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STATEMENT OF THE CASE

Appellants, landowners, pursue judicial review of the Order (R-6446-B) entered on rehearing by the Oil Conservation Commission in proceedings (Case No. 6967) on the application of Amoco Production Company for approval of its proposed Bravo Dome Carbon Dioxide Gas Unit Agreement (Plaintiffs' Petitions, Vol. 1, Tr. 1-135).

Section 70-2-25B, N.M.S.A., 1978, as amended, confers jurisdiction on the trial court and this Court and defines the nature and extent of the judicial review in this case, consolidating three like suits filed in the District Courts of Union, Quay, and Harding Counties, respectively, and transferred to Taos County. The District Court confined the trial to review of the record made before the Oil Conservation Commission, filed by the Commission, and brought forward to this Court, and to argument of counsel (Vol. 2, Tr.)

The trial court entered its Memorandum Decision (1 Tr. 180-183) concluding as a matter of law that the Commission acted within its authority in approving what the Court called a preliminary unitization agreement. (1 Tr. 183)

In its Judgment (1 Tr. 184-185), the trial court again classified the proposed unit agreement as a preliminary unitization agreement.

This case largely hinges on a number of written documents to be found in the Transcript of Commission Proceedings filed in this case and brought forward to this Court, as follows:

	DOCUMENT	LOCATION IN THE RECORD
1.	The Proposed Unit Agreement, in 23 pages, exclusive of Exhibits	Amoco Exhibit 1 in the Commission Transcript
2.	The Commission Order on original hearing (No. R-6446), dated August 14, 1980	1 Tr. 8-10, and in the Commission Transcript
3.	Application for Rehearing before the Commission	1 Tr. 16-24, and in the Commission Transcript
4.	Commission Order on Rehearing (R-6446-B), dated January 23, 1981	1 Tr. 34-40, and in the Commission Transcript
5.	The Trial Court's Memorandum Decision	1 Tr. 180-183
6.	The Trial Court's Judgment	1 Tr. 184-185

The Commission Transcript also includes Appellants' Requested Findings and Brief which may be of some assistance to the Court.

STATEMENT OF PROCEEDINGS

The Proceedings Before the Commission. The operative order of the Commission is the Order it entered on rehearing (1 Tr. 34-40). On rehearing, the Commission found that: Amoco Production Company seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement covering 1,174,225.43 acres of state, federal and fee lands (Finding 2, 1 Tr. 34). Unitized operation and management has advantages over lease-by-lease development in affording more efficient,

orderly and economic exploration, and more economical production, field gathering, and treatment of carbon dioxide gas. These advantages will reduce average well costs, provide for longer economic well life, and result in greater ultimate recovery of gas, thereby preventing waste (Findings 7, 8 and 9, 1 Tr. 35). The unit area is a large area with carbon dioxide potential, some parts of which have experienced a long history of production (Findings 10 and 11, 1 Tr. 35). At the time of the hearing, a number of exploratory wells had been completed in scattered parts of the unit, but the developed acreage is very small compared to the unit area, so the unit must be considered an exploratory unit (Findings 12 and 11, 1 Tr. 36). There are two methods of participation shown in evidence which would protect the corelative rights of owners. One is by formulae under which each owner would share in production from any unit well in the proportion that each owner's acreage interest in the unit bears to the total unit acreage. The other provides for the establishment of participation areas in the unit, based on completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties in interest within designated participating areas sharing in production. Such participation would be based on the proportion of each owner's acreage interest within the participating area as compared to the total acreage in the participating area. Each method has certain advantages and limitations (Findings 14 and 15, 1 Tr. 36). There is no evidence on which to base a finding

that either method is clearly superior at this time. The method of sharing the income from production as provided in the Unit Agreement is reasonable and appropriate at this time (Findings 16 and 17, 1 Tr. 36). There is a clear need for the carbon dioxide projected to be available from the unit in enhanced recovery of crude oil (Finding 18, 1 Tr. 37). Approval of the unit and development of the unit area will not result in excess capacity of carbon dioxide (Finding 19, 1 Tr. 37). The application is not premature (Finding 21, 1 Tr. 37). This is the largest unit ever proposed in the State of New Mexico, and perhaps, the United States. There is no other carbon dioxide gas unit in the State. The Commission has no experience with the long-term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas (Findings 22, 23 and 24, 1 Tr. 37). The Agreement at least initially provides for development by a method that will serve to prevent waste and which is fair to the owners of interests therein. The current availability of reservoir data does not permit the presentation of evidence or the finding that the Unit Agreement provides for the long-term development of the unit area in a method which will prevent waste and which is fair to the owners of interests. Further development should provide the data upon which such determinations could, from time-to-time, be made. (Findings 25, 26 and 27, 1 Tr. 37) (emphasis added). The Commission is empowered and has the duty with respect to Unit Agreements to do whatever might be reasonably necessary to prevent waste and to protect cor-

relative rights. (Finding 28, 1 Tr. 37). The Commission may and should exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions in the future as may in the future be necessary to prevent waste and protect corelative rights, including well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the Unit Agreement. (Findings 29 and 30, 1 Tr. 38) (emphasis added). Approval of the proposed unit area with the safeguards provided above should promote the prevention of waste and the protection of corelative rights within the unit area (Finding 37, 1 Tr. 38) (emphasis added).

The Commission then ordered: (1) that the Unit Agreement be approved (1 Tr. 38). (2) that the plan contained in the Unit Agreement for the development and operation of the unit area is approved in principle as a proper conservation measure; provided that notwithstanding any other provision of the Unit Agreement, this approval shall not be considered as waiving or relinquishing in any manner any right, duty or obligation now or hereafter vested in the Commission to supervise and control the operations for the exploration and development of any lands committed to the unit and production of carbon dioxide therefrom, including the prevention of waste and protection of corelative rights (1 Tr. 38-39). (11) Jurisdiction of this case is retained for the entry of future orders, as the Commission may deeem necessary (1 Tr. 40).

The Findings, Conclusions and Judgment of the Trial Court. Following review of the Commission record, and argument of counsel, the trial court, in its Memorandum Decision, found that Plaintiffs are all owners of carbon dioxide property rights within the proposed unit area, in the three counties (Finding 1, 1 Tr. 181). The Commission is a regulatory agency empowered under Section 70-2-1, et seq., N.M.S.A., 1978, to regulate and control production or handling of carbon dioxide (Finding 2, 1 Tr. 181-182). The primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, protecting correlative rights of owners during exploration of the natural resources (Finding 3, 1 Tr. 182). The petition to the Commission arose out of agreements contained in oil and gas leases with fee owners of land, some of whom are Plaintiffs, requiring review and approval of unit agreements by the Commission. The efforts to unitize in this case are therefore characterized as voluntary unitization where all parties concede that land belonging to fee owners not part of such lease agreements is not included as part of the unit (Finding 6, 1 Tr. 182). The record before the Commission contains (a) adequate geological data showing that the Tubb Formation is within the unitized area as a reasonable geological possibility; (b) inadequate geological data to show the various underground meanderings of the formation and therefore to determine, as a geological possibility, whether certain fee owners are or not entitled to royalties because of the location of that formation, and in what distribution;

(c) the data for such determination will occur during the very exploration and production contemplated within the challenged Commission Orders and at which time much of the waste to protect against would likely occur; (d) the Commission was unable to determine which method of guarantee of correlative rights would be best, because the information on which to reasonably calculate the best method at this time does not exist, and therefore, alternative methods subject to subsequent review by the Commission were approved (Finding 7, 1 Tr. 182-183); and (e) the Commission retained jurisdiction over the unit to reasonably respond as information develops (Finding 8, 1 Tr. 183).

