAY
Director

Rand - Commission
by A.G. - Scott -
Spencer will
submit new draft
letter.
Auntie says No - Potash
Reeve Case
March 17th
Longfellow



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



CERTIFIED - RETURN RECEIPT

BRUCE KING
GOVERNOR

ANITA LOCKWOOD
CABINET SECRETARY

January 26, 1994

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

Mr. Jimmie T. Cooper
C&C Landfarm, Inc.
Box 55
Monument, NM 88265

Re: Reeves v. OCC & C&C Landfarm, Inc.
Lea County District Court
Case CV 93-247

Dear Mr. Cooper:

Elsie Reeves, Trent Stradling and S-W Cattle Company have filed in the above case a petition for review of the Oil Conservation Commission order which approved your permit to operate a land farm in Lea County. You were served with a summons in that appeal in November of 1993.

The Commission filed its response on June 24, 1993. As of this date you have not filed a response to the petition. Apparently you have not even contacted Mr. Carr, or anyone else, to represent you in the case.

C&C Landfarm, Inc., is the real party in interest in this case. If you do not respond to the petition, the Commission will not spend its time and resources to defend the decision. The District Court has set a docket call for February 4, 1994 in Lovington. You must enter an appearance through counsel and respond to the petition by that date, and your attorney must appear at the docket call, or the Commission will advise the Court that it does not intend to further participate in the proceeding.

If you do not act, it is likely that the Court will reversing the Commission order, in which case your permit will be withdrawn, and you will be required to close the landfarm. Therefore it is very important that you participate in this case.

If you retain an attorney, please have him contact the Division immediately.

Sincerely,

Robert G. Stovall,
Division Counsel

xc: W. Thomas Kellahin, Esq.
C. Gene Samberson, Esq.
William F. Carr, Esq.



TOM UDALL
Attorney General

Attorney General of New Mexico

PO Drawer 1508
Santa Fe, New Mexico 87504-1508

505 827-6000
Fax 505 827-5826

MANUEL TIJERINA
MARIAN MATTHEWS
Deputy Attorneys General

May 16, 1994

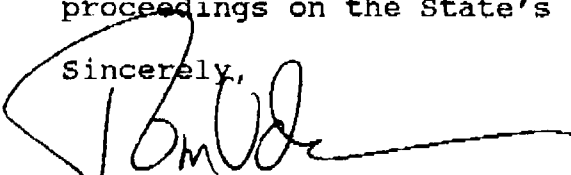
Via Fax: 827-5741

Rand Carroll
Energy, Minerals and Natural
Resources Department
Oil Conservation Division
PO Box 2088
Santa Fe, NM 87504-5800

Dear Mr. Carroll:

Effective immediately, I appoint you Special Assistant Attorney General for the express and limited purpose of representing the Oil Conservation Division in proceedings which it is a party. This commission and title should be used only in connection with your representation of the Oil Conservation Division and for no other purpose. We request that you advise Letty Belin, director of the Environmental Enforcement Division, of any unusual or significant litigation you do pursuant to your commission. Please consult with Ms. Belin before initiating any non-routine proceedings on the State's behalf.

Sincerely,


Tom Udall
Attorney General

TU/br

cc: Anita Lockwood, Secretary
Carol Leach, General Counsel
Letty Belin
Daryl Schwebach



TOM UDALL
Attorney General

Attorney General of New Mexico

PO Drawer 1508
Santa Fe, New Mexico 87504-1508

505/827-6000
Fax 505/827-5826

MANUEL TIJERINA
MARIAN MATTHEWS
Deputy Attorneys General

DATE: 5-16-94

TO: Rand Carroll

TELEPHONE NO. _____

FACSIMILE NO. 827-5741

FROM: Barbara Rivera

TELEPHONE NO. 827-6000

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE: 2

MESSAGE: _____

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

State of New Mexico
Energy, Minerals and Natural Resources
Office of the Secretary
Santa Fe, New Mexico 87505

Fax Cover SheetDate: 5/11

To:

<u>PLAND</u>	From: <u>SCOT</u>
Company:	Division: OFS
Telephone:	Telephone: (505) 827-5950
Fax No.:	Fax No.: (505) 438-3855
Number of Pages <u>3</u> (including cover sheet)	

MESSAGE: PLAND - THE AG SHOULD BE ISSUING YOUR COMMISSION
SOON - WHEN THAT HAPPENS, PLEASE GETEN YOUR
APPEARANCE & HANDLE THIS HEARING. I'LL SEND
YOU THE FILE WHEN YOU GET BACK.

Original will be sent by mail yes no

the docket call or arrange to be represented there by another attorney. The trial attorney or his representative shall know the dates the trial attorney, client, or witnesses are unavailable; the status of discovery and the estimated length of trial.

This requirement applies to all resident as well as out-of county attorneys. Opposing counsel may serve as a representative.

Attorneys are requested to notify the District Court Clerk's office at least one week prior to docket call of cases settled or tried, and cases presently set for trial; stayed by bankruptcy; or cases at issue omitted from your list.

Patrick J. Francoeur
JUDGE PATRICK J. FRANCOEUR

R. W. Gallini
JUDGE R. W. GALLINI

Larry Johnson
JUDGE LARRY JOHNSON

NEXT DOCKET CALL AUGUST 12, 1994.

PGM ID-DSFDOC
DATE 4/18/94

"DISTRICT V, THE COUNTY OF LEA"
CASE#: 05 06 CV-CV-93-0000247

PAGE 1
TIME 10:28

E: CIVIL STATUS: PENDING
REEVES, ELSIE M. VS. OIL CONSERVATION

-----JUDGE-----
CURRENT: GALLINI, RALPH W.
RECU 1/20/94: FRANCOEUR, PATRICK J.
EXCU 2/01/94: JOHNSON, LARRY

---PARTY #---

000
000

-----ATTORNEYS-----

PL 001: REEVES, ELSIE M.

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

PL 002: STRADLEY, TRENT

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

PL 003: S-W CATTLE COMPANY

KELLAHIN, W. THOMAS
SAMBERSON, C. GENE

VS.

DF 004: OIL CONSERVATION COMMISSION, STAT SPENCER, SCOTT D.

DF 005: C & C LANDFARM INC

LOVE, ROBERT L.
CARR, WILLIAM F.

ISSUES

ISSUE 1: CV OTHER-CIVIL

CV C1-04-10

MAJOR EVENTS

01/93 PETITION	CHERRI	000
6/24/93 RESPONSE	CONNIE	000
6/24/93 RESPONSE	CHERRI	004
1/10/94 JUDGE RECUSED	CONNIE	000
1/20/94 JUDGE ASSIGNMENT	CONNIE	000
1/28/94 JUDGE EXCUSE/DISQUAL	CONNIE	000
2/01/94 JUDGE ASSIGNMENT	CONNIE	000
3/07/94 RESPONSE	CONNIE	000
3/17/94 RESPONSE	CONNIE	000

FILING DATE	EVENT	COMMENT	PROCEEDINGS EVENT DATE	ENTRY PERSON/PARTY
6/01/93	PETITION			CHERRI 000
	EVENT JUDGE: FRANCOEUR, PATRICK J.	for Review of Decision of the Oil Conservation Com- mission og New Mexico - Kellahin & Samberson		
01/93	SUMMONS ISSUED	(3) issued		CHERRI 000
6/21/93	ENTRY OF APPEARANCE			DEBRA 000

ROBERT L. LOVE, J.D., LL.M.

Attorney at Law

113 N. Shipp
P. O. Box 1099
Hobbs, New Mexico 88240



Telephone No. 505-397-7461

Fax No. 505-397-7465

September 25, 1995

Rand Carroll, Esq.
Special Assistant Attorney General
New Mexico Oil Conservation Commission
Post Office Box 6429
Santa Fe, New Mexico 87505

RE: REEVES, ET. AL. VS. C & C LANDFARM, INC. NO. CIV93-247-G

Dear Mr. Carroll:

Enclosed herein please find the Order signed by the Honorable R.W. Gallini and filed in the District Court of Lea County on September 20, 1995.

Yours truly,

A handwritten signature in cursive script, appearing to read "Robert L. Love".

Robert L. Love

RLL:sk

Enclosures: as stated.



STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION
2040 S. PACHECO
SANTA FE, NEW MEXICO 87505
(505) 827-7131

CERTIFICATION

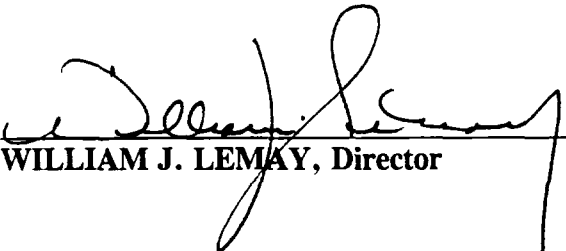
TO WHOM IT MAY CONCERN:

I, WILLIAM J. LEMAY, Director of the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department, do hereby certify that the attached are true and correct copies of the following:

1. Application for Surface Waste Disposal Facility
2. Notice of Publication dated November 18, 1991
3. May 20, 1992 Conditions
4. Affidavit of Publication dated June 25, 1992
5. Objection Letters
6. Request for a De Novo Hearing
7. Affidavit of Publication dated December 30, 1992
8. January 6, 1993 Revised Conditions
9. Application for Rehearing
10. Petition for Review


entered in Case No. 10507 on file in this office.

May 11, 1995


WILLIAM J. LEMAY, Director

STATE OF NEW MEXICO)
COUNTY OF SANTA FE)

The foregoing instrument was acknowledged before me this 11th day of May, 1995.


NOTARY

My Commission Expires:

Oct 25, 1997

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

**ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,**

Petitioners.

vs.

No. CIV 93-247-G

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
and C & C LANDFARM INC.**


Respondents.

**RESPONDENT C & C LANDFARM INC.'S NOTICE OF
SUPPLEMENTAL SUBMISSION OF RECORD ON APPEAL**

Respondent C & C Landfarm Inc. hereby gives notice of a supplemental submission of a Certified Copy of the record of the administrative proceedings in the Oil Conservation Division and Oil Conservation Commission regarding the above-captioned action. A copy of the Certification from the Director of the Oil Conservation Division is attached hereto as Exhibit A.

Respectfully submitted,

C & C LANDFARM INC.

By: 
ROBERT L. LOVE, ESQ.
Post Office Box 1099
Hobbs, New Mexico 88240
Telephone: (505) 397-7461

CAMPBELL, CARR & BERGE, P.A.
WILLIAM F. CARR, ESQ.
Post Office Box 2208
Santa Fe, New Mexico 87504
Telephone: (505) 988-4421

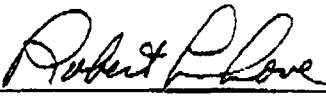
CERTIFICATE OF MAILING

I hereby certify that I have caused to be hand-delivered or mailed a true and correct copy of C & C Landfarm Inc.'s Notice of Supplemental Submission of Record on Appeal to the following counsel of record, on this 12th day of May, 1995:

C. Gene Samberson, Esq.
HEIDEL, SAMBERSON & NEWELL
Post Office Drawer 1599
Lovington, New Mexico 88260
Telephone: (505) 396-5303

W. Thomas Kellahin, Esq.
KELLAHIN & KELLAHIN
Post Office Box 2265
Santa Fe, New Mexico 87504-2265
Telephone: (505) 982-4285

Rand Carroll, Esq.
Oil Conservation Commission
of the State of New Mexico
Special Assistant Attorney General
Post Office Box 6429
Santa Fe, New Mexico 87505
Telephone: (505) 827-8156



Robert L. Love

COPY

FILED
1993-11-13

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA .

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No CIV 93-247 (Fr)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO AND
C & C LANDFARM INC.
Respondents.

PETITION FOR REVIEW OF DECISION
OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO

COMES NOW, Elsie M. Reeves, W. Trent Stradley and S-W Cattle Company, pursuant to the provisions of Section 70-2-25, N.M.S.A. (1978), as amended, and respectfully petitions the Court for review of the actions of the Oil Conservation Commission of New Mexico in Case No 10507 (DeNovo) on the Commission's docket, and its Order R-9769-A entered therein.

PARTIES:

1. Petitioners, Elsie Reeves, W. Trent Stradley and S-W Cattle Company, (collectively the "Opponents") each of whom is a property owner in the affected area and a party of record in all of the proceedings before the Commission in this matter and each is adversely affected by the Commission Order R-9769-A entered in Case 10507 (DeNovo).

2. The Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

3. C & C Landfarm, Inc. ("Applicant") is a party of record in all of the proceedings before the Commission in this matter being the applicant before the Commission in Case 10507 and sought approval of a surface waste disposal facility located in the SW/4NE/4 of Section 2, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico which is opposed by the Opponents and which was approved by Commission Order R-9769-A.

JURISDICTION:

4. The Commission held a public Hearing in Case 10507(DeNovo) on February 25, 1993 and by a 2-1 majority entered Order R-9769-A on April 29, 1993.

5. On May 18, 1993, Petitioners filed their Application for Rehearing, a copy of which is attached as Exhibit "1" and incorporated herein, which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

6. Petitioners have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25 N.M.S.A. (1978), as amended.

7. The Fifth Judicial District, Lea County, New Mexico, has jurisdiction of this case pursuant to the provisions of Section 70-2-25 N.M.S.A. (1978), because the property affected Commission Order R-9769-A is located within Lea County, New Mexico.

Petion for Review
Reeves, Stradley and S-W
Page 4

RELIEF SOUGHT:

8. Petitioners complain of Commission Order R-9769-A and assert that said Order is arbitrary, capricious, unreasonable, not supported by substantial evidence and is contrary to law as set forth in its Application for Rehearing (Exhibit "1") and further state:

POINT I:

THE COMMISSION IGNORED THE
ULTIMATE ISSUE IN DISPUTE

POINT II:

ORDER R-9769-A WAS ADOPTED BY A
MAJORITY OF THE COMMISSION BASED
UPON AN INCORRECT UNDERSTANDING OF
"BURDEN OF PROOF"

POINT III:

THE COMMISSION VIOLATED EVIDENCE
RULE 703 WHEN IT REJECTED EXPERT
OPINIONS NOT BASED UPON PERSONAL
KNOWLEDGE OF THE EXPERT

POINT IV:

THE COMMISSION BASED ITS ORDER R-9769-A
UPON FINDING (11) WHICH IS CONTRARY TO
THE EVIDENCE AND CONTAINS AN IRRELEVANT
FINDING

POINT V:

THE COMMISSION ERRONEOUSLY BASED ITS
DECISION ON A "VISUAL INSPECTION OF
THE SURFACE OF THE SITE" AND IGNORED
THE ABSENCE OF A SCIENTIFIC HYDROLOGIC STUDY

POINT VI:

THERE IS NO SUBSTANTIAL EVIDENCE TO
SUPPORT FINDING (12) CONCERNING A
NEED FOR THIS WASTE FACILITY

POINT VII:

THE ADMINISTRATIVE PROCESS OF
THIS CASE AND ORDER R-9796-A
VIOLATE PROCEDURAL DUE PROCESS

POINT VIII:

THE COMMISSION FAILED TO PROPERLY AMEND
THE OCD-EB PROPOSED CONDITIONS DATED
JANUARY 6, 1993 AND THEREFORE ORDER
R-9769-A IS ARBITRARY, CAPRICIOUS AND
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

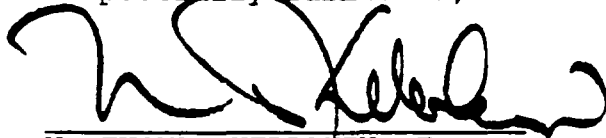
POINT IX:

THE COMMISSION VIOLATED THE FASKEN,
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WHEREFORE, Petitioners pray that the Court review
New Mexico Oil Conservation Commission Case 10507 (DeNovo)
and Commission Order R-9769-A and hold said order
unlawful, invalid and void, and for such other and
further relief as may be proper in the premises.

Respectfully submitted,



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FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA .

ELSIE M. REEVES, W. TRENT STRADLEY
AND S-W CATTLE COMPANY,
Petitioners,

vs.

No CIV 93-247 (Fr)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO AND
C & C LANDFARM INC.
Respondents.

PETITION FOR REVIEW OF DECISION
OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO

COMES NOW, Elsie M. Reeves, W. Trent Stradley and S-W Cattle Company, pursuant to the provisions of Section 70-2-25, N.M.S.A. (1978), as amended, and respectfully petitions the Court for review of the actions of the Oil Conservation Commission of New Mexico in Case No 10507 (DeNovo) on the Commission's docket, and its Order R-9769-A entered therein.