In its conclusions of law, the trial court decided that (1) substantial evidence exists on the record of proceedings to support the Commission's findings; (2) the conclusions reached by the Commission in approving the unitization agreement are supported by the findings of fact; (3) the Commission acted within its authority in approving the preliminary unitization agreement, and properly within its mandate to provide an opportunity for property owners, to produce, insofar as practicable, without waste, a proportion of gas in the formation, insofar as can practically be determined and obtained without waste; and (4) The decision of the Commission should be sustained (1 Tr. 183) (emphasis added).

In its judgment, the trial court found that the Commission's findings of fact are supported by substantial evidence; the conclusions reached by the Commission are

supported by findings of fact; the Commission acted within its authority in approving the preliminary unitization agreement; and the decision of the Commission should be sustained. (1 Tr. 184) (emphasis added).

The Unit Agreement. Appellants particularly call to the attention of the Court the following features of the proposed Unit Agreement (Exhibit 1 in the Commission Transcript):

1. It is a contract.

2. Section 3.3 modifies, amends and conforms all leases and contracts pertaining to oil and gas, including carbon dioxide, on lands committed to the Agreement, including provisions pertaining to drilling, producing, rental and minimum royalties; and provides that development and operation of lands subject to the Agreement under the terms of the Agreement shall be deemed full performance of all obligations for development and operation on each separate tract subject to the Agreement; and extends the term of all leases for the full term of the Unit Agreement. (emphasis added)

3. Section 4.2, pertaining to development, requires drilling not to exceed four wells per year on the more than one million acres during the first two years the Agreement is effective, and the submission of plans for further development thereafter, but nowhere does the agreement provide sanctions if the proposed plans do not meet with the approval of the Commission and the Commissioner of Public Lands;

4. Article 5, pertaining to tract participation, makes each acre in the unit equal to each other acre, without regard to productive quality, recoverable reserves, or

other relative values, and provide for a change within twenty years to eliminate only acreage that contains no Tubb Formation.

5. Section 6.3 expressly allows self-dealing by working interest owners to determine amounts to become due non-working interest owners.

6. Article 11 enlarges the servitudes on the surface estate in the individual tracts making up the unit, grants certain water rights and limits damages to growing crops, timber, fences, improvements and structures.

7. Section 17.1 (b) makes approval of the agreement by the Commission (or its division) a condition precedent to the agreement becoming effective.

8. There is no provision authorizing or appointing agents, ministers or regulatory bodies after the agreement becomes effective, to alter, amend or modify the contract.

The indictment against the proposed unit agreement and an analysis of the format of the proposed agreement are to be found in the Brief of the Appellants on motion for re-hearing in support of their requested findings of fact and conclusions of law contained in the Commission Transcript. This reflects that the agreement was taken partly from the American Petroleum Institute Model Form of Unit Agreement, and partly from the Federal Government's proposed form of Unit Agreement affecting Federal lands, with the elimination of the sanctions, safeguards, checks and balances contained in such forms.

Additional Relevant Facts. There are additional relevant facts in the Commission record that are worthy

of note.

From the July 21, 1980 Commission Transcript, it is to be seen that:

> The proposed unit area consists of about 1,174,000 acres of land, of which 318,000 acres are State lands, 95,000 acres Federal lands, and 761,000 acres are fee or patented lands in 1,568 tracts (Com. Tr. 16, 17). The proposed unit is completely voluntary and is subject to the rules and regulations of the Commission. It can only become effective with the approval of the Commission (Com. Tr. 27-29). Forty-two wells capable of production have been drilled. With 160 acre spacing, such might involve 6,000 acres. The working interest investment may amount to one or one and one-half billion dollars (Com. Tr. 41-43). Amoco Production Company owns about 68%, Amerada Hess owns about 9.54%, and Texas Pacific Oil Company (Sun) owns about 9.87% of the unit working interests. Most of the leases, taken from 1971 through 1980, have primary terms of 10 years or less and are Producer's 88-type leases (Com. Tr. 97-103).
>
> The predominate method of deposition of the Tubb Formation is fluvial, washed off the Sierra Grande Arch (Com. Tr. 54). Cross-sections of the Tubb Formation, Amoco's Exhibits 5-10, and the testimony of Amoco's petroleum geologist, Bruce I. May, (Com. Tr. 53-85) reveal that the Tubb Formation is not uniform in thickness and has material variations running from Westerly to Southeasterly. It is a faulted area affecting the trapping mechanism (Com. Tr. 55-60), perhaps creating numerous traps (Com. Tr. 76-80). Some wells are better than others, and in the Northwest, the formation pinches out, and has a tightness of formation as compared to the central

part of the unit area (Com. Tr. 78-83). Some of the wells are wet rather than productive of gas (Com. Tr. 83-84). Whether other of the wells drilled will be productive depends on completions and tests not yet made (Com. Tr. 84-85).

Unitization of at least 185,000 acres, and perhaps as much as 500,000 acres, of the patented and fee lands depends on the exercise of lease provisions authorizing the lessee unilaterally to commit the leases to unitization agreements approved by governmental authorities (Com. Tr. 92-95; 97-111; 118-128).

Amoco's original time table projected first sales for mid-1984 (Com. Tr. 37).

From the October 9, 1980, Commission Re-hearing Transcript:

No Amoco witness has ever contended that there is one common source of supply, and Amoco stipulates that there may be more than one common source of supply (Com. Reh. Tr. 163-164). Each acre in the Tubb Formation is not identical to each other acre (Com. Reh. Tr. 174)

In the opinion of Appellants' expert witness, the unitized zone is a highly variable and complex depositional environment which is going to contain certain sweet spots, certain areas that will be marginally productive, and others that will not be productive at all. Being a fluvial deposit, one would not expect things to be continuous over large distances, productive, and in communication with each other. Being fluvial, that is a deposit in a riverbed-type environment due to the emptying of rivers into lakes and oceans, one can expect wash outs, and the several reservoirs to be highly variable and limited in extent. (Com. Reh. Tr. 160-162).

Only CO_2 In Action, a company with less than 1% of the working interest in the proposed unit, has indicated an interest in selling, (as distinguished from using itself, in its own projects), its share of unit production (Com. Reh. Tr. 208-209).

The Commission did not determine or purport to find how, or to what extent, "waste" would be committed in the next few years before production commences, were the unit to be disapproved at this time. Neither did it determine the extent to which it found Amoco's proffered evidence on "waste" to be meaningful and credible. For instance, see the testimony about enhanced opportunities of truck drivers to hit gas well christmas trees, the more wells there might be drilled under 160 acre spacing rules rather than 640 acre spacing rules (Com. Reh. Tr. 102-132), and the number of additional compression facilities that might be required if Amoco doesn't have the right of free use of the surface of the million acres of land (Com. Reh. Tr. 38-101).