PARTIES:

1. Petitioners, Elsie Reeves, W. Trent Stradley and S-W Cattle Company, (collectively the "Opponents") each of whom is a property owner in the affected area and a party of record in all of the proceedings before the Commission in this matter and each is adversely affected by the Commission Order R-9769-A entered in Case 10507 (DeNovo).

2. The Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, N.M.S.A. (1978), laws of the State of New Mexico, as amended.

3. C & C Landfarm, Inc. ("Applicant") is a party of record in all of the proceedings before the Commission in this matter being the applicant before the Commission in Case 10507 and sought approval of a surface waste disposal facility located in the SW/4NE/4 of Section 2, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico which is opposed by the Opponents and which was approved by Commission Order R-9769-A.

JURISDICTION:

4. The Commission held a public Hearing in Case 10507(DeNovo) on February 25, 1993 and by a 2-1 majority entered Order R-9769-A on April 29, 1993.

5. On May 18, 1993, Petitioners filed their Application for Rehearing, a copy of which is attached as Exhibit "1" and incorporated herein, which was deemed denied by the Commission when it failed to act on the application within ten days as required by Section 70-2-25, N.M.S.A. (1978), as amended.

6. Petitioners have exhausted their administrative remedies before the Commission and now seek judicial review of the Commission's decision within the time provided for by Section 70-2-25 N.M.S.A. (1978), as amended.

7. The Fifth Judicial District, Lea County, New Mexico, has jurisdiction of this case pursuant to the provisions of Section 70-2-25 N.M.S.A. (1978), because the property affected Commission Order R-9769-A is located within Lea County, New Mexico.

RELIEF SOUGHT:

8. Petitioners complain of Commission Order R-9769-A and assert that said Order is arbitrary, capricious, unreasonable, not supported by substantial evidence and is contrary to law as set forth in its Application for Rehearing (Exhibit "1") and further state:

POINT I:

THE COMMISSION IGNORED THE
ULTIMATE ISSUE IN DISPUTE

POINT II:

ORDER R-9769-A WAS ADOPTED BY A
MAJORITY OF THE COMMISSION BASED
UPON AN INCORRECT UNDERSTANDING OF
"BURDEN OF PROOF"

POINT III:

THE COMMISSION VIOLATED EVIDENCE
RULE 703 WHEN IT REJECTED EXPERT
OPINIONS NOT BASED UPON PERSONAL
KNOWLEDGE OF THE EXPERT

POINT IV:

THE COMMISSION BASED ITS ORDER R-9769-A
UPON FINDING (11) WHICH IS CONTRARY TO
THE EVIDENCE AND CONTAINS AN IRRELEVANT
FINDING

POINT V:

THE COMMISSION ERRONEOUSLY BASED ITS
DECISION ON A "VISUAL INSPECTION OF
THE SURFACE OF THE SITE" AND IGNORED
THE ABSENCE OF A SCIENTIFIC HYDROLOGIC STUDY

POINT VI:

THERE IS NO SUBSTANTIAL EVIDENCE TO
SUPPORT FINDING (12) CONCERNING A
NEED FOR THIS WASTE FACILITY

POINT VII:

THE ADMINISTRATIVE PROCESS OF
THIS CASE AND ORDER R-9796-A
VIOLATE PROCEDURAL DUE PROCESS

POINT VIII:

THE COMMISSION FAILED TO PROPERLY AMEND
THE OCD-EB PROPOSED CONDITIONS DATED
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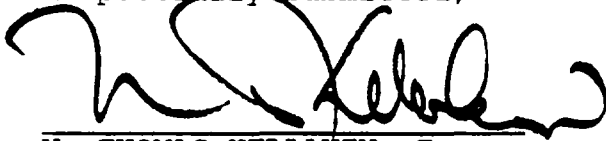
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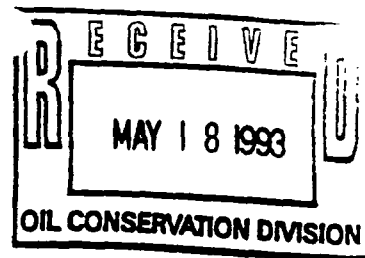
Respectfully submitted,



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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. 10507 (DeNovo)
ORDER NO. R-9769-A

APPLICATION OF C & C LANDFARM INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY,
NEW MEXICO

APPLICATION FOR REHEARING
BY
ELSIE REEVES AND W. TRENT STRADLEY

This Application for Re-Hearing is submitted by W. Thomas Kellahin, Esq. and C. Gene Samberson, Esq. on behalf of W. T. (Trent) Stradley and S-W Cattle Co. and by W. Thomas Kellahin on behalf of Elsie M. Reeves (hereinafter collectively the Opponents").

In accordance with the provisions of Section 70-2-25 NMSA (1978), the Opponents request the New Mexico Oil Conservation Commission grant this Application for

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. 10507 (De Novo)
Order No. R-9769-A

APPLICATION OF C & C LANDFARM, INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY,
NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on February 25, 1993, at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 19th day of April, 1993, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

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

(2) Sections 70-2-12.B(21) and (22) N.M.S.A. (1978) Compilation, also known as the New Mexico Oil and Gas Act, authorizes the New Mexico Oil Conservation Commission ("Commission") to regulate the disposition of non-domestic wastes resulting from various oil and gas activities and operations and to protect public health and the environment.

(3) The applicant, C & C Landfarm, Inc. (C & C) filed an application, pursuant to General Rule 711 with the Division on October 8, 1991 seeking authorization to construct and operate a commercial landfarm facility for the remediation of non-hazardous and exempt hydrocarbon contaminated soils. C & C proposes to utilize biodegradation process on a site located in the SW/4 NE/4 (Unit G) of Section 2, Township 20 South, Range 3-

EXHIBIT A TO APPLICATION
FOR HEARING

Application for Re-Hearing
Case No. 10507 (DeNovo)
Page 2

ReHearing in Case 10507 (DeNovo) to correct erroneous findings and conclusions set forth in Order R-9769-A, attached as Exhibit "A" and to substitute Opponents' proposed Commission Order attached as Exhibit "B" hereto, and IN SUPPORT THEREOF OPPONENTS STATE:

INTRODUCTION

On April 27, 1993, the New Mexico Oil Conservation Commission met at a public meeting to enter its decision in this case. During that public deliberation, Commissioner Carlson, the only attorney on the Commission, correctly applied his legal training and concluded that C & C Landfarm Inc. ("Applicant") had failed to meet its "burden of proof."

Commissioner Weiss concluded that the Opponents had failed to meet their "burden of proof" because the Opponents' hydrologist had not visited the site and had not presented any site specific scientific data proving the probable contamination of ground water.

Application for Re-Hearing
Case No. 10507 (DeNovo)
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Commission LeMay made no public comments but voted with Commissioner Weiss to approve the Applicant's request.

GROUND'S FOR REHEARING

**POINT I: THE COMMISSION IGNORED THE ULTIMATE
ISSUE IN DISPUTE**

This is a simple case. The ultimate factual issue is whether this surface waste facility creates a risk of contamination to the fresh water aquifer from which Trent Stradley's well has produced continuously in excess of forty-five (45) years and is the only fresh water supply for cattle in some nine sections and is referred to herein as the "Stradley Aquifer."

To answer that issue, it is essential for the Commission to have proper scientific evidence about the Stradley Aquifer including its size, shape and recharge mechanics. The Applicant's failure to submit that evidence is fatal to its case and is what Commissioner

Application for Re-Hearing
Case No. 10507 (DeNovo)
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Carlson meant when he said the Applicant had failed to meet its "Burden of Proof."

The fact that the Applicant did not find the Stradley Aquifer with some five shallow monitor wells drilled on the proposed facility does not substitute for a proper hydrologic study to determine the risk to the Stradley Aquifer. Contaminates can be introduced on the surface and with the introduction of rain will percolate into the ground both vertically and horizontally and migrate into the Stradley Aquifer.

Nobody knows how the Stradley Aquifer is recharged and from what source. Nobody knows the size and shape of the Stradley Aquifer. The Commission ignored that absence of evidence and in doing so, failed to decide the ultimate issue in this case.

POINT II: ORDER R-9769-A WAS ADOPTED BY A
MAJORITY OF THE COMMISSION BASED
UPON AN INCORRECT UNDERSTANDING OF
"BURDEN OF PROOF"

The Commission improperly placed the "Burden of Proof" on the Opponents to demonstrate that the waste facility would harm the fresh water aquifer. During public deliberations Commissioner Weiss commented that he had specifically edited Finding (13) of Order R-9769-A to place emphasis upon the Opponent's hydrologist's failure to visit the site and take samples and conduct tests.

The Commission missed the purpose of Mr. Kelly's testimony. As the only qualified hydrologic expert presented to the Commission on this matter, Mr. Kelly's testimony was to show the Commission what should be required of the Applicant (not the Opponents) before a proper decision could be made about this waste facility.

It is not the Opponents' burden to prove that this surface waste facility will contaminate the Stradley Aquifer. To the contrary, it is the Applicant's Burden of Proof to persuade the Commission that it will not.

The following is presented to guide the Commission in understanding the legal concept of "Burden of Proof." The term "proof" is the end result of conviction or persuasion produced by the evidence. The term encompasses two separate burdens of proof: one is the burden of producing evidence and the second is the burden of persuading the trier of fact that the alleged fact is true.

In this case, the alleged fact is that the approval of this facility will not pose a risk to ground water, human health and the environment. The Applicant always retains the ultimate burden of producing evidence AND the burden of persuasion that the facility would not pose a risk to the Stradley

Aquifer. The Applicant's failure to provide evidence of the size, shape and hydrology of the Stradley Aquifer from which the Stradley windmill produces fresh water is a failure of the Applicant to meet its "Burden of Proof."

All that the Opponents needed to do, they did by introducing evidence of the location of the fresh water sources in the Stradley Aquifer in close proximity to the waste facility. It then was the Applicant's Burden of Proof to produce the hydrologic study of the Stradley Aquifer which must provide convincing evidence that no risk was being imposed upon the Stradley Aquifer by this waste facility.

While the Applicant introduced evidence of five monitor wells having failed to encounter the Stradley Aquifer, the Applicant failed to provide evidence as to any of the following:

- (1) composition samples and tests
- (2) soil samples and tests
- (3) compaction tests
- (4) permeability tests

- (5) Cation Exchange capacity tests
- (6) liquid and plastic tests of the redbeds
- (7) any soil properties tests and data
- (8) any hydrology studies
- (9) any groundwater studies
- (10) any percolation tests or data
- (11) any ground water migration tests/data
- (12) any contaminant mobility tests/data

It is improper to put the Applicant's failure of proof on the Opponents.

POINT III: THE COMMISSION VIOLATED EVIDENCE
 RULE 703 WHEN IT REJECTED EXPERT
 OPINIONS NOT BASED UPON PERSONAL
 KNOWLEDGE OF THE EXPERT

The Commission accepted the opinions of the Division's Environmental Bureau ("NMOCD-EB") even though its witness was not a hydrologist because she had made a personal visual inspection of the site. The Commission rejected the expert opinions of Mr. Kelly, the Opponent's qualified hydrologist, because he had not made a recent personal visual inspection of the site. The Commission ignored the fact that Mr. Kelly

had been present for and reviewed all of the transcripts and exhibits of the Division Examiner hearing of this case including the various topographical maps and testimony of others concerning the appearance of the facility and the site.

New Mexico Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Apparently, the Commission failed to remember the testimony of Mr. Stradley who had repeatedly been over every part in this "White Breaks" area for decades. Mr. Stradley testified that the surface waste facility was located on the northeast edge of a natural topographical depression with his fresh water windmill located in the bottom of that depression and in excess of 30 feet lower than the surface waste facility. As an expert witness, Mr. Kelly does not have to

personally visit the site. He is entitled to rely upon the observations of Mr. Stradley and others and did so to support his expert opinions.

Mr. Kelly concluded that the likely direction of contaminant movement from the waste facility will be down gradient along the redbed surface. But there have been no hydrologic studies of the area to determine gradients and therefore no way to know the length of time and distance of travel of the contaminants. There has been no scientific study of the redbeds and the movement cannot be predicted. His point was that the Commission cannot approve this facility until that determination is made.

While a visual inspection of the surface of the facility is hardly scientific and does not allow the observer to divine the subsurface conditions in the area, the only inference for the Commission to have drawn from site inspection was that the surface topography would increase the risk of contamination to the Stradley Aquifer.

As an apparent excuse for disregarding the lack of technical data by the Applicant, the Commission decided this case based upon what witness had made a personal visual inspection of the site and thereby rejected the expert opinions of the Opponent's witness because he had not made a personal inspection of the site. Although the Commission enjoys the ability to relax the rules of evidence they should not decide cases based upon an erroneous application of those rules.

POINT IV: THE COMMISSION BASED ITS ORDER R-9769-A
UPON FINDING (11) WHICH IS CONTRARY TO
THE EVIDENCE AND CONTAINS AN IRRELEVANT
FINDING.

Finding (11)(a):

"There is no fresh water under the disposal site because there is no Ogallala aquifer present."

At the hearing the Commission raised the irrelevant issue of the location of the Ogallala

aquifer and then used that irrelevant fact as a basis for approval of the Application. See Finding (11)(a). The aquifer at risk and for which the Commission failed to address any findings was the Stradley Aquifer in the shallow alluvium down slope from the proposed waste facility. The issue is where are the vertical and horizontal limits of that aquifer and its recharge system.

It is of no consequence whether the Ogalalla aquifer is present under the waste facility. However, if the Commission wants to decide this case based upon the presence or absence of the Ogalalla aquifer under the facility, it has made a fundamental error in finding the Ogalalla aquifer absent. In fact, the Ogalalla aquifer IS PRESENT UNDER this surface waste facility. See Exhibit "C" attached hereto and incorporated by reference.

To decide this case based upon location of an aquifer not at issue in this case is to wrongly decide this case.

Finding (11)(b):

"The berm to be constructed and maintained
and operational requirements will be adequate
to prevent precipitation run-off and run-on
for the treatment portion of the facility"

This finding makes no grammatical sense. But more importantly, this finding is contrary to the evidence. There are no scientific data introduced on soils tests and therefore no compaction data, no composition data, and permeability data from which to determine the construction and maintenance standards for the berm. Further the order does not detail the constructions, maintenance or operations requirements for the berm.

This finding is simply an assumption without proper basis and cannot be supported by the record in this case.

POINT V: THE COMMISSION ERRONEOUSLY BASED ITS
DECISION ON A "VISUAL INSPECTION OF THE
SURFACE OF THE SITE" AND IGNORED THE
ABSENCE OF A SCIENTIFIC HYDROLOGIC
STUDY

The Commission erroneously based its decision on a visual inspection of the surface of the facility by a non-hydrologist staff member of the Oil Conservation Division's Environmental Bureau ("OCD-EB"). See Finding (14). The Commission also in error found it significant that the Opponents' hydrologist had not made a personal inspection of the surface of the facility.

The Commission ignored the testimony of Mr. Stradley about the slope of the topography and the fact the facility was some 35 feet higher in elevation to his down slop fresh water well. The Commission ignored the testimony of Opponent Reeves who had located and identified some forty-six (46) water wells in the area.

The Commission failed to explain how that surface inspection could substitute for a scientific hydrologic study of the potential contamination of Mr. Stradley's fresh water well.

**POINT VI: THE IS NO SUBSTANTIAL EVIDENCE TO
 SUPPORT FINDING (12) CONCERNING A
 NEED FOR THIS WASTE FACILITY**

Finding (12) states:

"There is a need for landfarms to
remediate oil contaminated soils in
the oil fields of Southeast New Mexico."

Contrary to this finding, the uncontested evidence was that the location of the facility was arbitrary; that the applicant had not conducted any economic analysis to justify this facility or establish its need; that there was nothing introduced about the capacity of existing OCD approved waste facilities or their location or inability to meet the "needs" of the industry; there was no testimony from any operator of oil & gas wells in this area supporting this application.

The Commission made an error. The need for this facility at this site was NOT established by substantial evidence.

**POINT VII: THE ADMINISTRATIVE PROCESS OF
THIS CASE AND ORDER R-9796-A
VIOLATE PROCEDURAL DUE PROCESS**

On October 8, 1991, the Applicant, C&C Landfarm, Inc. filed its application with the Division seeking authority to construct and operate a commercial "landfarm" facility ONLY for the remediation of soils contaminated with hydrocarbon substances which are exempt from the Federal Resources Conservation and Recovery Act (RCRA) on a 40-acre site owned by Jimmie T. Cooper. On November 27, 1991, notice concerning the original Application was published in The Lovington Daily Leader, a newspaper of general circulation in Lea County, New Mexico. No published notification was made of any of the amendments to the application.

The Commission granted the Applicant more than Applicant sought. While the Applicant only sought to construct and operate a commercial "landfarm" facility specifically limited to the remediation of non-hazardous hydrocarbon contaminated soils, the OCD Conditions appended to the Order R-9769-A as Exhibit "A" also authorize other contaminants to be received into the facility.

Specifically, OCD Conditions #1 and #10 set up a process for the Applicant to expand its waste facility to accept other contaminants and to do so without public notice or public hearing.

Since April, 1992, the Opponents have complained about receiving inadequate notice of about this Application, including the NMOCD-EB approving this facility and the various amendments to that Application without notice to Opponents. The public notice in this case is flawed and continues to violate due process. The Commission has perpetuated that violation of procedural due process by approving an order which

Application for Re-Hearing
Case No. 10507 (DeNovo)
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allows amendments to take place without public notice
or hearing.

**POINT VIII: THE COMMISSION FAILED TO PROPERLY AMEND
THE OCD-EB PROPOSED CONDITIONS DATED
JANUARY 6, 1993 AND THEREFORE ORDER
R-9769-A IS ARBITRARY, CAPRICIOUS AND
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Should the Commission disagree with the other
Points raised by the Opponents in this Application for
Rehearing, Order R-9769-A is still legally deficient
because certain conditions adopted by the Commission
are directly contrary to the uncontested evidence in
this case:

(1) Condition (2):

"No disposal or remediation of contaminated soils
will occur within one hundred (100) feet of your
property boundary."

The 100 foot horizontal setback ("buffer") was recommended by Kathy Brown of the OCD-EB. On cross examination, she admitted that there is no scientific basis for the distance being 100 feet.

A Buffer Zone is essential but the proper distance must be based upon some site specific scientific reasons to determine that distance is adequate. The Commission has adopted an arbitrary distance for the Buffer Zone without any scientific basis.

(2) Treatment Zone Monitoring:

The Commission has made a mistake when it adopted the OCD-EB proposed conditions concerning the Treatment Zone and its Monitoring. The OCD-EB speculates that the first three feet of native soils will be an adequate "Treatment Zone" and with monitoring will protect ground water.

Again, Kathy Brown, testifying in support of the adoptions of the OCD-EB conditions was not a qualified expert hydrologist and did not undertake an adequate scientific study to justify its Treatment Zone Monitoring.

The proposed monitoring of the Treatment Zone has no scientific basis for determining its reliability. There is no data from which to determine that the location of the cells in which the contaminated soils will be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property. Nobody knows how frequently to sample and how many samples per acre to take in order to detect contamination in the Treatment Zone. The OCD-EB Revised Recommendations are inadequate to detect any leaching process of movement of contaminants that could cause the pollution of nearby fresh water supplies.

In summary, while the OCD-EB recommendations are well intended, they are inadequate to provide reasonable protection of the valuable groundwater present in the immediate adjacent tracts.

POINT IX: THE COMMISSION VIOLATED THE FASKEN,
 THE VIKING PETROLEUM AND THE CONTINENTAL
 OIL CASES WHEN ITS FAILED TO ADDRESS AND
 DECIDE THE OPPONENTS' ISSUES AND
 OBJECTIONS

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975). Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962).

Likewise, in Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 453, 672 P.2d 280 (1983), the

Application for Re-Hearing
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New Mexico Supreme Court reiterated its opinions in Continental Oil and Fasken, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

It is not enough in this case for the Commission to simply adopted the OCD-EB revised Conditions of Approval and to then append those conditions to Order R-9769-A as Exhibit "A." The Commission needs to articulate its decision on each of the conditions which were opposed by the Opponents.

The Commission failed to explain why it found it important to summarize the disputed Applicant's evidence but omitted a summary of the Opponent's evidence.

A rehearing is required, if for no other reason than for the Commission to adopt an adequate order

which complies with state law. An adequate order would specifically address the issues described in the Opponents' Pre-Hearing Statement and which are summarized as follows:

Opponent Stradley stated he has fresh water in the immediate vicinity of the subject project which he currently uses and which is at risk of contamination if this project is approved as outlined by the "OCD Conditions of Approval" notice dated May 20, 1992 or as outlined in "OCD Recommendations" dated January 6, 1993.

Opponent Reeves, after extensive personal search of the State Engineer's records concerning fresh water wells in the area introduced evidence of the presence of some forty-six (46) water wells in the area. The Commission, with no explanation, ignored that evidence.

The Applicant had some 240 contiguous acres from which to select a possible site for the facility. The Commission could have and should have required that

this facility be located farther north within the same tract of land controlled by the Applicant. Instead the Commission chose to avoid this solution and approved a facility on the southern end of the Applicant's tract adjacent to Mr. Stradley's tract. That puts the risk of contamination directly upon Mr. Stradley and not upon the Applicant.

The procedure applied by the Division in processing this case violated procedural due process. This was a make it up as you go process.

The NMOCD "Conditions of Approval" notice dated May 20, 1992 and "OCD Recommendations" dated January 6, 1993 contain substantial errors and fail to protect ground water, human health and the environment.

The subject facility is being designed by the OCD and not the Applicant and is being permitted without any science or experience to know that it will work and prior to the OCD adopting guidelines for such a facility.

The Opponents presented evidence that the granting of the application by the Commission failed to protect human health and the environment and constitutes a risk of contamination of ground water, including the following:

(a) The Applicant's proposed plan will place at risk shallow water wells located down-dip from the proposed landfarm which will be subject to contamination from seepage of leachate contaminants.

(b) The Applicant's plans to prevent migration of contaminants down gradient along the redbed surface is inadequate.

(c) The proposed monitor wells are improperly located and will not afford adequate assurance of detection of contaminants.

(d) The proposed dike identified in OCD Condition (10) in said Order is insufficient and conditions on compaction and verification are inadequate to stop the mobility of the leachate contaminants.

(e) The composition of the berm is not environmentally safe.

(f) Additional soil tests should be performed on the redbed soil including:

- (1) Falling head permeability tests,
- (2) Soil property tests,
- (3) Cation Exchange Capacity tests,

(g) Applicant needs to perform liquid and plastic tests on the redbeds.

(h) The Applicant's proposed barrier is inadequate for its proposed landfarm.

(i) Applicant's geology is inadequate and fails to include an east-west cross section.

The OCD-Environmental Bureau's (OCD-EB) January 6, 1993 Recommendations assume that the contaminated soils will be kept from any shallow fresh water because of about 10 feet of native soil being used as a "treatment zone."

There is no characterization of the "redbeds." In this area there are the Triassic deposits, probably the Chinle shale, and referred to as the "redbeds." The integrity of this landfarm system is dependent upon the impermeability of the redbeds, but the Applicant has presented no data about the physical characteristics of these deposits, such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc. All of these are critical factors that ensure that there would be no migration of leachate along the top of or through the redbeds.

There are inadequate horizontal and vertical buffer zones surrounding this proposed facility. The configuration of the upper surface of the redbeds in the 40-acre tract has not been defined.

Commission Order R-9769-A is fatally flawed and should be withdrawn and a Rehearing granted to address all of the issues set forth in this Application for Rehearing.

Application for Re-Hearing
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• CONCLUSION

The Commission should withdraw Order R-9769-A and substitute Order R-9697-B which is attached hereto as Exhibit A and incorporated herein by reference. In order to preserve Opponents' right to further appeals of this matter, all of the issues set forth in our proposed Order R-9697-B are made a part of this Application for Rehearing.

Respectfully submitted,

KELLAHIN AND KELLAHIN,

A large, stylized handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', is written over a horizontal line.

W. Thomas Kellahin, Esq.
P.O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

C. Gene Samberson, Esq.
P. O. Drawer 1599
Lovington, New Mexico 88260
(505) 396-5303

ATTORNEYS FOR OPPOSITION-
W.T. STRADLEY (S-W CATTLE CO.)
AND ELSIE M. REEVES

East, NMPM, Lea County, New Mexico, which is located approximately two miles southeast of Monument, New Mexico. The term "non-hazardous and exempt" is synonymous as defined in the Resource Conservation and Recovery Act (RCRA) Subtitle C Regulations.

(4) This application was reviewed by the Environmental Bureau of the Oil Conservation Division and determined to be approvable.

(5) A Division Examiner hearing was scheduled to provide to interested parties an opportunity to present technical evidence why this application should not be approved pursuant to the applicable rules of the Division.

(6) Within the time frame authorized by Division rule, certain parties of interest filed written objections to the proposed facility including Elsie M. Reeves and W. T. Stradley, President of S-W Cattle Company.

(7) An Examiner hearing was held on September 1, 1992 at which time Elsie M. Reeves and W. T. Stradley presented evidence in opposition to this application.

(8) On November 16, 1992 the Division entered Order No. R-9769 approving this application and thereafter Elsie M. Reeves, S-W Cattle Company and W. T. Stradley timely filed for a hearing De Novo.

(9) Properly managed landfarming is an excellent method to manage contaminated soil, because those soils are remediated to a useful condition and contaminants can be contained and any movement observed and stopped before they cause any harm.

(10) The proposed landfarm is to be located on a forty-acre tract of land, as described in Finding Paragraph No. (3) which is bordered on the east by Lea County Road No. 58. Oil field contaminated soils will be trucked to the site and deposited within cells in six inch lifts; these soils will be tilled or plowed to ensure proper aeration and bioremediation to proper government standards. Prior to any soil being deposited in a cell, the soil in the cell or "treatment zone" will be sampled and tested. Six months after the first oil field contaminated soil is deposited in the cell and quarterly thereafter the treatment zone will be tested again to assure that no contamination is occurring.

(11) Applicant presented factual evidence that supports the following conclusions:

- (a) There is no fresh water under the disposal site because there is no Ogallala aquifer present.
- (b) The berm to be constructed and maintained and operational

requirements will be adequate to prevent precipitation run-off and run-on for the treatment portion of the facility.

- (c) Quarterly testing within the treatment zone will determine if there has been downward migration of contaminants.
- (d) The process of bio-remediation to be employed at the proposed landfarm is a proven, cost effective technology for treatment of oil contaminated soils.

(12) There is a need for landfarms to remediate oil contaminated soils in the oil fields of Southeast New Mexico.

(13) Elsie M. Reeves and W. T. Stradley, property owners in the area, appeared in opposition to the application and expressed concern that the proposed facility could contaminate fresh water. They called a hydrologist who testified that additional requirements might be necessary to assure there was no contamination of fresh water supplies but admitted that such requirements would need to be developed based on inspection of the facility and sampling and testing of the water and soil in the area. He stated he had not been to the site and had taken no samples nor conducted any tests at the proposed facility. His expert opinion was based upon general hydrologic information from the literature and not upon specific knowledge at the site and the type of operation and therefore was not useful in this case.

(14) The Division's Environmental Bureau has reviewed the proposed facility, inspected the site and made specific permit recommendations for this facility which it requests be incorporated into and made part of a Commission Order approving this application. These "Conditions of Approval" should be adopted to assure safe operations and to provide for a monitoring system to detect any leaching or movement of contaminants that could cause the pollution of nearby underground fresh water supplies.

(15) If contaminant migration occurs, the Division should immediately order the operator to stop taking additional contaminated soils and implement steps to remediate the contaminated zone and provide a procedure to prevent future contamination migration.

(16) Approval of this application and operation of the proposed landfarm in accordance with the Environmental Bureau's proposed "Conditions of Approval" will not impair fresh water supplies in the area, will have no adverse effect on human health nor on the environment, will not cause waste and should be approved.

IT IS THEREFORE ORDERED THAT:

(1) The applicant, C & C Landfarm, Inc. is hereby authorized to construct and operate a commercial "landfarm" facility for the remediation of non-hazardous hydrocarbon contaminated soils utilizing an enhanced biodegradation process on a site located in the SW/4 NE/4 (Unit G) of Section 2, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico.

PROVIDED HOWEVER THAT: the proposed facility shall be constructed and operated in accordance with the permit conditions attached hereto as Exhibit "A" which are incorporated herein and made a part of this order, and in accordance with such additional conditions and requirements as may be directed by the Division Director, and shall be operated and maintained in such a manner as to preclude spills, fires, limit emissions and protect persons, livestock and the environment.

PROVIDED FURTHER THAT, prior to initiating operations, the facility shall be inspected by a representative of the Hobbs District Office of the Oil Conservation Division in order to determine the adequacy of fences, gates and cattle guards necessary to preclude livestock and unauthorized persons from entering and/or utilizing said facility, and also to determine the adequacy of berms to assure safe facility operations.

(2) Prior to commencing operations on said facility, the applicant shall submit, to the Santa Fe Office of the Division, a surety or cash bond pursuant to General Rule 711, in the amount of \$25,000 in a form approved by the Division.

(3) The Director of the Division shall be authorized to administratively grant approval for the expansion or modification of the proposed disposal facility after notice to interested parties.

(4) Authority for operation of the landfarm shall be transferrable only upon written application and approval by the Division Director.

(5) Authority for operation of the landfarm facility shall be suspended or rescinded whenever such suspension or rescission appears necessary to protect human health or property, to protect fresh water supplies from contamination, to prevent waste, or for non-compliance with the terms and conditions of this order or Division Rules and Regulations.

(6) The permit granted by this order shall become effective only upon acceptance by the applicant of the "Conditions of Approval" attached hereto as Exhibit A.

(7) The Division shall have the authority to administratively change any condition

Page 5

Case No. 10507 (De Novo)

Order No. R-9769-A

of this permit to protect fresh water, human health and the environment. Applicant may request a hearing upon any change which materially affects the operation of the permit.

(8) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

Bill Weiss

WILLIAM W. WEISS, Member

William J. Lemay

WILLIAM J. LEMAY, Chairman

I Dissent:

Gary Carlson

GARY CARLSON, Member

S E A L

dr/

Exhibit "A"
Case No. 10507 De Novo
Order No. R-9769-A

C & C LANDFARM, INC. APPLICATION
OCD CONDITIONS OF APPROVAL

LANDFARM OPERATIONS

1. Remediation of contaminated soils will occur only on the native ground surface. The caliche pit present on the facility will not be used for the disposal, storage or remediation of any materials without the case-by-case approval of the OCD.
2. No disposal or remediation of contaminated soils will occur within one hundred (100) feet of your property boundary.
3. Disposal will only occur when an attendant is on duty. The facility will be secured when attendant is not present.
4. The facility will be fenced and have a sign at the entrance. The sign will be legible from at least fifty (50) feet and contain the following information: 1) name of the facility, b) location by section, township and range, and c) emergency phone number.
5. An adequate berm will be constructed and maintained to prevent run-off and run-on for that portion of the facility containing contaminated soils.
6. All contaminated soils received at the facility will be spread and disked within 72 hours of receipt.
7. Soils will be spread on the surface in six inch lifts or less.
8. Soils will be disked a minimum of one time every two weeks (biweekly) to enhance biodegradation of contaminants.
9. Successive lifts of contaminated soils will not be spread until a laboratory measurement of Total Petroleum Hydrocarbons (TPH) in the previous lift is less than 100 parts per million (ppm), and the sum of all aromatic hydrocarbons (BTEX) is less than 50 ppm, and the benzene is less than 10 ppm. Comprehensive records of the laboratory analyses and the sampling locations will be maintained at the facility. Authorization from the OCD will be obtained prior to application of successive lifts.
10. Only oilfield wastes which are exempt from RCRA Subtitle C regulations or non-hazardous by characteristic testing will be accepted at the facility. Solids from operations not currently exempt under RCRA Subtitle C or mixed exempt/non-exempt solids will be tested for appropriate hazardous constituents. Test results must

be submitted to the OCD along with a request to receive the non-exempt solids, and a written OCD approval (case specific) must be obtained prior to disposal. Any non-oilfield wastes which are RCRA Subtitle C exempt or are non-hazardous by characteristic testing will only be accepted on a case-by-case basis and with prior OCD approval. Comprehensive records of all laboratory analyses and sample locations will be maintained by the operator.

11. Moisture will be added as necessary to enhance bio-remediation and to control blowing dust. There will be no ponding, pooling or run-off of water allowed. Any ponding of precipitation will be removed within seventy-two (72) hours of discovery.
12. Enhanced bio-remediation through the application of microbes (bugs) and/or fertilizers will only be permitted after prior approval from the OCD. Request for application of microbes must include the location of the area designated for the bio-remediation program, composition of additives, and the method, amount and frequency of application.
13. No free liquids or soils with free liquids will be accepted at the facility.
14. Comprehensive records of all material disposed of at the facility will be maintained at the facility. The records for each load will include: 1) the origin, 2) date received, 3) quantity, 4) exempt or non-exempt status and analysis for hazardous constituents if required, 5) transporter, and 6) exact cell location and any addition of microbes, moisture, fertilizers, etc.
15. The monitor wells will be inspected for the presence of fluids on a quarterly basis on the same schedule as the treatment zone monitoring. If fluids are discovered the OCD will be notified immediately.