ARGUMENT AND AUTHORITIES

The Commission's Order should be set aside on several grounds. Neither the State of New Mexico nor the Commission has the power and ability the Commission claims for itself to compel drilling and production and re-writing the contract. Since the basic premise of the Commission's Order is that it does have such power, the Order itself should be set aside. Neither is a preliminary agreement or a preliminary contract tantamount

> to approval. There is a defect in notice to interested parties. Further, the Commission lacks the tools with which to properly exercise the powers it has reserved unto itself.

There appears to be but six New Mexico reported opinions dealing with the Oil and Gas Conservation Commisson (or Division). All of these cases are concerned only with gas proration formulae or formation of proration units. These involve only prohibitions which the regulatory bodies can undoubtedly change from time-to-time as additional facts are determined or as the relevant facts change. None of the cases deal with any power of the Commission to compel affirmative acts or to re-write contracts. These cases are:

> Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P. 2d 809 (N.M. Sup. Ct., 1962), dealing with gas proration formulae.
>
> Sims v. Mechem, 72 N.M. 186, 382 P. 2d 183 (N.M. Sup. Ct., 1963), dealing with formation of proration units.
>
> El Paso Natural Gas Company v. Oil Conservation Commission, 76 N.M. 268, 414 P. 2d 496 (N.M. Sup. Ct., 1966), dealing with gas proration formulae.
>
> Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 531 P. 2d 939 (N.M. Sup. Ct., 1975), dealing with gas proration formulae in an undeveloped field.
>
> Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P. 2d 588 (N.M. Sup. Ct., 1975) dealing with description of an area as a separate pool.

Rutter & Wilbanks Corporation v. Oil Conservation Commission, 87 N.M. 286, 532 P. 2d 582 (N.M. Sup. Ct., 1975) dealing with formation of proration units.

Appellants are aware of no cases of the State of New Mexico or of any other jurisdiction dealing with powers which, in this case the Commission has reserved unto itself, to compel the drilling of additional wells, to compel the production of greater quantities of gas than the operator wants to produce, to produce gas at a time when the operator doesn't want to produce it, and to re-write the terms and provisions of ocntracts of private citizens. Neither are Appellants aware of any authority that holds or treats a "preliminary approval", or which characterizes a "preliminary agreement" as the equivalent of "approval" of a contract which has "approval" as a condition precedent to its becoming effective.

Unlike in some States, such as Texas, New Mexico has no statute, rule or regulation that unitization agreements must be approved by the Commission in order to become effective. Major reasons, Appellants submit, that the proposed unitization agreement contractually required Commission approval as a condition precedent to effectiveness of the contract, were:

1. As an inducement to landowners by extending them assurances that the state's Oil Conservation Commission with the very expertise and experience that the Commission disclaims (Findings 22, 23 and 24 1 Tr. 37) would protect their interests before granting its "Good Housekeeping Seal of Approval"; and

2. To supposedly allow some of the lessees to unilaterally commit leases to the unitization agreement without further consent of their lessors under powers included in the pooling provisions of their leases. (See Com. Tr. of 7-21-80 hearing, Pages 103-111).

In the absence of a forced unitization statute, unitization is contractual in nature, and is totally dependent upon mutual agreements of those whose interests are bound. See 6 Williams & Myers, Oil & Gas Law, Sections 910-912, Sections 923-938; Raymond Myers, The Law of Pooling and Unitization, Voluntary - Compulsory, Second Edition, Chapter 4. On the subject of waste, it should be noted that waste and the most efficient means of development repeatedly mentioned by the proponents and the Commission, are not synonymous. Sims v. Mechem, 72 N.M. 186, 382 Pacific 2d, 183 (1963).

There can be no doubt that in the exercise of lawful police powers, the State has tremendous powers to regulate oil and gas activities in the name of conservation in order to prevent waste. Some states purport to exercise such lawful powers to a greater or to a lesser extent than some other states, depending on the public policy of the particular state as determined by its legislative enactments.

There can be no doubt that the exercise by a State of its police powers in conservation matters can render, and has rendered, contracts and contractual provisions in contracts impossible of performance and, hence, ineffective as

between parties to the contract. There can be no doubt that such laws and orders, and the schemes of implementing the same, may nullify private contractual provisions, if there is rational justification for the law, regulations, rule or order in relation to the subject matter.

In unitization of oil and gas properties, it is recognized that a particular State may order unitization on such reasonable terms as may have been authorized by statute. In such an eventuality, the unitization is not grounded on a contract of the affected parties, but rather on the exercise by the State of its police powers. In the absence of such a compulsory unitization act of the State, however, unitization depends on mutual agreement of the parties in interest in the form of a contract. Without a contract, and without lawful compulsory unitization, there can be no unitization.

A unitization contract may, and frequently does, contain formulae created by the parties to take into account how to deal with future eventualities and changes in assumptions or known facts. By mutual agreement, such a contract may appoint an agent subsequently to alter the contract to meet such changed assumptions or facts. In the absence of such agreements concerning future modifications, however, such contracts will remain in force during their stated term, as written, subject only to unanimous agreement of the parties to the contract and the successors in interest to alter or amend the same, and to the effective nullification of provisions of the contract by collision of such contract

or its particular terms with lawfully exercised power of the State, to render such incapable of performance.

Appellants are aware of no scheme of regulation of natural resources by either state or federal governments, (acting in a governmental, as distinguished from proprietary, capacity), in the absence of contractual provisions authorizing the same, which cedes to a legislative, or quasi legislative, or other governmental body many of the powers that the Commission in this case claims unto itself. Particularly Appellants refer to the power to re-write the unitization contract of the parties, thereto, and particularly the sharing arrangement thereof, the right to direct the working interest owners to spend their money in drilling more wells, and installing additional facilities, and in compelling the additional production of gas, or the production of gas at a time when the working interest owners do not wish to do so, the existence and reservation of all of which powers the Commission regards as a basic premise in approving the contract of the parties.

Appellants submit that neither the executive, judicial nor legislative branches of the New Mexico government can constitutionally re-write the unit agreement, once the agreement becomes effective according to its terms, much less to adversely affect the interest under the agreement of some of the parties thereto, even though the State can, by its rules, regulations and orders, perhaps, in effect, nullify some of the provisions as impossible of performance.

Under the existing public policy of the State of New Mexico, as expressed in its legislative enactments the New Mexico Oil Conservation Commission has no power, itself, either to create, modify or amend the proposed unit contract, or otherwise to create the unit. The Commission's only permissible functions under the Application Amoco Production Company made to the Commission is either to approve the proposed unit agreement, in the name of conservation, or to disapprove it because of specified deficiencies in the contract having to do with prevention of waste and protection of correlative rights.

The Commission recognizes and candidly admits that on the record before it, it cannot determine that, in fact, the unit will prevent waste in its various aspects and protect correlative rights in the future. (Findings 25, 26 and 27, 1 Tr. 37) For waste to be prevented and correlative rights protected in the future, the Commission recognized that there must be some means of inducing additional development and additional production than that specified in the unit agreement, as well as a different sharing agreement among the parties to the contract. To try to meet this deficiency, the Commission took upon itself, with the agreement of none of the parties to the contract, the power to affirmatively or mandatorily enjoin future action, and to, itself, change the contract. On the record, as made, it can only be determined that the Commission lacks such power.