TREATMENT ZONE MONITORING

1. One (1) background soil sample will be taken from the center portion of the landfarm two (2) feet below the native ground surface. The sample will be analyzed for total petroleum hydrocarbons (TPH), general chemistry, and heavy metals using approved EPA methods.
2. A treatment zone not to exceed three (3) feet beneath the landfarm will be monitored. A minimum of one random soil sample will be taken from each individual cell, with no cell being larger than five (5) acres, six (6) months after the first contaminated soils are received in the cell and then quarterly thereafter. The sample will be taken at two to three (2-3) feet below the native ground surface.
3. The soil samples will be analyzed using approved EPA methods for TPH and BTEX quarterly, and for general chemistry and heavy metals annually.
4. After obtaining the soil samples the boreholes will be filled with an impermeable

material such as bentonite cement.

REPORTING

1. Analytical results from the treatment zone monitoring will be submitted to the OCD Santa Fe Office within thirty (30) days of receipt from the laboratory.
2. The OCD will be notified of any break, spill, blow out, or fire or any other circumstance that could constitute a hazard or contamination in accordance with OCD Rule 116.

BOND

Pursuant to OCD Rule 711 a surety or cash bond in the amount of \$25,000, in a form approved by the Division, is required prior to commencing construction of the commercial surface disposal facility.

CLOSURE

The operator will notify the Division of cessation of operations. Upon cessation of disposal operations for six (6) consecutive months, the operator will complete cleanup of constructed facilities and restoration of the facility site within the following six (6) months, unless an extension for time is granted by the Director. When the facility is to be closed no new material will be accepted. Existing soils will be remediated until they meet the OCD standards in effect at the time of closure. The area will then be reseeded with natural grasses and allowed to return to its natural state. Closure will be pursuant to all OCD requirements in effect at the time of closure, and any other applicable state and/or federal regulations.

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. 10507 (DENOVO)
ORDER NO. R-9769-B

APPLICATION OF C & C LANDFARM, INC.
FOR A COMMERCIAL SURFACE WASTE
DISPOSAL FACILITY, LEA COUNTY, NEW MEXICO.

ELSIE REEVES AND W. TRENT STRADLEY'S
PROPOSED
ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 AM on Thursday, February 25, 1993, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter the "Commission."

NOW, on this 20th day of May, 1993, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

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

(2) The New Mexico Oil and Gas Act, Section 70-2-12.B(21) and (22), NMSA (1978) authorizes the New Mexico Oil Conservation Division ("Division") to regulate the disposition of non-domestic wastes resulting from various oil and gas activities and operations and to protect public health and the

environment.

(3) Pursuant to that authority the Division has adopted regulations governing the operation of commercial surface waste disposal facilities (Rule 711 of the Rules and Regulations of the Oil Conservation Division, hereinafter "OCD Rules").

(4) On October 8, 1991, the Applicant, C & C Landfarm, Inc. ("C&C"), filed its Application with the Division seeking authority to construct and operate a commercial "landfarm" facility ONLY for the remediation of soils contaminated with hydrocarbon substances which are exempt from the Federal Resource Conservation and Recovery Act (RCRA), (42 USA 6921-6939b), Subtitle C regulations (40 CFR Parts 260-272) on a 40-acre site, owned by Jimmie T. Cooper and located in the SW/4NE/4 (Unit G) of Section 3, Township 20 South, Range 37 East, NMPM, Lea County, New Mexico, which is approximately two miles southeast of Monument, New Mexico.

(5) In its original Application, C&C applied for approval to excavate the native soil within the facility down to the Triassic formation ("redbeds") (about 10-16 feet) and then to fill the excavated pit with hydrocarbon contaminated soils.

(6) C&C asserted it had drilled five "monitor" wells within the 40-acre site and did not encounter groundwater under the facility.

(7) The Oil Conservation Division's Environmental Bureau ("OCD-EB") commenced processing the C&C application pursuant to Division Rule 711 which provides among other things that "If there is objection by owners or occupants of adjacent lands, the Director of the Division may set any application for a surface waste disposal permit for public hearing."

(8) On November 27, 1991 public notice concerning the subject Application was published in The Lovington Daily Leader, a newspaper of general circulation in Lea County, New Mexico.

(9) Within the 30-day public notice provision set forth in OCD Rule 711(B), written objections were filed with the Division by Elsie M. Reeves and W. T. "Trent" Stradley of S-W Cattle Company, each of whom is an adjoining land owner and unless otherwise stated are referred herein collectively as "Opponents."

(10) Despite receiving timely objections from the Opponents, the OCD did not set the C&C Application for hearing, but rather continued with its administrative processing.

(11) On February 21, 1992, the OCD-EB wrote to C&C expressing, among other things, concern for the "possibility of contaminants migrating off of your property along the surface of the redbed" and requested a detailed description of how C&C planned to prevent the migration of contaminants down gradient along the redbed surface.

(12) On March 2, 1992, C&C submitted to OCD-EB a schematic for the excavated pit now showing a proposal to install a "redbed dike" on the south, west and north edges of the facility with the south edge of the dike touching the north edge of the Stradley property.

(13) On April 3, 1992, OCD-EB notified the Opponents that, "The application at this time is administratively approvable since it meets all of the technical requirements to protect ground water, human health and the environment." and informs the Opponents that they had 30-days to submit comments which responded with "substantive technical information."

(14) The Opponents renewed their protest and filed objections which raised the following issues:

(a) That the OCD-EB "Conditions of Approval" contained substantial errors and failed to protect ground water, human health and the environment;

(b) That C&C's proposed facility would place at risk shallow water wells located down-dip from the facility which will be subject to contamination from seepage of leachate contaminates;

(c) That there was inadequate notice of the C&C Application and of the various amendments to that Application and that the Application, as amended, should be dismissed;

(d) That the administrative processing by the OCD-EB had violated procedural due process and did not comply with the rules of the OCD;

(e) That the Application requested approval of a 40-acre tract but proposed to use only 2 acres;

(f) That the OCD-EB proposed to grant C&C significantly greater disposal authority than the C&C had requested;

(g) That C&C's plan to prevent migration of contaminants down gradient along the redbed surface was inadequate;

(h) That there was no scientific data submitted by the Applicant to support its Application; and

(i) That the design of the facility was grossly inadequate.

(15) On May 20, 1992, the OCD-EB notified the Opponents that the OCD-EB, without a hearing, would grant the C&C application subject to the "Conditions of Approval" dated May 20, 1992.

(16) Prior to June 9, 1992, the Opponents again requested a public hearing.

(17) Finally the OCD set a hearing not for C&C to present its case but rather for the limited purpose of hearing the Opponents' technical evidence in opposition to the OCD-EB conditional approval of May 20, 1992.

(18) The limited Hearing was held before OCD Examiner Michael Stogner on September 1, 1992.

(19) On November 16, 1992, the OCD issued Order R-9769 approving the disposal of contaminated soils and solids into the excavated pit subject to the May 20, 1992 conditions proposed by the OCD-EB.

(20) The Opponents timely filed for a DeNovo hearing of Case 10507 before the Commission.

(21) On January 6, 1993, the OCD-EB issued newly proposed "Revised Recommendations" which provided for the disposal of the contaminated soils within the facility but precluded disposal into the excavated pits.

(22) At the Commission Hearing, C&C presented the following in support of its Application:

(a) That out of the 200 acres controlled by Jimmie Cooper, C&C proposed to use a 40-acre tract the southern boundary of which is immediately adjacent to a tract controlled by Trent Stradley;

(b) That C&C had not examined any other site in this area or any other portion of the Cooper tract as a possible site;

(c) That it had drilled five "monitor" wells within the 40-acre site and did not encounter groundwater under the facility;

(d) That it proposed to limit the material taken into the facility to oil field contaminated soils; and

(e) That it would adopt and abide by all of the OCD-EB Revised Recommendations dated January 6, 1993.

(23) At the Commission Hearing, the Opponents presented the following in opposition to the Application:

(a) That C&C failed to present a qualified expert hydrologist and did not undertake an adequate scientific study to justify its Application;

(b) That Stradley's fresh water windmill well some 1,700 feet to the southwest of the facility is at risk of contamination if the project was approved as outlined by the OCD-EB;

(c) The location of the facility within this proposed 40-acres within the Cooper tract is arbitrary;

(d) C&C failed to provide any reasonable reasons for selecting this site over available sites within the Cooper property which would be farther away from Stradley and Reeves;

(e) The need for this facility at this site was not established;

(f) The design of the facility is flawed and will not provide adequate protection for ground water, public health or the environment;

(g) The 100 foot buffer recommended by the OCD-EB is arbitrary and inadequate;

(h) The proposed monitoring of the treatment zone has no scientific basis for determining its reliability;

(i) There is no data from which to determine that the location of the cells in which the contaminated soils will be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property;

(j) The OCD-EB recommendations, while well intended, are inadequate to provide reasonable protection of the valuable groundwater present in the immediately adjacent tract;

(k) The facility is an environmental accident waiting to happen;

(l) The \$25,000 Bond recommended by the OCD-EB is grossly inadequate;

(m) The Applicant failed to undertake any scientific study and allowed the OCD-EB to attempt to design the facility for the Applicant based upon the OCD-EB's best guess; and

(n) The January 6, 1993 OCD-EB Revised Recommendations are inadequate to detect any leaching process or movement of contaminants that could cause the pollution of nearby underground fresh water supplies.

(24) At the Commission Hearing, the OCD-EB presented the following in support of its January 6, 1993 Revised Recommendations:

(a) Although the OCD-EB originally approved the C&C request to place contaminated soils into the excavated pits, the OCD-EB now (January 6, 1993) recommends against such a request;

(b) C&C originally sought to put the facility and contaminated soils right up to the property line common with Trent Stradley. The OCD-EB May 20, 1992 conditions approved the facility without a set back or "buffer zone." The OCD Order approved the application also without a buffer zone. Now, the OCD-EB proposes a 100 foot setback from the property line as a "buffer zone."

(c) The OCD-EB admitted that the 100 foot buffer was an arbitrary distance without any scientific basis;

(d) The integrity of the proposed landfarm is dependent upon the impermeability of the redbeds and the apparent absence of shallow groundwater at five locations under the facility;

(e) The OCD-EB proposes that the first three feet of native soils will be an adequate "treatment zone" and proper monitoring will protect ground water;

(f) The OCD-EB January 6, 1993 Recommendations are predicated upon the assumption that the contaminated soils will be kept from any shallow ground water by monitoring for potential contaminant in a "treatment zone" consisting of the first three feet of native soil upon which the contaminated soils have been placed; and

(g) The OCD-EB proposes that a single soil sample can be taken at the center of the facility and provide a background soil sample.

(25) It is of significance to the Commission, which must rely upon expert witnesses, to judge the creditability and expertise of each such witness.

(26) In this case, the Opponents presented a well-recognized geohydrologist with both bachelor and master degrees in hydrology who had specific knowledge of the immediate subject area and who has testified before this Commission on a number of prior occasions.

(27) C&C relied upon a petroleum geologist without expertise in hydrology who had not undertaken any hydrology studies and who was unable to express any expert opinions concerning this matter.

(28) The OCD-EB relied upon the testimony of a petroleum geologist, who had in fact designed the facility for C&C, but who had no hydrology degrees and no experience with the actual operation of this type of facility.

(29) Based upon the foregoing and upon the entire record in this case, the Commission finds that:

(a) The rebeds are the first layer which will divert shallow ground water but they have not been mapped in this area and their characteristics are unpredictable;

(b) the Applicant presented no data about the physical characteristics of the rebeds such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc., all of which would be critical factors to ensure that there is no migration of leachate along the top of or through the rebeds;

(c) Although the OCD-EB on February 21, 1992 expressed its concern about the potential migration of contaminants down gradient along the rebed surface, there is no evidence of any hydrologic studies of the area to determine the direction of migration of contaminants;

(d) There was no scientific data presented to support the OCD-EB conclusion that the disposal of contaminated soils on top of undisturbed native soil constitutes an adequate vertical buffer between the contaminants and the potential source of ground water recharge to the Stradley windmill water well;

(e) Although a monitoring procedure of the treatment zone is proposed, there is no assurance that such a monitoring procedure will timely detect potential contaminants and the facility should be substantially removed from any potential ground water both horizontally and vertically so as not to pose a risk;

(f) The OCD-EB proposed monitoring system for the "treatment zone" is inadequate and not based upon either experience with similar sites nor upon published scientific literature;

(g) An adequate horizontal "buffer zone" is essential but there is no evidence, scientific data, experience or anything else presented to determine what that distance should be;

(h) C&C's proposed facility is the 40-acre tract at the SE corner of a 200 acre tract owned by Jimmie Cooper. The NE/4 40-acre tract appears to be sufficiently removed from the Stradley tract so as not to pose a risk to his groundwater but no effort was made by C&C to investigate the feasibility of any alternative sites;

(i) While C&C expressed a "need" for this facility there was no economic justification for this facility presented;

(j) There was no evidence presented as to the risk to public health and the environment when contaminated soils are concentrated at this facility rather than leaving those contaminants at the well sites;

(k) The OCD-EB January 6, 1993 Recommendations propose that one soil sample of the treatment zone be taken quarterly for not more one sample for a 50-acre tract.

(l) The Applicant did not present any soil samples or analysis for the facility;

(m) There have been no studies to determine if a single soil sample will be representative of the soil conditions and characteristics over the entire 40-acre tract;

(n) There was no evidence introduced from which to determine how frequently to sample and how many samples per how many acres should be taken;

(o) A single soil sample monitoring procedure is inadequate;

(p) The OCD-EB proposed sampling assumes the ability to detect contaminants percolating into the native soil treatment zone but is not based upon anything more than speculation;

(q) There are no published scientific reports or OCD-EB experience about any similar facilities from which to determine the potential success or failure of the proposed treatment zone monitoring;

(r) That while the C&C application sought approval ONLY for disposal of oil field contaminated soils, the OCD-EB proposed to allow the disposal of oil field solids and other contaminants;

(s) That the OCD-EB Revised Recommendations provide a method for future modification of the C&C facility which fails to provide adequate public notice and will violate procedural due process; and

(t) That the OCD-EB Rules and Regulations fail to provide adequate protection for ground water, public health or the environment.

(30) The Commission finds that the Application should be DENIED.

IT IS THEREFORE ORDERED THAT:

(1) This application is hereby DENIED.

(2) Order No. R-9769, entered in this matter on November 16, 1992, and Order R-9769-A entered in this matter on April 29, 1993 are hereby rescinded and are of no effect.

NMOCD ~~Case~~ ³ No. 10507 (DeNovo)
ORDER NO. R-9769-B
Page 12

(3) Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

GARY CARLSON
Member

WILLIAM W. WEISS
Member

WILLIAM J. LeMAY
Chairman

Geohydrology Associates, Inc.

May 17, 1993

W. Thomas Kellahin, Esq.
P. O. Box 2265
Santa Fe, New Mexico 87501

RE: C & C LANDFARM

Dear Tom:

By FAX I am sending copies of a portion of a map prepared by Nicholson and Clebsch, which clearly shows that the C & C Landfarm facility is located well within the outcrop area of the Ogallala formation. Also listed below are four other references, all of which have mapped the site within the outcrop area of the Ogallala.

Conover, C. S. and Akin, P. D., 1942, Progress report on the ground water supply of northern Lea County, New Mexico: New Mexico State Engineer Biennial Report.

Bretz, J. H., 1949, The Ogallala formation west of the Llano Estacado: Journal of Geology.

Judson, S. S., Jr., 1950, Depressions of the northern portion of the southern High Plains of eastern New Mexico: Geological Society of America Bulletin.

Dane, C. H. and Bachman, G. O., 1965, Geologic map of New Mexico: U. S. Geological Survey and New Mexico Bureau of Mines.

Hopefully this information will be of use to you.

Sincerely,

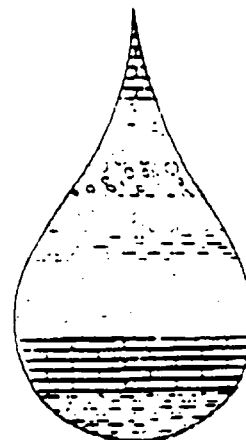
GEOHYDROLOGY ASSOCIATES, INC.

T. E. Kelly
T. E. Kelly
President

attachment

TEK/kc

EXHIBIT C TO APPLICATION
FOR REHEARING



GEOHYDROLOGY ASSOC., INC.