The contract itself contains an express condition precedent to the agreement becoming effective, namely, that

the Commission give the agreement its "Good Housekeeping Seal of Approval" in the form of an order approving the contract. Once approved by the Commisson and made effective by the operator, as provided in the contract, the agreement becomes jelled, welded in iron, and subject to modification only by the unanimous agreement of those interested in the contract, including those to be adversely affected by the modifications. The agreement does not provide for something in between approval and disapproval called "preliminary agreement" or "preliminary approval". This is for a very good reason. While approval is only preliminary, some of the valuable property rights, like CO_2 produced, water and surface rights and disadvantages from self-dealing have already gone by the board. Before the "preliminary agreement" or "preliminary approval" could turn into either "approval" or "disapproval", what happens about these used up assets after later disapproval? Are they disapproved ab initio, at midstream, and is it for the Commission or the court's determination? All that has been done is the Commission has assumed to itself the power to re-write, as it goes along, a contract, when what it was asked to do was approve or disapprove an existing contract. If re-writing is to be done, the parties to the contract should be the ones to do so, subject to the same approval or disapproval powers of the Commission.

If waste in all its aspects is to be prevented and correlative rights are to be protected under the Commission's order, it is essential that the rule of law be

established, and be binding on all concerned, that the Commission does have the power to do those things which in its re-hearing Order it says it has the power to do in Findings 29 and 30 of such Order. If the basic premise of the Order is false in any material particular, but the approval is nevertheless valid, all is lost, not only for Appellants, but as well for the public policy of the State, except as the State might remedy the same as such affects waste through lawful, and presumably, conventional, negative restraints on the working interest owners. Correlative rights in this unit will by all means be dead, unless against infinitesimally high odds and contrary to facts in the record already known, it should develop that each acre out of the million-plus acres is, in fact, equal to each other acre in terms of relative value. It is herein that Appellants have their greatest concern, inasmuch as it is Amoco Production Company which should be protesting the loudest about the Commission's reserved power over Amoco's purse strings and treasury, but protests not. If it is only in future court proceedings that it is decided that the exercise by the Commission of such controversial powers is illegal, will the unit agreement as written remain in force and effect?

The trial court tried to save the order with all its recognized deficiencies, by treating the proposed agreement as but a preliminary agreement, to be superseded at some later date, either by the unanimous agreement of all of the thousands of persons whose interests are bound by the

unit agreement, including those adversely affected by changes, or by the re-writing of the agreement by the Commission. If the trial court is correct, and the agreement is only preliminary to something else, then the mutual agreement of the affected parties as expressed in the proposed unit agreement never becomes effective because its condition precedent has not been satisfied. If that is the case, the Commission's order is moot for want of a subject contract that becomes effective and operative.

There is also the matter of procedural due process of law. Amoco Production Company sought the order of the Commission (or its Division) approving the contract. Procedural due process of law and Section 70-2-7, N.M.S.A., 1978, require fair notice to interested parties. From the application and presumably the notice actually given to interested parties, nothing would intimate that the Commission's jurisdiction had been invoked so that it might come forth with an Orders abrogating and otherwise re-writing the private contract of the interested parties, to reduce or eliminate their contracted shares in production from the unit area in favor of others whose lands contain a greater share of recoverable reserves. Procedural due process of law requires fair notice of the possibility of impending adverse governmental action. There must be thousands of interested owners who have no inkling, and no cause to suspect, that the Commission has entered an order which could result in their divestment of interest in the benefits of the unit agreement by the Commission's re-write of their

contract.

The Commission has been vested with jurisdiction in the name of conservation to prevent waste and protect correlative rights (Section 70-2-11, N.M.S.A. 1978). If the subject matter of the proceeding is prevention of waste and protection of correlative rights, to some extent the Commission has jurisdiction of the subject matter. See Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P 2d. 939 (1975); Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P 2d, 809 (1962). Waste and protection of correlative rights in carbon dioxide is a Commission function perforce of Section 70-2-34, N.M.S.A., 1978. Correlative rights are defined by statute in Section 70-2-33H, N.M.S.A., 1978, and the Continental Oil Company case just cited.

The New Mexico Legislature, in its expression of the public policy of the State, has enacted a limited forced pooling statute and a very limited forced unitization statute, to avoid the necessity for unanimity of agreement by interested parties to such pooling and to such unitization as are subject to the these Acts. The pooling statute is Section 70-2-17 N.M.S.A., 1978, and is limited to spacing or proration units (in this case, at the time of the Commission hearing, allowing only one well for 160 acres).

The Statutory Unitization Act, first adopted in 1975, is to be found in Sections 70-7-1 through 70-7-21, N.M.S.A., 1978. The Statutory Unitization Act is expressly made inapplicable to exploratory units, the characterization

attributed to the Bravo Dome Unit by the Commission. Section 70-7-1, N.M.S.A., 1978, in its last sentence. It is expressly limited to unitization to carry on pressure maintenance or secondary or tertiary recovery operations (Section 70-7-6A(1), N.M.S.A., 1978) and requires allocation of production, based on relative value of each separately owned tract and its contributing value to the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity in the absence of unit operations, the burden of operations to which the tract is likely to be subjected, or other pertinent engineering, geological, operating or pricing factors, all of which are critical in determining correlative rights to be protected by the Commission. (Section 70-7-6B and Section 70-7-4J, N.M.S.A., 1978). It must also be shown that the unitized reservoir, or parts thereof, to be unitized has been reasonably defined by development (Section 70-7-5B, N.M.S.A., 1978). It is not believed that anyone has ever contended that either the forced pooling or Statutory Unitization Act can serve to create a Bravo Dome carbon dioxide gas unit, because of the express limitations of the Act. The Commission in its Findings 14 and 15 (1 Tr. 36) did, however, completely overlook the statutory means of allocating production in unitization based on relative value not directly related to gross acreage, to reflect a fair means of allocating production, and overlooked the public policy of the State as expressed in the Statutory Unitization Act.

These statutes are the statutory authority authorizing the Commission to order unitization. The limitationss in the statute would be rendered meaningless if the State can re-write the contract of the parties without meeting the specifications of the Statutory Unitization Act. The Statutory Unitization Act sets some standards of unitization, as a matter of public policy, that the proposed agreement does not begin to attain.

Unless New Mexico becomes the first State to hold that its oil and gas regulatory body has the power to create or re-create oil and gas units under the general power to prevent waste, there is no delegation of power to the Commission to create or modify units, except those specified in the Statutory Unitization Act. The fact that the Statutory Unitization Acts is so limited and stringent must dictate the conclusion that the Legislature has not seen fit to establish in government the power to create other units, either by taking the initiative in the first instance, or re-writing unit agreements. In other States, their courts have held that in the absence of explicit statutory authority, neither the courts nor administrative agencies have the power to "force" pool or unitize interests in oil or gas. See Pickens v. Ryan Consolidated Petroleum Corp., 219 SW 2d 150 (Tex. Civ. App., 1949), N.R.E., er. ref.; Republic Natural Gas Company v. Baker, 197 Fed. 2d 647 (C. A. 10, Kans., 1952); Dobson v. Arkansas Oil and Gas Commission, 218 Ark. 165, 235 SW 2d 33 (1950). New Mexico has no contrary holdings.

It is believed that whatever powers the Commission has are police powers. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842, (1952); Marrs v. Oxford, 32 F. 2d 134 (CA 8, Kans., 1929) Cert. Den., 280 U. S. 573, 74 L. Ed. 625, 50 S. Ct. 29, 37 ALR. 2d 436.

The New Mexico statutory scheme of exercising police powers, including oil and gas regulation, and the Commission practice, has heretofore been, except in authorized statutory forced pooling and unitization, to identify and prohibit undesirable practices in its jurisdiction. This is most closely akin to the judicial practice of issuing restraining orders prohibiting, as distinguished from compelling, affirmative action.

Appellants have found no other scheme of regulation of natural resources, state or federal, in the United States, under which the regulatory agency has purportedly proclaimed itself virtual czar to re-write contracts, or compel persons affirmatively to expend their resources and to perform affirmative acts, such as drilling wells and producing gas when such persons don't want to do so. The only lawful government czars with which we are familiar are those in the executive branch of government who act in a proprietary capacity, as distinguished from regulatory capacity, dealing in assets belonging to the government. Not even executive agencies acting under emergency war powers have gone so far as has the Commission in this case.

A government order to Amoco to spend a half billion dollars of its own money in drilling wells it had rather not drill, or to produce and sell gas that it didn't want to sell, should shock the American sense of what are lawful governmental powers. For the Commission to re-write a contract should strike a soft spot in the same senses.

Sanctions against waste by under-development and under-production have traditionally been through enforcement by the judiciary, at the instance of lessors pursuing their enlightened self-interests, of implied covenants of reasonable development and the implied covenant to protect against drainage, through court ordered conditional lease termination, after giving the lessee a reasonable opportunity to drill and produce that which a reasonably prudent operator would drill and produce under the same circumstances. This has been in judicial proceedings in which interested parties have the benefit of advance discovery processes essential to the establishment of the full truth, a process not available in Commission proceedings at this time.

Amoco, of course, has expressly written the checks and balances of implied covenants out of the unit agreement. But instead of disapproving the unit agreement and sending the working interest owners back to restore the appropriate checks and balances, including the implied covenants of oil and gas leases, the Commission has gone to an extreme to set a course in totally unchartered seas, charging itself to re-write the contract and ordering affirmative acts.

In regard to implied covenants, please see 5 Williams & Myers, Oil & Gas Law, Sections 801-869, with citations, the full opinion in Phillips Petroleum Company v. Peterson, 218 F. 2d 926 (CA. 10, 1954) dealing with unitization; and Amoco Production Company v. First Baptist Church of Pyote, 579 SW 2d, 280 (Tex. Civ. App. 1979), er. ref., n.r.e., with opinion, 611 SW 2d 610, (Tex. Sup. Ct. 1980), dealing with marketing gas.

Appellants believe that the exercise by the Commission of the powers reserved by itself in Paragraphs 29 and 30 of its Findings on Re-hearing, cuts across several constitutional limitations. New Mexico, of course, has constitutionally mandated separation of powers among the legislative, judicial and executive branches of its government (Article III, Section 1 of the New Mexico Constitution). It is believed that the Commission is a quasi legislative body. Appellants do not believe that either the legislative or executive branches of government have it in their power to order the divestiture of property interests of one person for the benefit of another person, as would be the case were the Commission to re-write the sharing provisions of the unit agreement. The divestiture of private property can only be applied by the judicial branch of the government, and then in observance of substantive and procedural due process of law, and then in a process that affords trial by jury, as guaranteed by Article II, Section 12 of the New Mexico Constitution. See Fellows v. Shultz, 81 N.M. 496, 469 Pacific 2d 141 (1970); State ex rel Hovey

Concrete Products Co. v. Mechem, 63 N.M. 250, 316 Pacific 2d 1069 (1957); and 4 Nat. Resources J., 350 (1964), on the New Mexico interpretation of Article III, Section 1, of its Constitution.

Article II, Section 20 of the New Mexico Constitution has been held to deny the State the power to take properties from one private citizen for the benefit of another private citizen, with or without compensation. See Kaiser Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 467 Pacific 2d 986 (1970) and see Estate of Waggoner v. Gleghorn, 378 SW 2d 47 (Tex. Sup. Ct., 1964) and Marrs v. Railroad Commission, 177 SW 2d 941, 949 (Tex. Sup. Ct., 1944).

There is also the constitutional limitation on the power of the state to impair the obligations of contracts, contained in Article II, Section 19, of the Constitution of New Mexico, and in Section 10, Article I of the Constitution of the United States.

Additionally, there is the matter of constitutionally protected due process of law under Article II, Section 18 of the New Mexico Constitution, and the Fourteenth Amendment to the Constitution of the United States, having to do with the sufficiency of notice given to those thousands of persons in interest in the proposed unit. Amoco's applications and notices given under Section 70-2-7, N.M.S.A., 1978, can but suggest that the Commission was to either approve or disapprove of the contract as written. Without any additional notice to interested parties, on re-hearing, the Commission actually neither approved nor

disapproved the contract, but, instead, took upon itself the power to re-write the contract without authorization of the parties to the contract. Procedural due process of law surely requires that before such can become effective, fair notice, perhaps notice of a hearing to show cause, should be adequately have been given. See Anderson National Bank of Luckett, 321 U. S. 233, 88 L. Ed. 692, 64 S. Ct. 599 (1944); 2 Am. Jur. 2d, Administrative Law, Section 353, Pages 166-267.

Then there is the matter of mandatory injunction, that is one requiring positive, affirmative action, as distinguished from a prohibitory injunction requiring restraint, especially by a quasi legislative body, such as the Commission. For some good reason, courts have always felt themselves compelled to refrain from issuing mandatory injunctions unless the court has absolutely no other alternative. See 42 Am. Jur. 2d, Injunctions, 745-755. Surely, such good reason dictates that quasi legislative bodies should legally be held to similar restraint and discipline, to exercise such only when there is no other available, adequate remedy to avoid irreparable injury to the interests the Commission is charged to protect. Not the least of the remedies that the Commission had before it was to disapprove the proposed unit agreement, without prejudice, on findings that:

1. The agreement of the parties must include formulae for sharing of production from the unit area which would recognize relative value of each tract within some reasonable

length of time after the development of additional facts, on additional approval, or expressly appointing the Commission, from time to time, to re-write or apply the formulae of sharing so that the same would be binding on all parties whose interests are bound to the Contract.

2. The agreement must provide that implied covenants of oil and gas leases pertaining to reasonable development, protection against drainage through offsets, and fair marketing of gas, will be made applicable to unit operations.

3. Each separate reservoir should be treated as the subject of a separate unit agreement among those having interests in each particular reservoir.

4. The agreement must eliminate authority for self dealing to adversely affect other parties to the agreement.

5. The unit agreement must provide enforceable sanctions if the contractual provisions in which the Commission should be interested are not timely complied with.

6. The unit agreement must be made to contain such other provisions and authorizations as the Commission, in its expertise, can foresee as being things that it might require in the future, not the least of which are contained in the New Mexico Statutory Unitization Act.

To send Amoco back for additional agreements to protect the valid interests of the State and the interests of those whom Amoco serves as operator, including royalty and other non-working interest owners, might create some work and problems for Amoco before it gets what it wants and should have, but such is nothing in a billion dollar plus

project with gigantic benefits for Amoco in unitization. Otherwise the project hangs on entirely dubious, tenuous, unfamiliar and alien powers of the Commission, and an infinite number of additional lawsuits.