GROUND-WATER REPORT 6

Geology and Ground-Water
Conditions in Southern
Lea County, New Mexico

by *ALEXANDER NICHOLSON, Jr.*
and *ALFRED CLEBSCH, JR.*

UNITED STATES GEOLOGICAL SURVEY

Prepared in cooperation with the
New Mexico Institute of Mining and Technology,
State Bureau of Mines and Mineral Resources Division
and the New Mexico State Engineer

1961

STATE BUREAU OF MINES AND MINERAL RESOURCES
NEW MEXICO INSTITUTE OF MINING & TECHNOLOGY
CAMPUS STATION SOCORRO, NEW MEXICO

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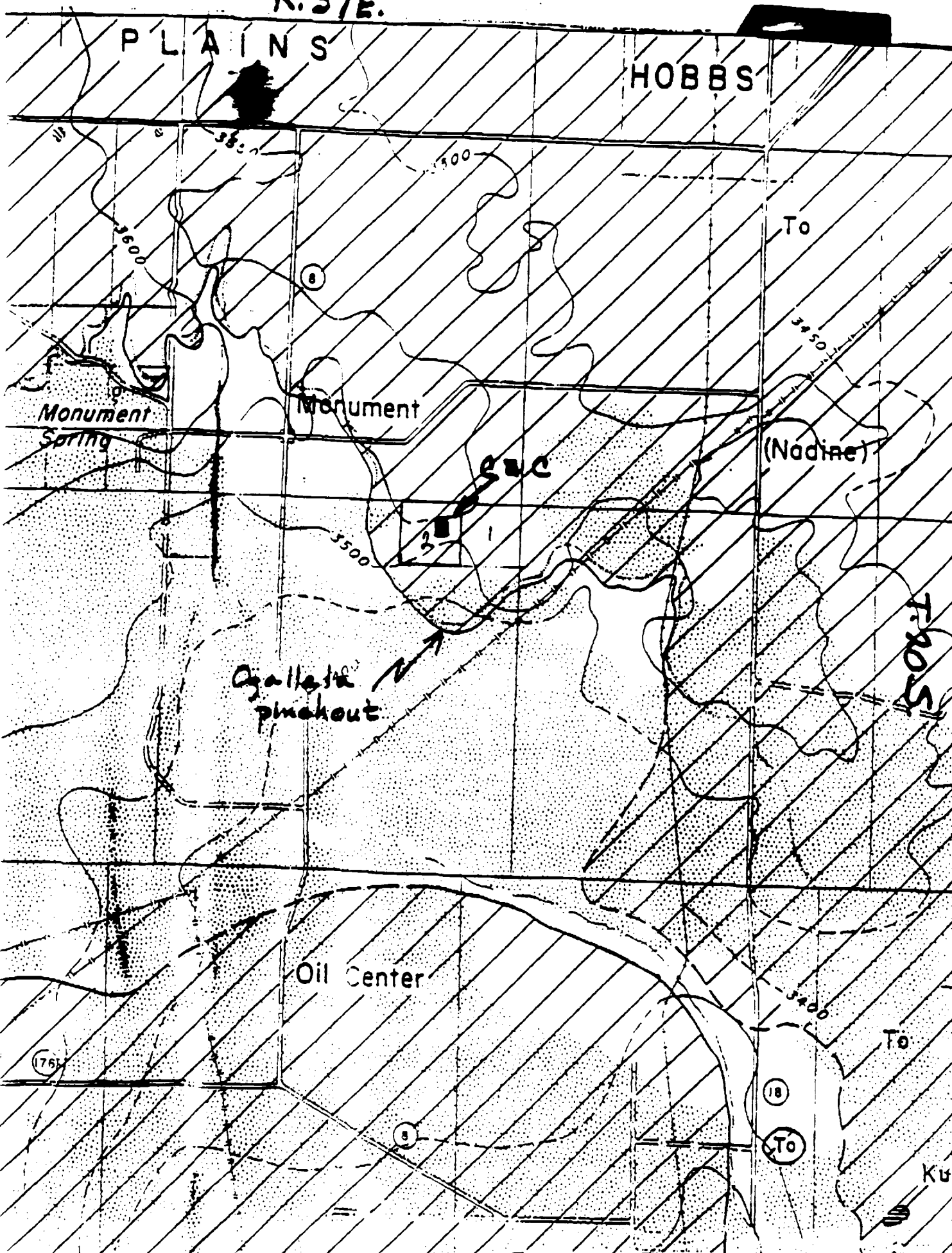
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FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

5TH JUDICIAL DIST COURT
LEA COUNTY NEW MEXICO
FILED IN MY OFFICE

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JANIE G. HERNANDEZ
CLERK OF THE DIST COURT

ELSIE M. REEVES, W. TRENT STRADLEY
and **S-W CATTLE COMPANY,**

Petitioners,

vs.

No. CIV 93-247-G

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
and **C & C LANDFARM INC.**

Respondents.

ORDER

THIS MATTER having come before the Court on May 15, 1995, pursuant to § 70-2-25 NMSA 1978, upon the Petition for Review of Decision of the Oil Conservation Commission of New Mexico ("the Commission"), of Elsie M. Reeves, W. Trent Stradley and S-W Cattle Company, and the Court having considered the evidence and transcript of the proceedings before the Commission, in Oil Conservation Division Case 10507 (De Novo) in which Order No. R-9769-A was entered authorizing C & C Landfarm Inc. to operate a commercial landfarm to remediate non-hazardous oil field waste, as well as the oral arguments of counsel and the briefs of the parties, and being otherwise fully advised in the premises finds:

1. That Commission Order No. R-9769-A contains all findings required by law which are material to the ultimate fact that the operation of the C & C Landfarm Inc. commercial landfarm will not impair fresh water supplies in the affected area;

2. That the Order of the Commission contains sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings;

3. That the findings of the Commission are supported by substantial evidence;

4. That the proceedings conducted by the Oil Conservation Commission which resulted in the issuance of Order No. R-9769-A fully comply with all constitutional, statutory, and procedural requirements;

5. That Commission Order No. R-9769-A authorizing C & C Landfarm Inc. to construct and operate a commercial "landfarm" facility for the remediation of non-hazardous hydrocarbon contaminated soils is not arbitrary, unreasonable, unlawful or capricious;

6. That Petitioners failed to meet its burden of overcoming the prima facie presumption of the validity of Commission Order No. R-9769-A set forth in § 70-2-25(B) NMSA; and

7. That Commission Order No. R-9769-A should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Commission Order No. R-9769-A be and the same is, hereby AFFIRMED.

R.W. Gallini

R. W. GALLINI
District Judge

SUBMITTED BY:

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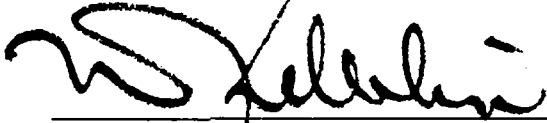
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COUNTY OF LEA

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
CLERK OF DISTRICT COURT

CLERK OF DISTRICT COURT

CLERK OF DISTRICT COURT

**ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,**



MAR 13 1994

Petitioners,

vs.

No. CIV 93-247-G

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.,**

Respondents.

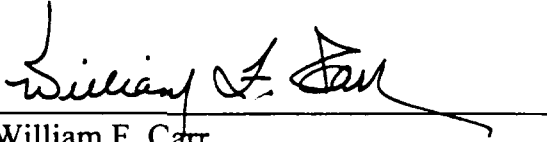
ORDER DISMISSING APPEAL WITH PREJUDICE

THIS MATTER having come before the Court on the parties' Stipulated Motion to Dismiss Appeal With Prejudice, and the Court having considered the arguments stated therein, and the Court being otherwise advised of the issues in this case, it is hereby ORDERED that the appeal in this case is hereby DISMISSED WITH PREJUDICE.

A handwritten signature in cursive script, reading "R.W. Gallini". The signature is written in dark ink and is positioned above a horizontal line.
DISTRICT JUDGE

SUBMITTED BY:

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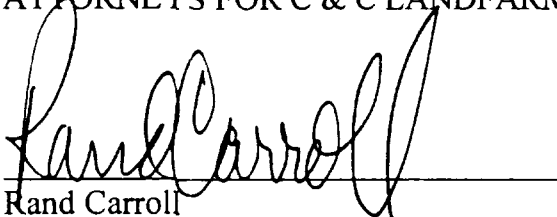
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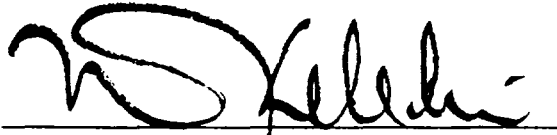
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ATTORNEY FOR THE NEW MEXICO
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ORDER DISMISSING APPEAL


Page 2

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COUNTY OF LEA

**ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,**

Petitioners,

vs.

No. CIV 93-247-G

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO and
C&C LANDFARM, INC.,**

Respondents.

STIPULATED MOTION TO DISMISS APPEAL WITH PREJUDICE

Come now, Petitioners, Elsie M. Reeves, W. Trent Stradley and S.W. Cattle Company, and Respondents, Oil Conservation Commission of the State of New Mexico and C & C Landfarm, Inc., and pursuant to SCRA 1986, 12-401(A), hereby move this Court to dismiss with prejudice the appeal in this matter. As grounds for this motion, the parties state:

1. All disputed issues between the parties have been resolved, and no further proceedings are necessary; and
2. Because the appeal in this case has not yet been docketed, this Court has the authority to dismiss the appeal in this case. SCRA 1986, 12-401(A).

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO
FILED

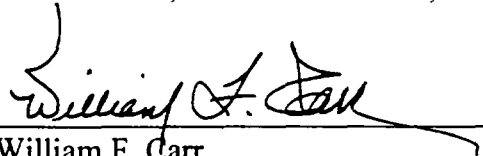
CERTIFICATE OF APPEAL COURT

FILED

MAR 13 1993

Respectfully submitted,

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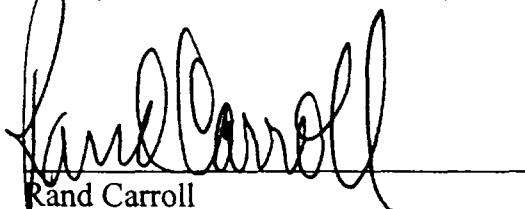
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Rand Carroll

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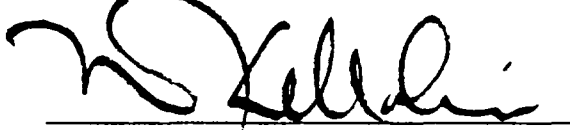
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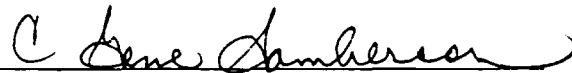
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May 10, 1995

VIA FEDERAL EXPRESS

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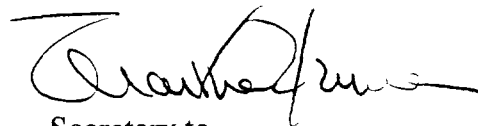
Re: ***Elsie M. Reeves, et al., v. Oil Conservation Commission, et al.***
Fifth Judicial District Court No. CIV 93-247-G

Dear Mr. Love:

Enclosed for filing is the original trial brief in the above-captioned case. Please provide our office with a conformed copy once you have filed it with the Court.

Thanking you in advance for your assistance in this matter.

Very truly yours,



Secretary to
William F. Carr

Enc.

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

**ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY,**

Petitioners,

vs.

No. CIV 93-247-G

**OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
and C & C LANDFARM INC.,**

Respondents.

**TRIAL BRIEF
OF RESPONDENTS
OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
AND
C & C LANDFARM INC.**

Having twice been unsuccessful in administrative proceedings before the Division and Commission¹, Petitioners now ask the Court to set aside Oil Conservation Commission Order No. R-9769-A which authorizes C & C Landfarm Inc. ("C & C") to operate a commercial landfarm to remediate non-hazardous oil field waste.

¹

For the purpose of this brief, the Oil Conservation Division of the New Mexico Department of Energy, Minerals and Natural Resources and its Environmental Bureau are referred to as "the Division" and the New Mexico Oil Conservation Commission is referred to as "the Commission."

SCOPE OF JUDICIAL REVIEW

This case presents two matters to the Court for decision. First, the Court is asked to determine the sufficiency of the Commission's Order. Second, it must determine if the procedures followed by the Commission protected all parties' rights to procedural due process. The scope of judicial review of administrative agency orders has been well defined by the New Mexico Supreme Court. It is limited to determining whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the order is supported by substantial evidence; and, generally, whether the action of the administrative body is within its scope of authority. *Elliott v. N.M. Real Estate Comm'n.*, 103 N.M. 273, 705 P.2d 679 (1985); *Snyder Ranches, Inc. v. Oil Conservation Comm'n., et al.*, 110 N.M. 637, 798 P.2d 587 (1990). The Court cannot substitute its judgment for the Commission but instead only must decide whether the Commission's decision is reasonable, lawful and based upon the substantial evidence in the record as a whole. *Continental Oil Company v. Oil Conservation Comm'n.*, 70 N.M. 310, 373 P.2d 809, 818 (1962).

Handwritten notes:
① agency acted fraudulently, arbitrarily or capriciously;
② substantial evidence;
③ its scope of authority.
④ Not Final
⑤ will scope of authority

Petitioners contend that the Commission's approval of this landfarm was arbitrary and capricious. "Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when reviewed in light of the whole record is unreasonable or does not have a rational basis ...". *Perkins v. Department of Human Services*, 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

On appeal, the role of an appellate court in determining whether an administrative agency has abused its discretion by acting in an arbitrary and capricious manner, is to review the record to determine whether there has been ¹unreasoned action without proper consideration in disregard for the facts and circumstances. Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached.

Id. at 655, 748 P.2d at 28.

Petitioners raise a number of issues concerning the sufficiency of this Order in the nine points in their Petition for Review and attached Application for Rehearing. However, when their arguments are examined, Petitioners only challenge:

1. the sufficiency of the Commission's findings in Order No. R-9769-A (Petitioners Points I, IV, VIII and IX);
2. the sufficiency of the evidence supporting these findings (Petitioners Points V and VI); and
3. the manner in which the Commission applied rules of evidence and procedure (Petitioners Points II and III).

STATEMENT OF FACTS

In October 1991, C & C Landfarm Inc. filed an application with the Oil Conservation Division seeking authority to construct and operate a commercial landfarm located in the SW/4 NE/4 of Section 3, Township 20 South, Range 37 East, Lea County, New Mexico. (S-W Cattle Company, Exhibit 8, pp. 1-21). Pursuant to Commission rules, copies of this application were provided to all landowners within one-half mile of the proposed facility and each was given an opportunity to present objections to the proposal. (*Id.* at 18-21). Notice

TRIAL BRIEF OF RESPONDENTS OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO AND C & C LANDFARM INC.,

of this application was also provided by publication. *Id.* at 22.

Following receipt of this application, the proposed site was inspected by the staff of the Division's Environmental Bureau and additional information from C & C was requested on February 11, 1992. *Id.* at 23-25. This data was provided by C & C on March 2, 1992. *Id.* at 26.

With the information acquired from its inspection of the site, and the data supplied by C & C, the Environmental Bureau prepared Conditions of Approval dated May 20, 1992. *Id.* at 33. By letter dated June 1, 1992, the Conditions of Approval were provided to C & C and it was advised that the application had been determined to be administratively approvable.

Because the Division received objections to the proposed facility, this application was set for hearing. The hearing occurred on September 1, 1992, and on November 16, 1992, C & C was authorized to construct and operate a commercial landfarm facility by Order No. R-9769. This approval required C & C's compliance with the Division's Conditions of Approval which were incorporated by reference into this Order. (Order No. R-9769, Order Paragraph 1). Furthermore, the Division reserved the authority to administratively change any condition of this permit if needed to protect fresh water, human health and the environment. (Order No. R-9769, Order Paragraph 7).

Petitioners sought a De Novo hearing before the Commission. On January 6, 1993,

prior to the Commission hearing, the Division revised the Conditions of Approval. (S-W Cattle Company, Exhibit 8, pages 41 through 44).

At the February 25, 1993 Commission hearing, C & C presented Michael Pierce, an expert geological witness who reviewed the need for a landfarm in this area (TR. 28, 47 and 59); explained how the facility would be constructed (TR. 31-32, C & C Exhibit 4); reviewed how it would be operated (TR 32, 39-40) and showed that the operation of this landfarm would not pose a threat to fresh water in the area (TR. 33-38, 41-44, 63-65).