In the final anaysis, the unit agreement is, in fact, a contract. It is a solemn and binding obligation between and among the parties thereto which can only be set aside by the parties thereto, unless the parties to the contract have otherwise consented, either in the contract itself or some other agreement. 17 Am. Jur. 2d, Contracts, Section 458.

It also needs to be asked how the Commission, under existing statutes, including appropriation statutes, is to go about the process of deciding what it should affirmatively order or re-write in a project using billion dollar figures. Substantive due process would seem to require that its decisions be based on reason. Reason depends on facts discerned. Facts in turn, depend on evidence presented. Evidence to establish truth requires discovery and meaningful discovery processes, and somebody to go about gathering evidence and presenting the same in a state of advanced preparation, and the expenditure of large sums of money in the process. The existing statutes afford no discovery procedures for the Commission or processes to aid interested parties in gathering evidence in the possession of adverse parties, or in behalf of the Commission. No one, including Amoco, can be expected on its own to prosecute itself in any meaningful way. Cross-examination of Amoco witnesses with-

out pre-discovered facts in hand is hardly productive of the whole truth. The Legislature has never had occasion to appropriate funds for Commission use in affirmatively managing or directing oil and gas operations. Proceedings to order affirmative action and to re-write Contracts is essentially adversary in nature, at least if full truth is to be known with reasonable certainty. Thus, the Commission, with the exercise of its alleged reserved powers, casts itself in a managerial role, an investigatory role, then a prosecutorial role, and ultimately in the decision making role. If the czar role, which the Commission assumes for itself, seems alien, the assumed role of prosecutor, jury and court, all in one, should seem even more foreign. If the New Mexico Legislature or the Governor of New Mexico refuses to have the State pay the Oil and Gas Conservation Commission to act as overseer to compel affirmative action and to undertake the vast reservoir analyses required to protect correlative rights, to be able to know how to revise the contract, where will everyone be insofar as this unit agreement is concerned? Appellants express the fear that they will be subject to a demonstrably deficient agreement with no remedy and the State's valid interests in its one major deposit of carbon dioxide will essentially be dependent upon the self-centered aims and objectives of the 68% owner of the unit. If the landowners, such as Appellants, are going to have to be the prosecutors, how, it fairly may be asked, under existing statutes governing proceedings before the Commission, are they going to become seized and

possessed of the necessary evidence to present to the Commission, assuming they could afford to do so, if Amoco isn't willing to furnish the data? The Commission has provided what at first glance might appear to be an attractive means of curing the obvious deficiencies in the proposed Unit Agreement. In reality, it provides no viable and enduring means at all. The most learned experts have to have facts and to be able to obtain such facts to reach any meaningful conclusions.

CONCLUSION

It is one thing to exercise police powers to effect conservation of natural resources by making rules and regulations and enforcing the same to prohibit undesirable acts. It is yet another thing for the policeman in addition to his other duties, to affirmatively manage and direct business affairs. Appellants are not prepared to say that there never will be circumstances when the policeman may compel affirmative acts. But, Appellants do submit that such can be only in the most dire and compelling circumstances, and as a last resort effort to prevent the occurrence of irreparable, material harm or injury which cannot be averted in any other reasonable way. The Commission in this case acted only on the premise that it has such affirmative power, in the jaws of serious legal and constitutional impediments, on a record that barely develops the facts, rather than adopt worthy alternatives that are eminently

practical and effective. Because the Commission Order rests on a basic premise that it has such powers, the Order should not stand, unless the basic premise on which it is founded stands. In judicial review, it has been said over and over again that constitutional issues should not be decided on less than fully developed factual records and then only if there is no reasonable means of avoiding the constitutional issues. In this case, one such means is to hold that since the Commission could not create this unit due to lack of statutory authority, neither has it the power to re-write the contract even to correct its gross deficiencies. The Commission having acted on a false premise, the order should be set aside, without prejudice, thereby leaving it to the proponents to remedy the defects of the agreement before presenting a properly revised contract to the Commission for its approval. Another tack would be to judicially interpret and hold the order to be merely a preliminary approval which only becomes the approval required in the contract after the impediments of the contract are cured by the parties to the contract, thereby rendering moot the order in this case.

Otherwise, it would appear to be necessary to decide the Constitutional issues. To decide such in favor of the Commission order is to confirm powers that no oil and gas regulatory agency has ever claimed for itself, and which subjects the ownership of private property to heretofore unheard of and never exercised governmental powers, only to uphold a glaringly deficient and over-reaching agreement which should have been cured before it was ever presented to

the Commission in the first place. Put another way, as a matter of precedent, the Commission's way is too tough and too expensive a way to remedy the defects of the unitization agreement.

Appellants have no quarrel with the concept of unitization under a proper unitization agreement which will prevent waste and afford efficient operation, but which will also reasonably guarantee now and in the future the protection of correlative rights of all parties at interest as the knowledge becomes more certain. Agreements that become effective are mutual agreements that are seldom dictated from but one self-centered point of view. If Amoco Production Company wants the Bravo Dome area unitized and the benefits to itself of unitization, let it first devise formulae to be applied in the future when more facts are known to determine fair sharing arrangements, which preserve the protection of implied covenants of oil and gas leases as applied to the unitized area and which eliminates the time recognized evil of self-dealing as determinative of the rights of others. If Amoco Production Company wants to enlarge the servitudes and to claim new rights in surface estates and water from those who own both mineral and surface estates, let the agreement at least include a fair means of compensating for the resulting reduction in value of the surface estates. Put another way, Amoco Production Company needs first to come up with a fair agreement that allows for checks and balances on an otherwise virtually unfettered control over more than of a million acres of land

and the State of New Mexico's one great carbon dioxide deposit.

Respectfully submitted,

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IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS,
et al,

Plaintiffs-Appellants

vs.

OIL CONSERVATION COMMISSION,
et al,

Defendants-Appellees,

and

ALEX J. ARMIJO, COMMISSIONER
OF PUBLIC LANDS

Intervenor-Appellee

Filed
12-17-82

No. 14,359

COUNTY OF TAOS

CALDWELL, J.

ANSWER BRIEF

of

DEFENDANT-APPELLEE

OIL CONSERVATION COMMISSION

W. PERRY PEARCE
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Oil Conservation Commission
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STATEMENT OF THE CASE

This appeal is brought pursuant to Section 70-2-25, NMSA 1978, for judicial review of orders entered by the New Mexico Oil Conservation Commission on August 14, 1980, and modified and affirmed on January 23, 1981. By Judgment filed May 6, 1982, the District Court for the County of Taos, Judge Caldwell presiding, affirmed these orders.

STATEMENT OF PROCEEDINGS

Defendant-Appellee Oil Conservation Commission received application from Defendant-Appellee Amoco Production Company on May 28, 1980, for approval of the Bravo Dome Carbon Dioxide Unit Agreement. This agreement provided for the unitized operation of approximately 1,035,000 acres of federal, state and fee lands located in Harding, Quay and Union Counties, New Mexico. A public hearing was held on July 21, 1980, after notice was given.

The Commission entered Order No. R-6446 on August 14, 1980, (Record p. 8) approving the unit. The findings contained in that order which are material to this review are:

> 1) That all plans of development, plans of operations and all expansions or contractions of the unit should be submitted to the Director of the Oil Conservation Division for approval. (Order No. R-6446, Finding 3, Record p. 8)
>
> 2) That the proposed unit agreement should promote the prevention of waste and the protection of correlative rights. (Order No. R-6446, Finding 4, Record p. 8)

Based upon these findings, as supported by the record of proceedings, the Commission ordered:

> 1) That the proposed unit agreement is approved as a proper conservation measure specifically subject to any present or future right, duty or obligation of the Division to supervise and control operations. (Order No. R-6446, Ordering Paragraph 2, Record p. 9)

2) That all plans of development and operation and all expansions and contractions of the unit area shall be submitted to the Director of the Oil Conservation Division for approval. (Order No. R-6446, Ordering Paragraph 4, Record p. 9)

3) That jurisdiction of the cause is retained for entry of such further orders as the Commission may deem necessary. (Order No. R-6446, Ordering Paragraph 6, Record p. 9)

As is provided by Section 70-2-25, NMSA 1978, Plaintiffs-Appellants, who appeared at the July 21, 1980, public hearing in opposition to the requested approval, filed an Application for Rehearing and Request for Additional Findings (Record p. 16). The Application for Rehearing contained five main bases for rehearing stated in nine points. These bases were:

1) Lack of substantial evidence to support the findings and orders. (App. for Rehearing, paragraphs 1 and 7, Record pps. 17-19, 22-23)

2) Lack of sufficient findings (App. for Rehearing, paragraph 1, Record p. 17-19)

3) Failure of order to prevent waste and protect correlative rights. (App. for Rehearing paragraphs 2, 3, 4, 5, and 6, Record p. 19-22)

4) That the Order is premature. (App. for Rehearing, paragraph 8, Record p. 23)

5) That the Order is arbitrary and capricious. (App. for Rehearing paragraph 9, Record p. 24)

By order No. R-6446-A, entered September 12, 1980, (Record p. 32), the Commission granted the Application for

Rehearing. The issues to be addressed at the Rehearing were stated in that order.

They were:

1) prevention of waste within the unit area

2) protection of correlative rights

3) prematurity of the unit agreement

Rehearing was held on October 9, 1980, and on January 23, 1981, the Commission entered Order No. R-6446-B (Record p. 34) which affirmed the approval of the unit agreement and made certain additional clarifying findings.

The material findings contained in this order, each of which is challenged in Point I, are:

1) That unitized operation is a more efficient and economic method of exploration and operation of the carbon dioxide area. (Finding 8, Record p. 35)

2) That the advantages of efficiency and improved economy prevent waste. (Finding 9, Record p. 35)

3) That the proposed unit area has carbon dioxide potential. (Finding 10, Record p. 35)

4) That there are two primary methods of unit participation which would allocate the proceeds of production in a manner to protect correlative rights. (Finding 14, Record p. 36) They are:

1) Unit wide participation under which all unit production is allocated in the ratio that each participating owners acreage bears to the total unit acreage.

2) Participating acreage allocation under which productive acreage is grouped into participating acreage and each interest owner in the participating area shares in the area

production in the ratio of his acreage to the participating area acreage.

5) That the method set forth in the unit agreement, unit wide participation (method No. 1 above), is presently reasonable and appropriate. (Finding 17, Record p. 36)

6) That the projected carbon dioxide production is necessary for enhanced oil recovery operations (Finding 18, Record p. 37)

7) That approval of the unit will not make carbon dioxide prematurely available. (Finding 19, Record p. 37)

8) That the unit agreement at least initially provides for operations which will operate to prevent waste and fairly allocate the proceeds of production. (Finding 25, Record p. 37)

9) That information presently available does not allow finding that the unit agreement is the best long-term method of operation to prevent waste and fairly allocating production proceeds. (Finding 26, Record p. 37)

10) That the Commission should exercise continuing jurisdiction to prevent waste and protect correlative rights. (Finding 29, Record p. 38)

11) That some methods of exercising such continuing jurisdiction may be changes in well spacing, requiring additional well drilling, eliminating acreage which is undeveloped or dry and modification of the unit agreement. (Finding 30, Record p. 38)

12) That at least every four years and more frequently if required by the Commission, the unit operator must demonstrate at a public hearing that its operations are working to prevent waste and protect correlative rights. (Finding 31 and 32, Record p. 38)

13) That all plans of development and operation are to be submitted to the Commission for approval. (Finding 33, Record p. 38)

Notice of Appeal from this order on rehearing was filed on February 11, 1981, in the District Courts of Harding, Quay and Union Counties, New Mexico (Record pps. 1, 46, 92). These appeals were consolidated and transferred to the District Court for Taos County, J. Caldwell presiding. (Record p. 166, 168, 170)

After considering the record on appeal, briefs and argument, the District Court for Taos County affirmed the orders of the Oil Conservation Commission. Judgment was entered by the District Court on May 6, 1982. (Record p. 184)

Notice of Appeal to this Court was filed on May 27, 1982. (Record p. 186)

Following the filing of Plaintiff-Appellants Brief-in-Chief, a Motion to Strike Issues on Appeal was filed by Defendant-Appellee Amoco Production Company. By order entered on November 30, 1982, this Court granted such motion and thereby restricted the issue in this appeal to those raised in Plaintiff-Appellant's Motion for Rehearing before the Commission.

ARGUMENT AND AUTHORITIES

The following sections of discussion and analysis of evidence and authorities will be presented in a way which addresses the errors claimed in Plaintiff-Appellant's Application for Rehearing and Request for Additional Findings. A point-by-point response to Plaintiff-Appellant's Brief-in-Chief will not be possible since the Brief-in-Chief contained only one point and the order entered on the Motion to Strike Issues on Appeal relieved this record of certain improperly raised issues.

A review of the Proceeding as summarized above indicates that the allegation that the findings in Order No. R-6446, if it was correct, has been answered by the expanded findings in Order No. R-6446-B. This order on Rehearing detailed the basis of the Commission's order and the discussion of this alleged error will therefore be contained in the discussion of whether or not there is in the record substantial evidence to support the decision.

The Issues addressed in this Answer Brief will therefore be:

I

WHETHER ORDER NO. R-6446-B CONTAINS SUFFICIENT FINDINGS AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Oil Conservation Commission and the District Court have found that it did and that it was.

II

WHETHER ORDER NO. R-6446-B IS ARBITRARY AND CAPRICIOUS

The Oil Conservation Commission and the District Court found that it was not.

III

WHETHER ORDER NO. R-6446-B WAS ENTERED PREMATURELY

The Oil Conservation Commission and the District Court found that it was not.

POINT I

ORDER NO. R-6446-B CONTAINS ADEQUATE FINDINGS AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

PRIMARY DUTY OF COMMISSION IS TO PREVENT WASTE

Section 70-2-34 NMSA 1978 sets forth the duties of the Commission. The primary duty is to prevent waste. It states in part:

> "A. The oil conservation division is hereby vested with the authority and duty of regulation and conserving the production of and preventing waste of carbon dioxide gas within this state in the same manner, insofar as is practicable as it regulates, conserves and prevents waste of natural or hydrocarbon gas. The provisions of this act relating to gas or natural gas shall also apply to carbon dioxide gas insofar as the same are applicable. 'Carbon dioxide gas' as used herein shall mean noncombustible gas composed chiefly of carbon dioxide occurring naturally in underground rocks.
>
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law."