The Petitioners called Tim Kelly, an expert witness with a bachelor's degree and master's degree in geology and expertise in hydrogeology. Although he had not personally visited the site (TR. 132) nor been previously involved with a landfarm in Southeast New Mexico that went through the permitting process (TR. 129-130), he had reviewed the application filed by C & C (S-W Cattle Exhibit 8) and the Commission's approval of another landfarm which is located in the San Juan Basin (S-W Cattle Exhibit 9). Based on his expertise and these two exhibits, he testified about additional studies and tests he felt should be conducted at this site. (TR. 119-128).

Kathy Brown testified as an expert witness for the Commission. Ms. Brown has a bachelor's degree and a master's degree in geology. In her position with the Environmental Bureau, she worked with landfarm applications and served as the lead person in developing Division guidelines for these projects in association with other members of the Division's

Environmental Bureau, including hydrogeologists and engineers. (TR. 147-149). Ms. Brown reviewed how the Division's Conditions of Approval had been developed for this facility (TR. 156) and how the operation of this facility under these conditions would assure no migration of contaminants from this site. (TR. 157-171).

On April 29, 1993, the Commission entered Order No. R-9769-A, again approving the application of C & C and expressly finding that **"the operation of the proposed landfarm in accordance with the Environmental Bureau's proposed "Conditions of Approval" will not impair fresh water supplies in the area..."** (Finding 16, Order No. R-9769-A).

Petitioners sought rehearing pursuant to N.M.Stat.Ann. § 70-2-25 (1978). The Commission took no action on the Petition for Rehearing and it was thereby denied whereupon the Petition for Review was filed.

POINT I

THE FINDINGS IN ORDER NO. R-9769-A ARE SUFFICIENT

While the Commission is not required to make elaborate findings, it must make findings of ultimate facts which are material to the issues and to otherwise make findings which are sufficiently extensive to disclose its reasoning in reaching these ultimate conclusions. *Viking Petroleum v. Oil Conservation Comm'n.*, 100 N.M. 451, 453, 672 P.2d 280 (1983); *Fasken v. Oil Conservation Comm'n.*, 87 N.M. 292, 532 P.2d 588 (1975);

**TRIAL BRIEF OF RESPONDENTS OIL CONSERVATION COMMISSION OF THE STATE OF
NEW MEXICO AND C & C LANDFARM INC.,**

Continental Oil Company v. Oil Conservation Comm'n., 70 N.M. 310, 373 P.2d 809 (1962).

Contrary to the contentions of the Petitioners, the Commission squarely addressed the ultimate factual issue in this case when it found the C & C Landfarm would not impair fresh water supplies in this area.

Commission Finding 16 reads:

"(16) Approval of this application and operation of the proposed landfarm in accordance with the Environmental Bureau's proposed "Conditions of Approval" will not impair fresh water supplies in the area, will have no adverse effect on human health nor on the environment, will not cause waste and should be approved." [Emphasis added]

With this finding the Commission decided the ultimate factual issue in this case. Furthermore, other findings in Order No. R-9769-A disclose the Commission's reasoning in reaching its conclusion that contamination will not occur.

Finding 10 describes how the facility will be operated and what tests will be conducted "to assure that no contamination is occurring."

In Finding 11(a) the Commission finds that no fresh water exists under the 40-acre landfarm site because the Ogallala aquifer is not present there.²

Petitioners call this finding irrelevant and contrary to the evidence in Point IV of their

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The absence of fresh water under the site was confirmed by each expert witness in this case. (Pierce, TR. 40-41, 54, 63; Kelly, TR. 134; Brown, TR. 157-158). Furthermore, their testimony was not limited to the Ogallala formation. Even Petitioners' own expert could not say there was any groundwater under this particular 40-acre tract (TR. 133-134).

Petition for Review. However, the relevance is that with no groundwater directly below the facility, contaminants cannot escape by migrating down into fresh water and then moving out laterally through an aquifer. (Brown TR. 151). Instead, the only possible ways for fresh water to be impaired would be for contaminants to be moved by (1) surface migration or (2) subsurface migration away from the site and only then, after leaving the facility, getting into an aquifer. In the remainder of Finding 11, the Commission determined that neither surface nor subsurface migration of contaminants is possible.

Finding 11(b) addresses surface migration. The Commission concludes that with the berms and the prescribed Conditions of Approval, surface migration will not occur for there will be no movement of fluids off of or onto this landfarm.

Finding 11(c) deals with the question of subsurface migration. Here the Commission concludes that with the tests required by its order of the treatment zone, subsurface migration could be detected if it ever occurred.

Finding 14 incorporates into Order No. R-9769-A the Commission's "Conditions of Approval" which will "assure safe operations" by detecting "leaking or movement of contaminants that could cause the pollution of nearby underground fresh water supplies."

With Finding 15, the Commission determines that "[i]f contaminant migration occurs", the Division can "provide a procedure to prevent future contamination migration."

Clearly, the findings in Commission Order No. R-9769-A decide the ultimate facts

material to the issues in this case and are sufficient to disclose its reasoning in reaching these conclusions. Points I and IV of the Petition for Review are without merit.

Petitioners also attack the findings in this Order for failure to explain its decision on each of the conditions they proposed (Petition for Review, Point IX). Here, Petitioners seek the elaborate findings which in *Fasken* the Supreme Court stated were not required. *Fasken v. Oil Conservation Comm'n.*, 87 N.M. 292, 532 P.2d 588 (1975). When Finding 13 is compared to the evidence presented by Petitioners, it is apparent that Petitioners' evidence was fully addressed in Order No. R-9769-A.

Tim Kelly, Petitioners' expert hydrologist, testified about what he felt should be done by the Commission prior to approving this landfarm. He recommended numerous additional tests be conducted. However, he testified that normally, before you decide what conditions should be established and tests conducted, you go look at the site to reach conclusions about the viability of the project. (TR. 130). Mr. Kelly then stated that he had never been to this site, that he had conducted no tests or sampling in preparation for the hearing and that he was unaware of what else the Petitioners might have done to prepare their objections to the C & C proposal (TR. 130). Mr. Kelly testified that while he had no specific calculations for this site (TR. 139), the Commission's guidelines developed after on-site inspections (TR. 44) were "good as written" and again emphasized that "each site must be evaluated on its own." (TR. 132).

In Finding 13, the Commission acknowledged that Mr. Kelly "testified that additional requirements might be necessary to assure there was no contamination of fresh water supplies." But the Commission also found that Mr. Kelly had "admitted that such requirements would need to be developed based on inspection of the facility and sampling and testing of the water and soil in the area." This finding then notes that Mr. Kelly "stated he had not been on the site and had taken no samples nor conducted any tests at the proposed facility." Confronted with this presentation, the Commission did the only thing it could -- it found Mr. Kelly's opinion "not useful in this case." After such a complete impeachment of himself, any other conclusion by the Commission about Mr. Kelly's testimony would have been absurd. Any suggestion that any additional findings on this testimony is required, is likewise ludicrous. Petitioners' Point IX must fail.

Petitioners assert the Division violated New Mexico Rule of Evidence 703 by rejecting Mr. Kelly's opinions because he had not made a visual inspection of the site. This argument mischaracterizes the Commission's action. The opinions of Mr. Kelly were determined to not be useful in this case because **he testified** the additional tests he was advocating should be developed based upon inspection of the facility -- something **he said** he had not done. **He testified** that he had made no studies of this site, conducted no tests and made no calculations and **he admitted** that his opinions were not based on his knowledge of this site but upon a review of the application filed by C & C. The Commission is not

required to accept an expert witness's opinions when the expert admits actions necessary to validate his opinions were not taken and his recommendations were not developed for the specific application at issue. Furthermore, when the Commission is confronted with conflicting expert opinions, as the trier of fact it can accept the opinions of the experts whose testimony is credible and useful in deciding the issues in the case and reject those opinions which are not credible. Petitioners' Point III is without merit.

POINT II

ORDER NO. R-9769-A IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the laws creating it. *Continental, supra* at 814. The New Mexico Oil and Gas Act charges the Division and Commission to regulate the disposition of nondomestic wastes resulting from various oil and gas activities and operations and to protect public health and the environment. Sections 70-2-12.B(21) and (22), N.M.Stat.Ann. (1978). Pursuant to this statute, the Division has developed guidelines to be followed by those who propose to construct and operate commercial landfarms. It has been given this authority because of its special expertise and competence in these matters. *Continental, supra* at 819.

After C & C filed its application seeking approval of this commercial landfarm, the Division exercised its statutory authority by conducting in-house reviews of the proposal,

**TRIAL BRIEF OF RESPONDENTS OIL CONSERVATION COMMISSION OF THE STATE OF
NEW MEXICO AND C & C LANDFARM INC.,**

inspecting the site (TR. 44), and developing "Conditions of Approval" tailored to the specifics of this project (TR. 156). Two public hearings were held on the application and at both hearings this landfarm was approved.

Petitioners assert in Point V of their Petition for Review that the Commission erroneously based its decision on a "visual inspection of the surface of the site" and ignored the absence of a scientific hydrologic study. In essence, Petitioners contend that Commission Order No. R-9769-A is arbitrary, capricious and not supported by substantial evidence. They ask the Court to disregard the technical evidence presented by the expert witnesses of C & C and the Division and the testing, inspections and recommendations of these experts.

As the Supreme Court announced in *Nat. Council on Comp. Ins. v. Corp. Comm'n.*, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988), in reviewing administrative decisions to determine if they are supported by substantial evidence, a review of the whole record is required and while "the court views the evidence in the light most favorable to the agency decision", it may not totally disregard the contravening evidence. The reviewing court must look at the entire record to find evidence "that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Id.*; see also *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 101 N.M. 291, 681 P.2d 717 (1984), *on remand*, 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984), *cert. quashed*, 101 N.M. 741, 688 P.2d 778 (1984). Therefore, Petitioners' substantial evidence claim requires a full

review of the evidence presented to the Commission on the operations at this facility and the protection of fresh water supplies in the area.

At the hearing, C & C presented Michael Pierce, an expert geological witness, who reviewed the need for a landfarm in this area (TR. 28, 47 and 59), explained how the facility would be constructed and showed where pits, cells and monitor wells would be located (TR. 31-32, C & C Exhibit A) and how they would be operated (TR. 32, 39-40). Mr. Pierce reviewed the "treatment zone monitoring method" to be used at this facility. With this method, surface vegetation is removed and berms are constructed around each cell and around the entire facility (TR. 33-36, C & C Exhibit 4). Tests are then conducted on the top 2 1/2 to 3 feet of soil below the original land surface in the cell, ("the treatment zone"), to obtain data on the constituent elements in the soil against which subsequent test results can be measured (TR. 35). Oil contaminated soils are then spread in the cells in layers, or "lifts," not to exceed six inches in thickness. These lifts are tilled or plowed at least every two weeks to ensure proper aeration and bioremediation. (TR. 36). The soil is tested quarterly to assure contaminants are not migrating into the treatment zone, and more comprehensive testing is required on an annual basis (TR. 36-37). The results of all tests are reported to the Oil Conservation Division (TR. 38).

Concerning the protection of fresh water in this area, Mr. Pierce testified that there was no fresh water under this facility (TR. 41, 63) and showed that with the "treatment zone

monitoring method" migration from this site to a water aquifer is not possible (TR. 64-66). He testified that the monitor wells provide an extra level of protection against underground migration (TR. 63). Mr. Pierce also noted that during a 100 year flood which occurred in May, 1992, when there were no berms around the facility, water ran from the site to the county road to the north and south of the facility (TR. 43) and not toward the Stradley well, 1/2 mile southwest of the disposal site (TR. 41). Furthermore, after this flood, the Oil Conservation Division tested the five monitor wells at this site and found all to be dry (TR. 44). With berms at the site, and the 100 foot buffer zone around this facility, there should be no surface fluid flow of any kind into the facility or runoff from this landfarm. (TR. 68-69).

In response to this presentation, Mr. Stradley and Ms. Reeves presented testimony concerning the general slope of the land in the area and the locations of various other water wells. In addition to this information and the testimony of Mr. Kelly summarized in Point I of this brief, Mr. Kelly called for an extensive hydrologic study of the area (TR. 119-126).

In response to Mr. Kelly's recommendations, Ms. Brown explained the Division's "Conditions of Approval" and how they would result in no significant risk to the Stradley water well.

When the whole record is reviewed as required by *Nat. Council on Comp. Ins., supra* at 562, and *Duke City Lumber, supra* at 717-720, it is clear that Order No. R-9769-A is

supported by substantial evidence, that this order was not based only on a visual inspection of the surface of the site, and that no hydrologic study is required with the "treatment zone monitoring method" being used at this facility.

Mr. Kelly might have decided this case differently than the Commission but he was not the trier of fact. The Commission reviewed the evidence and entered an Order based thereon with findings that fully disclose its reasoning. These findings are supported by evidence sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency. Petitioners' Point V is without merit.

In Point VI, Petitioners challenge Finding 12 on substantial evidence grounds.

Finding 12 states:

"There is a need for landfarms to remediate oil contaminated soils in the oil fields of southeast New Mexico."

Mr. Pierce testified that there were no similar landfarms in the area of the proposed facility. (TR. 28-29). He stated "... it's a much needed system. Right now we're very limited on what we can do with oil-contaminated soil." (TR. 47). On cross-examination he further elaborated on the need for this facility as follows:

"A. (Mr. Pierce) I think a facility like this is needed, yes, sir.

Q. (Mr. Kellahin) Upon what basis did you reach that opinion?

A. Under even new OCD regulations, when you abandon a lease, this lease will have to be reclaimed for state land, under state leases. And, under current federal leases, once you abandon a lease, this lease must be reclaimed.

So, you can either remediate it on site, or you can haul this material over to an appropriate facility." (TR. 59).

Mr. Pierce's testimony was not challenged nor contradicted by any other witness.

Finding 12 is supported by substantial evidence and Petitioners' Point VI fails.

POINT III

C & C LANDFARM INC. MET ITS BURDEN OF PROOF

In their Point II, Petitioners assert the Commission erred by improperly placing the "Burden of Proof" on them at the Commission hearing. Because of what they characterize as a misunderstanding by the Commission of this legal concept, they contend they were required to demonstrate that this landfarm would harm fresh water. (Petition for Review at 4; Application for Rehearing at 5 through 8).

At the beginning of the February 25, 1993 Commission hearing, the issue of who had the burden of proof was discussed. In response to questions by Commissioner LeMay about the procedures to be followed, the Division's attorney, Robert G. Stovall, stated:

"This is truly, and the Division views this, as a **De Novo** case. It is the obligation of the Applicant to show that this facility can be constructed and operated in a manner which is environmentally sound and meets the requirements of the Division, including the fresh water protection, the human or public health and the environment protections that are required. All the requirements of the OCD rules must be satisfied." (TR. 20).

From the start, there was no confusion about who had to carry the burden of proof.

As Petitioners point out, the term "burden of proof" encompasses two separate

burdens. The first is the burden of producing evidence. C & C's evidence is summarized in Point II of this brief (pp. 13 through 15). The second burden is that of persuading the trier of fact that the alleged facts are true. Here, the Commission was persuaded that the proposed commercial landfarm would pose no threat to fresh water supplies in the area. (Order No. R-9769-A, Finding 10, 11, 14-16).

To support their contention that the Commission had a misunderstanding of "Burden of Proof", Petitioners attempt to rely on their own counsel's characterization of the April 27, 1993 deliberations of the Commission. The record on appeal consists of the sworn testimony of the witnesses and the exhibits admitted into evidence. The post-hearing comments of the Commissioners as reported by Mr. Kellahin are outside the record and may not be considered by the Court in reviewing this Order. *See, Continental, supra* at 819.

C & C met its burden of proof, presented evidence, and persuaded the trier of fact that this landfarm should be approved. Point II of the Petition for Review fails.

POINT IV

THE COMMISSION PROCEDURES FULLY PROTECT THE DUE PROCESS RIGHTS OF ALL PARTIES

The purpose of procedural due process is to ensure that the owners of constitutionally protected property rights do not have those rights impaired by state action without having notice and opportunity to be heard and participate in the proceedings which result in the state action. *See Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322 (10th Cir. 1984); *McCoy v.*

**TRIAL BRIEF OF RESPONDENTS OIL CONSERVATION COMMISSION OF THE STATE OF
NEW MEXICO AND C & C LANDFARM INC.,**

N.M. Real Estate Comm'n., 94 N.M. 602, 614 P.2d 14 (1980).

In this proceeding, the parties were aware of the application to be considered by the Commission and the "Conditions of Approval" which the Division recommended be incorporated into any Order which approved this application. Mr. Kelly testified at the September 1, 1992 Examiner hearing on this application and, in preparation for the February 25, 1993 Commission hearing, that he had reviewed the January 6, 1993, revised "Conditions of Approval." (TR. 115, 119-123). It is without dispute that the Petitioners had notice of the February 25, 1993 hearing and the issues to be considered by the Commission in that proceeding. Petitioners were afforded a full opportunity to be heard and participate in this proceeding. Each of the Petitioners and their expert hydrologist presented evidence to the Commission. Thus, their due process rights have been protected, and Point VII of their Petition for Review is without merit.

CONCLUSION

C & C Landfarm Inc. filed an application with the Oil Conservation Division seeking authorization to construct and operate a commercial landfarm in Lea County, New Mexico. The application was reviewed by the Division, the site of the proposed facility inspected by the Division's Environmental Bureau and the application was determined to be approvable. Pursuant to Division rules, notice of this application was provided to Petitioners and others. Because of Petitioners' objections, the application has been twice reviewed in administrative

hearings where Petitioners fully participated. The C & C application has been approved twice.

The Order of the Commission approving this application contains all findings required by law. These findings are supported by the evidence and the proceedings which resulted in these Orders fully comply with all constitutional, statutory and procedural requirements.

Order No. R-9769-A should be affirmed.

Respectfully submitted,

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

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CERTIFICATE OF MAILING

I hereby certify that I have caused to be hand-delivered or mailed a true and correct copy of the Trial Brief of Respondents Oil Conservation Commission of the State of New Mexico and C & C Landfarm Inc. to the following counsel of record, on this ____ day of May, 1995:

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FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF LEA

ELSIE M. REEVES, W. TRENT STRADLEY
and S-W CATTLE COMPANY

Petitioners,

vs.

CIV 93-247 (G)

OIL CONSERVATION OF THE STATE OF
NEW MEXICO and C & C LANDFARM, INC.

Respondents.

**MEMORANDUM BRIEF
OF
ELSIE REEVES AND W. TRENT STRADLEY**

This matter is before the Court on Petitioner's Petition for Review of an administrative order issued by the New Mexico Oil Conservation Commission ("Commission"). Petitioners seeks to have Commission Order R-9769-A declared void. This order was issued by the Commission approving an application by C & C Landfarm Inc. ("Applicant") to construct and operate a commercial surface disposal facility for the landfarming certain oil field wastes ("E&P waste") in Lea County, New Mexico which adjoins property owned by Petitioners W. Trent Stradley and S-W Cattle Company ("Opponents"). Applicant appears in support of the Commission's Order.

SCOPE OF JUDICIAL REVIEW

In recent years the substantial evidence requirement has changed from a review of the evidence most favorable to the agency decision to a review of the evidence in the whole record. **Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). **Trujillo v. Employment Sec. Dept.**, 734 P.2d 245 (N.M. App. 1987).

In reviewing the decision of the Commission, the New Mexico Supreme Court has determined that the District Court is acting as an appellate court and the presentation of new or supplemental evidence in such appellate proceedings is not proper. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962).

In addition, the Court cannot substitute its judgment for the Commission but instead only must decide whether the Commission's decision is reasonable, lawful and based upon the substantial evidence in the record as a whole. **Continental Oil, supra**.

Recently, the New Mexico Supreme Court in **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 835 P.2d 819 (1992) provided the following summary:

"Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Commission**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency

determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members.

Where a state agency possesses and exercises such knowledge and expertise, we defer to there judgment. **Groendyke Transport v. N.M. State Corporation Commission**, 101 N.M. 470, 684 P.2d 1135 (1984);

Arbitrary and capricious action by an administrative agency consists of a ruling or conduct, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.

An abuse of discretion will also be found when the decision is contrary to logic and reason."

The New Mexico Supreme Court has stated the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the laws creating it. **Continental Oil, supra** at 814. The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights (Sec. 70-2-2 NMSA (1978), as amended, and also charges it with responsibility for specifically enumerated powers set forth in Section 70-2-12(B) NMSA (1978) as amended, which include:

(21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment; and

(22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment including administering the Water Quality Act (74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1987) as provided in Subsection E of Section 74-6-4 NMSA 1978."

New Mexico's "Water Quality Act" was first enacted in 1967, established the Water Quality Control Commission ("WQCC") and empowered it to "prevent and abate" pollution of surface water and groundwater. Section 74-6-4.D NMSA 1978. The Oil Conservation Division is one of the WQCC's eight "constituent" agencies, and has been designated by the WQCC to implement and enforce WQCC regulations for oil and gas facilities.

In attempting to meet its statutory charge, the Division adopted Rule 711 which defines "a commercial surface disposal facility" as any facility that receives compensation for collection, disposal, evaporation or storage of produced water, drilling fluids, drill cuttings, completion fluids, and/or other approved oil field related waste in surface pits, ponds or below grade tanks.

Pursuant to Division Rule 711, an operator of a commercial surface disposal facility must file with the Division an application for permit to operate such a facility. In this case, Applicant sought to construct and operate a commercial "landfarm" facility which takes hydrocarbon contaminated soil to a central point and then spreads it on the surface.

The task before this Court is to determine if the Commission's decision is reasonable, lawful and based upon substantial evidence in the record as a whole.

Opponents submit that it is not.

ISSUES FOR REVIEW

Opponents asks this Court to vacate Commission Order R-9769-A because the order was entered in violation of Opponents' constitutionally guaranteed due process rights. Additionally, Opponents assert that this order is contrary to law, not supported by substantial evidence and is arbitrary, capricious and an abuse of the Commission's discretion and should be vacated because:

(1) The Commission ignored the ultimate issue in dispute which was whether this commercial waste disposal facility creates a risk of contamination to the "Stradley fresh water aquifer";

(2) Order R-9769-A was adopted by a majority of the Commission based upon an incorrect understanding of "burden of proof" and by improperly shifting that burden to the Opponents to demonstrate that the waste facility would harm the fresh water aquifer;

(3) The Commission violated New Mexico SCRA Rules of Evidence Rule 703 when it rejected Opponent's expert witness's opinions because he had not made a visual inspection of the surface;

(4) Order R-9769-A contains Finding (11) concerning the Ogallala Aquifer" but failed to make appropriate findings concerning the Stradley Aquifer" which discloses that the Commission decided this case based upon the location of an aquifer not at issue and therefore wrongly decided this case;

*(5) The Commission erroneously based its decision on a "visual inspection of the surface of the site" by an unqualified Division employee and ignored the absence of a scientific hydrologic study and thereby adopted a standard for scientific testimony which is contrary to **State v. Alberico**, 116 N.M. 156, 861 P.2d 192 (1993);*

(6) There is no substantial evidence to support Finding (12) which states "there is a need for landfarms to remediate oil contaminated soils in the oil fields of Southeast New Mexico";

(7) The Commission has entered an order which approved a commercial "landfarm" waste facility specifically limited to the remediation of non-hazardous hydrocarbon contaminated soils but set up a process for the applicant to expand its facility and accept other contaminants and to do so without public notice or public hearing violates procedural due process;

*Kelly
Bundy
aquifer
Ogallala*

(8) The Commission's order violated the *Fasken*, the *Viking Petroleum*, and the *Continental Oil* cases when it failed to address and to decide the Opponents' issues and objections

BACKGROUND

This is a precedent setting case. This is only the second application for a commercial "landfarm" facility ever to be approved by a Division Examiner and the first to be appealed to the Commission. The following chronology is provided:

(1) About October 4, 1991, C & C Landfarm Inc. ("Applicant") prepared and filed with the OCD-Environmental Bureau ("OCD-EB") an application for a SURFACE WASTE DISPOSAL FACILITY seeking authority to place contaminated soils on the surface of a 40-acre tract in the SW/4NE/4 of Section 3, T20S, R37E, Lea County, New Mexico.

(2) Originally, Applicant applied for approval to excavate the native soil within the facility down to the redbeds (about 10-16 feet) and then to fill the excavated pit with non-hazardous hydrocarbon contaminated soils. Applicant had drilled five monitor wells and had not encountered water in any of them.

*soils mixed
in 6" lifts and
remixed
before next lift
is added*

(3) At the time of the application, a two acre portion of the site had been excavated with the caliche material being removed and used on roads etc in the area. Applicant sought approval to continue to increase the excavation to include the entire 40-acres over time.

(4) The OCD-EB began processing the application under Division Rule 711-Commercial Surface Waste Disposal Facilities.

(5) Timely objections were filed by Trent Stradley of S-W Cattle Company, Elsie Reeves and others, ("the Opponents"). Mr. Stradley's ranch is adjacent to and south of the facility. His windmill is located one-half mile from the facility and it is the only water available for his cattle within two miles. It's current water level is at about 12 feet below ground level.

(6) On February 21, 1992, OCD-EB (Kathy Brown) wrote Applicant expressing, among other things, concern for the "possibility of contaminants migrating off of your property along the surface of the redbed" and requested a detailed description of how Applicant planned to prevent the migration of contaminants down gradient along the redbed surface.

(7) On March 2, 1992, Applicant submitted to OCD-EB a schematic for the excavated pit now showing a proposal to install a "redbed dike" on the south, west and north edges of the property with the south edge of the dike touching the north edge of the Stradley property.

(8) April 3, 1992, Kathy Brown notifies the Opponents that the application is now to be administratively approved since it meets all of the OCD-EB requirements to protect ground water, human health and the environment.

(9) May 20, 1992, Kathy Brown notifies the Opponents of the application has been approved subject to the May 20, 1992 conditions, attached. She further notifies the Opponents that they may object and seek a hearing.

(10) September 1, 1992, the case is heard by Division Examiner Stogner with Michael Pierce testifying for the Applicant and Tim Kelly, hydrologist, Trent Stradley and Elsie Reeves testifying for the Opponents.

~~Kathy~~
~~100~~

(11) On November 16, 1992, Division Order R-9769 was entered approving disposal into excavated pit subject to the May 20, 1992 OCD-ED Conditions, with very minor modifications.

(12) On December 8, 1992, Opponents timely filed for DeNovo Hearing before the Commission.

(13) On January 6, 1993, the OCD-EB issued its proposed Revised Recommendations which now preclude disposal into excavated pit.

(14) On February 25, 1993, the Commission held its DeNovo hearing.

(15) On April 29, 1993, by a vote of 2-1, the Commission (with Commissioner Gary Carlson dissenting) issued its decision approving this facility.

(16) On May 18, 1993, an Application for Rehearing was timely filed and was deemed denied when not granted within ten days.

(17) On June 1, 1993, an appeal to District Court was timely filed.

ARGUMENT

THE CONCERN:

This is a simple case. The disposal facility is adjacent to Opponent Stradley's S-W Cattle Ranch and approximately one-half mile from his nearest windmill which provides water for his cattle. The ultimate factual issue is whether this surface waste facility creates a risk of contamination to the fresh water aquifer ("Stradley Aquifer") from which Trent Stradley's well has produced continuously in excess of forty-five (45) years and is the only fresh water supply for cattle in some nine sections (TR. 83-89, 99).

Opponent Stradley has fresh water at approximately 12-15 feet below the surface in the immediate vicinity of the subject project which he currently uses and which is at risk of contamination if this project is approved as outlined by the "OCD Conditions of Approval" notice dated May 20, 1992 or as outlined in "OCD Recommendations" dated January 6, 1993 (Tr. 99-101).

Opponent Stradley, who has been over every part of this "White Break" area for decades, testified that the facility was located on the northeast edge of a natural topographical depression with his fresh water windmill located in the bottom of that depression and in excess of 30 feet lower than the surface waste disposal facility (TR. 89-90).

Opponent Reeves, after extensive personal search of the State Engineer's records concerning fresh water wells in the area introduced evidence of the presence of some forty-six (46) water wells in the area (TR. 108, Opponent's Exhibits 6 & 7).

The Applicant had some 240 contiguous acres from which to select a possible site for the facility. It chose a site closest to the Stradley property and his water well (TR. 50, 101).

Land Use

No GW

This is a simple case because there was insufficient scientific evidence presented by the Applicant or by the OCD-EB to justify its request.

Opponents contend that the Commission could have and should have required that this facility be located farther north within the same tract of land controlled by the Applicant (TR. 101). Instead, the Commission chose to avoid this solution, ignored the Opponents and approved a facility on the southern end of the Applicant's tract adjacent to Mr. Stradley's tract which puts the risk of contamination upon Mr. Stradley and not upon the Applicant (TR. 99).

Land Use

TWO AQUIFERS TO BE PROTECTED

The aquifer at risk is the Stradley Aquifer in the shallow alluvium down slope from the proposed waste facility. The Stradley Aquifer is produced by a windmill where the top of the water is only 12-15 feet below the surface (TR. 86). The issue should be where are the vertical and horizontal limits of that aquifer and its recharge system.

However, at the hearing the Commission raised the irrelevant issue of the location of the Ogallala aquifer and then used that irrelevant fact as a basis for approval of the Application (TR. 141-144) and Finding (11)(a). The aquifer at risk

and for which the Commission failed to address any findings was the Stradley Aquifer in the shallow alluvium down slope from the proposed waste facility. The issue which the Commission failed to address is where are the vertical and horizontal limits of the Stradley Aquifer and its recharge system.

It is of no consequence whether the Ogalalla aquifer is present under the waste facility. However, if the Commission wants to decide this case based upon the presence or absence of the Ogalalla aquifer under the facility, it has made a fundamental error in finding the Ogalalla aquifer absent.

To decide this case based upon location of an aquifer not at issue in this case is to wrongly decide this case.

HOW TO PROTECT THE STRADLEY AQUIFER?

Protection of the Stradley Aquifer is based upon the reliability of the facility design which is based upon the integrity of the soil between the contaminants and the aquifer and the ability to detect those contaminants as they move through those soils.

No GW
No Acc 131
irrelevant
The integrity of this landfarm system is dependent upon the impermeability of the redbeds, but the applicant presented no data about the physical characteristics of these deposits, such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc. All of these would be critical factors to ensure that there is no migration of leachate along the top of or through the redbeds (Tr. 131). *BS!*

Treatment zone
monitoring

WHERE'S THE SCIENCE?

To protect the Stradley Aquifer, it was essential for the Commission to have proper scientific evidence about the physical characteristics of the soils and about the Stradley Aquifer including its size, shape and recharge mechanics.

The Applicant's failure to submit that evidence is fatal to its case and is what Commissioner Carlson meant when he said the Applicant had failed to meet its "Burden of Proof."

BS!

(Look @ Clouds)

No fluids. If none -> emit

The fact that the Applicant did not find the Stradley Aquifer with some five shallow monitor wells drilled on the proposed facility does not substitute for a proper hydrologic study to determine the risk to the Stradley Aquifer. Contaminates can be introduced on the surface and with the introduction of rain will percolate into the ground both vertically and horizontally and migrate into the Stradley Aquifer (TR. 118, 133).

Nobody knows how the Stradley Aquifer is recharged and from what source. Nobody knows the size and shape of the Stradley Aquifer. The Commission ignored that absence of evidence and in doing so, failed to decide the ultimate issue in this case.

X

There are no scientific data introduced on soils tests and therefore no compaction data, no composition data, and permeability data from which to determine the construction and maintenance standards for the facility so that Stradley Aquifer would be protected (TR. 52-54).

Nothing to move

Irrelevant: No recharge.

In approval

Based:
1. No fluids introduced
2. No GW
3. Monitoring

No leachate allowed

In a failed attempt to overcome the lack of scientific evidence, the Commission found it necessary to order the construction of a berm to "prevent precipitation run-off and run-on..." See Finding 11(b). However, it is of no use to order the construction of a berm if there is no science or experience upon which to base its effectiveness and no details concerning the construction, maintenance or operations requirements for the berm.

The Commission also made a mistake when it attempted to overcome the lack of scientific evidence by adopting the OCD-EB January 6, 1993 Proposed Conditions concerning a Buffer Zone, a Treatment Zone and a Monitoring system.

A Buffer Zone is essential but the proper distance must be based upon some site specific scientific reasons to determine that distance is adequate. The Commission has adopted an arbitrary distance for the Buffer Zone without any scientific basis.

A Treatment Zone and its Monitoring System are essential but it is speculation that the first three feet of native soils will be an adequate "Treatment Zone" and with monitoring will protect ground water. The proposed monitoring of the Treatment Zone has no scientific basis for determining its reliability. There is no data from which to determine that the location of the cells in which the contaminated soils will be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property. Nobody knows how frequently to sample and how many samples per acre to take in order to detect contamination in the Treatment Zone. The OCD-EB Revised Recommendations are inadequate to detect any leaching process of movement of contaminants that could cause the pollution of nearby fresh water supplies.

THE EXPERTS:

APPLICANT'S EXPERT:

Applicant's only witness was Michael Pearce, a petroleum geologist, who was employed by the Applicant to plan the facility (TR. 25, 26). Pearce testified that he did not have a degree in hydrology and did not have any experience in modeling or studying groundwater movement (TR. 27). He simply agreed to do what the OCD-EB asked him to do (TR.29).

Other than the results of the five marker wells drilled to between 16-20 feet deep (TR.40, Opponent Exhibit 8) and a water sample from the Stradley windmill (TR. 42), Applicant had no technical data to support its application (TR. 40, 41) and expressed no expert opinions concerning the adequacy of the design or operation of this facility to protect public health, safety or groundwater (TR. 47-48).

Over the objection of Opponents, the Division attorney asked Mr. Pearce, an unqualified witness, his opinions of the mostly likely manner in which contaminants from the soil would possible get to fresh water (TR. 63).

In response to Commissioner Carlson question about how this facility was going to work Pearce testified it's "going to be trial and error." (TR. 72)

THE AGENCY'S EXPERT:

Despite a disclaimer by the Commission's attorney, the OCD assumed an adversarial role in these proceedings with the Commission's attorney calling Division employee, Kathy Brown, to support granting the Applicant's application (Tr. 146).

OCD-EB's Kathy Brown dealt extensively with the Applicant and prepared the various conditions of approval of the facility (Tr. 149-150). She was the Division's "expert witness" who had visited the site and was responsible for the latest draft of the OCD proposed conditions for approval (Tr 150, 155). Kathy Brown held a degree in geology but no degree, training or experience in hydrology.[?] This was the first such project for Southeastern New Mexico and the first she had work on (Tr 151).

Ms. Brown had no idea about the likely direction that contaminants may move and has no clue about the rate of that migration (Tr. 167). The 100 foot horizontal setback ("buffer") was recommended by Kathy Brown of the OCD-EB. On cross examination, she admitted that there is no scientific basis for the distance being 100 feet (Tr. 175).

Again, Kathy Brown, testifying in support of the adoptions of the OCD-EB conditions was not a qualified expert hydrologist and did not undertake an adequate scientific study to justify her proposed Treatment Zone or its Monitoring system (Tr. 161).

THE OPPONENTS' EXPERT:

Opponents presented Mr. Tim Kelly, an expert hydrologist, (TR.111-113) who testified and concluded that, based upon published U. S. Geological Survey maps of water table contours, the likely direction of contaminant movement from the waste disposal facility will be down gradient along the redbed surface directly towards the Stradley water well (TR.117 and Opponent Exhibit 10 page 8). But there have been no hydrologic studies of the area to determine the length of time and distance of travel of the contaminants. (Tr. 135-137) His point was that the Commission cannot approve this facility until that determination is made.

The Commission also assumed that any contamination would be kept confined to a three foot "treatment zone" above the "redbeds" and if not, then detected by periodic soil sampling. But Mr. Kelly testified that the Treatment Zone was inadequate (TR. 127); there was no scientific study of the character of the soil (TR. 120); that the configuration of the upper surface of the redbeds in the 40-acre tract has not been defined (TR.122); and there was an insufficient number of monitoring wells to protect the environment (TR.119, 122, 127, 128). Mr. Kelly told the Commission "there's a tremendous opportunity for this stuff (contaminants) to get away from them and they would never know it" (TR. 128).

COMMISSION'S STANDARD FOR EXPERTS:

The Commission accepted the opinions of the Division's Environmental Bureau ("NMOCD-EB") even though its witness was not a hydrologist because she had made a personal visual inspection of the site. See Finding (14). The Commission rejected the expert opinions of Mr. Kelly, the Opponent's qualified hydrologist, because he had not made a recent personal visual inspection of the site. See Finding (13). The Commission ignored the fact that Mr. Kelly had been present for and reviewed all of the transcripts and exhibits of the Division Examiner hearing of this case including the various topographical maps and testimony of others concerning the appearance of the facility and the site and had conducted hydro-geologic studies in this general area in the past.

New Mexico Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Commission failed to remember the testimony of Mr. Stradley who had repeatedly been over every part in this "White Breaks" area for decades (TR. 89-90). Mr. Stradley testified that the surface waste facility was located on the northeast edge of a natural topographical depression with his fresh water windmill located in the bottom of that depression and in excess of 30 feet lower than the surface waste facility (TR.89-90). As an expert witness, Mr. Kelly does not have to personally visit the site. He is entitled to rely upon the observations of Mr. Stradley and others and did so to support his expert opinions.

While a visual inspection of the surface of the facility is hardly scientific and does not allow the observer to divine the subsurface conditions in the area, the only inference for the Commission to have drawn from site inspection was that the surface topography would increase the risk of contamination to the Stradley Aquifer (TR. 117-118).

As an apparent excuse for disregarding the lack of technical data by the Applicant, the Commission decided this case based upon which witness had made a personal visual inspection of the site and thereby rejected the expert opinions of the Opponent's witness because he had not made a personal inspection of the site. Although the Commission enjoys the ability to relax the rules of evidence they should not decide cases based upon an erroneous application of those rules.

The Commission erroneously based its decision on a "visual inspection of the surface of the site" by an unqualified Division employee and ignored the absence of a scientific hydrologic study and thereby adopted a standard for scientific testimony which is contrary to **State v. Alberico**, 116 N.M. 156, 861 P.2d 192 (1993) where

the New Mexico Supreme Court adopted a three factor approach to the admissibility of scientific evidence:

- a) The expert must be qualified by knowledge, skill, experience, training or education;
- b) will the testimony assist the trier of fact; and
- c) will the expert testify only as to "scientific, technical or other specialized knowledge.

COMMISSION'S EXPERTISE:

What distinguishes the subject case from the contested cases discussed in **Santa Fe Exploration Company**, supra, is that there was no technical evidence in dispute which required the specialized expertise of the Commission. The Applicant simply failed to present a hydro-geologic study. And the Commission failed to require it ~~thereby abandoning its duty to use its expertise.~~

based upon

It is not a resolution by the Commission of a technical dispute between competing expert witnesses when there are no hydrologic studies of the area and no data from which to form an opinion about the proper facility design which would adequately protect water from contamination.

The Commission failed to explain how that surface inspection could substitute for a scientific hydrologic study of the potential contamination of Mr. Stradley's fresh water well.

OCD-EB VIOLATED DUE PROCESS:

The subject facility was one of the first of its kind (Tr. 151) and was designed by the OCD-EB (TR.38,61) and not the Applicant and was permitted without any science or experience to know that it would work. This has been and continues to be

a "make it up as you go" process by which the agency designs the specifications for the facility and then challenges the Opponents to prove them wrong (TR. 115, 146). Such an adversarial role is not the proper role for this agency. The procedure applied by the Division in processing this case violated procedural due process.

Rather than functioning as a reviewing regulatory agency, the OCD-EB in this case has taken a facilitator's role by providing "technical" support and assistance to the Applicant before, during and after the hearing.

In its efforts to engage in the design of a "new type facility" and to accommodate the requests of a former OCD employee, Eddie Seay, who is now a consultant to the Applicant (TR.80-81), the OCD-EB's actions in this case have impaired and tainted its ability to be impartial and have caused the Commission to approve an application which otherwise would have been denied.

It is difficult to have confidence in the expertise of this agency when the OCD-EB approved the use of the excavated pit concept subject to conditions issued May 20, 1992. Then after the OCD-Examiner Hearing where the Opponents strenuously objected to the use of the pit, the OCD-EB substantially revised the Conditions and issued new requirements dated January 6, 1993 which now preclude the use of the excavated pit.

It is difficult to consider the agency reasonable and objective when the Applicant has let the OCD-EB in effect design the Landfarm facility and the OCD keeps changing its mind. Opponents wonder if the facility as now approved even with the January 6, 1993 conditions will protect ground water, human health and the environment.

The Opponents fear the answer is that "nobody knows"--this is an experiment in an area of known ground water produced at 18 feet. The methods used by the Division in processing this case violates procedural due process.

ARBITRARY AND CAPRICIOUS:

It is characteristic of this case that the Division and Commission simply have no expertise in this area. The procedures being applied to this facility over the object of the Opponents are based upon OCD-EB "guesses" of what is necessary for this project.

What is arbitrary and capricious is that the Division has designed this facility for the Applicant without any public notice or comment and then issues a notice to the Opponents requiring them to come forward to assume the burden of proving that the facility will harm the Opponents.

It is impossible to defer to the specialized knowledge and technical expertise of the Commission when the Commission failed to ask even the most basic of "common sense" questions about:

(A) The agency's handling of the Horizontal Buffer Zone for the facility: Applicant sought to put the facility and contaminated soils right up to the property line common with Trent Stradley, an opponent. The OCD-EB May 20, 1992 conditions approved the facility without a buffer zone. The OCD examiner approved the application without a buffer zone.

Now, the Commission has adopted OCD-EB January 6, 1993 conditions for a 100 foot buffer zone around facility BUT does not require a buffer zone around the excavated pit.

It is undisputed that Tim Kelly, the only qualified expert to testify on this subject, said that an adequate Buffer Zone is essential to keep contaminants from getting outside the facility prior to detection and moving undetected along the redbeds towards the Stradley water well (TR. 117, 121-122). So the agency recommends a distance it admits is arbitrary (TR. 121) and the Commission approves the use of an arbitrary 100 foot set back without any prior experience, regulations, guideline or anything else. That is arbitrary.

(B) The agency's handling of the Treatment Zone for the facility:

OCD-EB's Kathy Brown in Item #1 of the January 6, 1993 Conditions, recommended that no contaminated soil be placed in the excavated pit because she was concerned about the ability to detect and monitor for contaminants moving along the redbeds which reversed an earlier OCD-EB May 20, 1992 Conditions of Approval which allowed the disposal of contaminated soils into the excavated pit.

The OCD-EB January 6, 1993 Plan now precludes the use of the excavated pit. In order to protect ground water OCD-EB considers the disposal of contaminated soils on top of undisturbed native soil to constitute an adequate vertical buffer between the containments and the potential source of ground water recharge to the Stradley windmill.

Now, the Commission adopts the OCD-EB's January 6, 1993 Recommendations because it is assumed that the contaminated soils will be kept from any shallow fresh water because of about three feet of native soil being used as a "treatment zone."

It is undisputed that Tim Kelly, the only qualified expert to testify on this subject, said that an adequate Treatment Zone is essential to keep contaminants including salts from getting outside the facility prior to detection and moving undetected along the redbeds (TR. 124-128). So the agency recommends and the Commission approves the use of an arbitrary three (3) foot Treatment Zone, ignoring potential salt contamination, without any prior experience, regulations, guideline or anything else. That is arbitrary.

(C) The agency's handling of the soil samples for the facility:

The May 20, 1992 Conditions did not require for any soil samples to be taken. The January 6, 1993 Recommendation now requires soil samples. The Commission adopts the OCD-EB January 6, 1993 Recommendations to sample the treatment zone with a one sample taken quarterly in not more than 5-acre cells.

It is undisputed that Tim Kelly said the ability to detect contaminants percolating into the native soil treatment zone is predicated upon adequate soil samples but until it is subject to a proper study nobody knows how frequently to sample and how many samples per how many acres (TR. 131). So the Commission approves a soil sample procedure for the facility with only a single sample taken at the center of the 40-acres and without any knowledge whether soil conditions and characteristics will change over the 40-acre tract. That is arbitrary.

WHAT HAPPENED TO DUE PROCESS?

It is not enough in this case for the Commission to simply adopted the OCD-EB revised Conditions of Approval and to then append those conditions to Order R-9769-A as Exhibit "A."

The Commission granted the Applicant more than Applicant sought. While the Applicant only sought to construct and operate a commercial "landfarm" facility specifically limited to the remediation of non-hazardous hydrocarbon contaminated soils, the OCD Conditions appended to the Order R-9769-A as Exhibit "A" also authorize other contaminants to be received into the facility.

Specifically, OCD Conditions #1 and #10 set up a process for the Applicant to expand its waste facility to accept other contaminants and to do so without public notice or public hearing.

Since April, 1992, the Opponents have complained about receiving inadequate notice of about this Application, including the NMOCD-EB approving this facility and the various amendments to that Application without notice to Opponents. The public notice in this case is flawed and continues to violate due process. The Commission has perpetuated that violation of procedural due process by approving an order which allows amendments to take place without public notice or hearing.

WHAT THE COMMISSION IGNORED:

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975). Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962).

Likewise, in Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in Continental Oil and Fasken, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

The Commission failed to explain why it found it important to summarize the disputed Applicant's evidence but omitted a summary of the Opponent's evidence.

The Commission failed to adopt an adequate order which complies with state law. The Commission required the submittal of Post Hearing proposed orders from both the Applicant and the Opponents (TR. 180) and then ignored the Opponent's requested findings. An adequate order would specifically address the issues described in the Opponents' Proposed Order and in its Application for Re-Hearing. The Commission needed to articulate its decision on each of the essential conditions which were opposed by the Opponents.

The Commission ignored the testimony of Mr. Stradley about the slope of the topography and the fact the facility was some 35 feet higher in elevation to his down slope fresh water well.

The Commission ignored the testimony of Opponent Reeves who had located and identified some forty-six (46) water wells in the area.

The Commission ignored Opponents' Requested Findings in its Proposed Order that the granting of the application by the Commission would fail to protect human

health and the environment and constituted a risk of contamination of ground water, because:

- (a) The Applicant's proposed plan will place at risk shallow water wells located down-dip from the proposed landfarm which will be subject to contamination from seepage of leachate contaminants.
- (b) The Applicant's plans to prevent migration of contaminants down gradient along the redbed surface is inadequate.
- (c) The proposed monitor wells are improperly located and will not afford adequate assurance of detection of contaminants.
- (d) The proposed dike identified in OCD Condition (10) in said Order is insufficient and conditions on compaction and verification are inadequate to stop the mobility of the leachate contaminants.
- (e) The composition of the berm is not environmentally safe.
- (f) Additional soil tests should be performed on the redbed soil.
- (g) Applicant needs to perform liquid and plastic tests on the redbeds.
- (h) The Applicant's proposed barrier is inadequate for its proposed landfarm.

Commission Order R-9769-A is fatally flawed and should be vacated by this Court.

WHOSE BURDEN ANYWAY?

The Commission improperly placed the "Burden of Proof" on the Opponents to demonstrate that the waste facility would harm the fresh water aquifer. During public deliberations Commissioner Weiss commented that he had specifically edited Finding (13) of Order R-9769-A to place emphasis upon the Opponent's hydrologist's failure to visit the site and take samples and conduct tests.

The Commission missed the purpose of Mr. Kelly's testimony. As the only qualified hydrologic expert presented to the Commission on this matter, Mr. Kelly's testimony was to show the Commission what should be required of the Applicant (not the Opponents) before a proper decision could be made about this waste facility.

It is not the Opponents' burden to prove that this surface waste facility will contaminate the Stradley Aquifer. To the contrary, it is the Applicant's Burden of Proof to persuade the Commission that it will not.

In this case, the alleged fact is that the approval of this facility will not pose a risk to ground water, human health and the environment. The Applicant always retains the ultimate burden of producing evidence AND the burden of persuasion that the facility would not pose a risk to the Stradley Aquifer. The Applicant's failure to provide evidence of the size, shape and hydrology of the Stradley Aquifer from which the Stradley windmill produces fresh water is a failure of the Applicant to meet its "Burden of Proof."

All that the Opponents needed to do, they did by introducing evidence of the location of the fresh water sources in the Stradley Aquifer in close proximity to the waste facility. It then was the Applicant's Burden of Proof to produce the hydrologic study of the Stradley Aquifer which must provide convincing evidence that no risk was being imposed upon the Stradley Aquifer by this waste facility.

While the Applicant introduced evidence of five monitor wells all located within the facility having failed to encounter the Stradley Aquifer, the Applicant failed to provide evidence explaining: (a) how water was present at the windmill and yet only

one-half mile away, was absent at the facility; and (b) how the facility was going to adequately protect the water well from contamination.

It is improper to put the Applicant's failure of proof on the Opponents.

CONCLUSION

In summary, while the OCD-EB recommendations are well intended, they are inadequate to provide reasonable protection of the valuable groundwater present in the immediate adjacent tracts. The Commission should withdraw Order R-9769-A and substitute Order R-9697-B which is attached hereto as Exhibit A and incorporated herein by reference. In order to preserve Opponents' right to further appeals of this matter, all of the issues set forth in our proposed Order R-9697-B are made a part of this Application for Rehearing.

Respectfully submitted,

KELLAHIN AND KELLAHIN,

A handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', is written over a horizontal line.

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