This statute governing the authority, responsibility and duties of the Oil Conservation Commission does not specifically mandate the approval by the Commission of voluntary unit agreement. However, the unit agreement which Amoco Production Company had proposed contained language which made the effectiveness of such unit agreement contingent upon approval of that agreement by the Oil Conservation Commission. In addition,

the rules of the State Land Commissioner, who was one of the parties being asked to join in that unit agreement, provide that the State Land Commissioner may postpone any decision on any unitization agreement pending action by the Oil Conservation Commission.

Respondent Oil Conservation Commission submits that in view of the statutory mandate placed upon it in Section 70-2-34 NMSA, 1978, and the application filed with the Commission by Co-respondent Amoco Production Company that its actions in regard to the Bravo Dome Carbon Dioxide Unit Agreement and the approval of such agreement by Orders Nos. R-6446 and R-6446-B were appropriate.

SUBSTANTIAL EVIDENCE STANDARD

In its Application for Rehearing and Request for Additional Findings, Petitioner alleges that Order No. R-6446 is invalid and should be set aside because it is not supported by substantial evidence that such order acts to prevent waste or protect the correlative rights of petitioners or other fee interest owners. Before discussing the specific items of substantial evidence which support the Commission's decision, a brief review of the "substantial evidence" standard is appropriate.

The most clearcut discussion of the substantial evidence rule in New Mexico is contained in a case dealing with an order

of the Oil Conservation Commission. That case is Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939, (1975). When confronted with a challenge similar to this one that a certain order of the Commission was not supported by substantial evidence, the Supreme Court stated in part:

> "'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Rinker v. The State Corporation Commission, 84 N.M. 626, 506 P.2d 783 (1973). In resolving those arguments of the appellant, we will not weigh the evidence. By definition, the inquiry is whether on the record, the administrative body could reasonably make the findings. See IV Davis, Administrative Law Treatise, §29.01 (1958).
>
> [4] Moreover, in considering these issues, we will give special weight and credence to the experience, technical competence and specialized knowledge of the Commission. C.f., McDaniel v. New Mexico Board of Medical Examiners, 86 N.M. 447, 525 P.2d 374 (1974); §4-32-22, subd. A. NMSA, 1953. 87 N.M. at 208

The record presently before this Court clearly demonstrates that the New Mexico Oil Conservation Commission exercised its "experience, technical competence and specialized knowledge" in issuing the orders here under review and such orders are supported by substantial evidence.

A. THERE IS SUBSTANTIAL EVIDENCE THAT THE ORDERS UNDER REVIEW ACT TO PREVENT WASTE.

WASTE DEFINED

The New Mexico Oil and Gas Act, discussed above, which grants authority to and imposes duties on the Oil Conservation Commission sets forth a definition of "waste" which the Commission is charged with preventing. That definition found in §70-2-3 NMSA 1978, states in part:

> As used in this act the term "Waste" in addition to its ordinary meaning, shall include:
>
> > A. 'Underground waste' as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in any manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas;
> >
> > B. 'Surface waste' as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form or crude petroleum oil, or any product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells or instant to or resulting from the use of inefficient storage or from the production of

crude petroleum oil or natural gas in excess of the reasonable market demand;

. . .

FINDINGS THAT UNIT AGREEMENT PREVENTS WASTE

It is on the basis of this statutory definition that the Commission is compelled to judge whether or not any proposed action will operate to prevent waste. In operating under this statutory definition, the Commission in Order No. R-6446-B, made the following findings:

> (8) That the unitized operation and management of the proposed unit has the following advantages over the development of this area on a lease-by-lease basis:
>
> (a) More efficient, orderly and economic exploration of the unit area; and
>
> (b) More economical production, field gathering, and treatment of carbon dioxide gas within the unit area.
>
> (9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste. (Record p. 35)

These findings specifically address the statutory definition of what constitutes "waste" of carbon dioxide gas. Of the items specifically set forth in the statute, these two findings address, (1) the prevention of "inefficient, excessive or improper, use or dissipation of reservoir energy," (2) the prevention of "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to tend to reduce the total quantity of crude petroleum oil or natural

gas ultimately recovered from the pool," as well as, (3) the prevention of surface waste by the prevention of "loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction instant to or resulting from the manner of spacing, equipping, operating or producing, well or wells..."

SUBSTANTIAL EVIDENCE THAT UNIT AGREEMENT PREVENTS WASTE

Evidence presented to the Commission shows that these findings, which set out the basis of the orders, are supported by substantial evidence. Some of the evidence presented showed that the Tubb formation is the formation which is productive of CO_2 and is the unitized interval. (Transcript of Hearing, p. 14.) Since the unitized substance under the definition set forth in the unit agreement is CO_2 (Amoco's Exhibit 1 to Hearing, paragraph 1.3) the Commission focused its attention on this formation.

Applicant presented a set of five stratigraphic cross-sections at the hearing on July 21, 1980. These cross-sections were interpreted by qualified expert geologists as showing that the Tubb formation was contiguous throughout the unit area. (Transcript of Rehearing, p. 99.) These cross-sections correlate the rock characteristics at specific depths at 28 known locations in and around the unit area. By demonstrating that the formation being studied tends to vary in

a known way (thicker or thinner, wetter or dryer, more or less permeable, etc.) it is possible for highly trained geologists to predict how the formation characteristics vary in an area for which no test data is available.

A review of the testimony relative to each of these cross-sections (Transcript of Hearing, p. 56-74, Exhibits 5 through 10) shows that the Applicant demonstrated that the Tubb formation was evident in the entire unit area and that the formation was substantially less evident, if present at all, outside the unit boundaries. Evidence was presented that "this entire area could reasonably be considered productive." (Transcript of Rehearing, p. 101, J. C. Allen.)

UNIT AGREEMENT AVOIDS UNNECESSARY WELLS

In addition to establishing that the entire unit area could be considered productive, Applicant demonstrated that without an approved unit agreement, it would be forced to drill additional, and possibly unnecessary wells. (Transcript of Hearing, p. 28, Transcript of Rehearing, p. 100.) This unnecessary drilling would cause the cost of production to rise and would therefore decrease the amount of CO_2 which would ultimately be recovered from the formation. (Transcript of Rehearing, p. 63-64.)

With regard to the question of waste, Mr. Bruce Landis the expert witness appearing on behalf of applicant Amoco Production

Company at Page 35 of the transcript of the initial hearing on this matter stated:

> "All right. First of all, with respect to conservation of CO_2. Where you have an orderly and efficient development, where it can be planned ahead, and where you are not running into competitive operators who have desperately to drill offset obligations, and so on, you are conserving the unitized substances. You are preventing waste in the drilling process. You are preventing waste in the completion of process."

The question of whether or not the Bravo Dome Carbon Dioxide Unit Agreement would operate to prevent waste was one main focus of the rehearing before the Oil Conservation Commission of this matter. At that hearing Mr. J. C. Allen, an expert witness appearing on behalf of Amoco Production Company, addressed this question and the affect which the Bravo Dome Dioxide Unit Agreement might have on the efficient use and production of materials contained in the Bravo Dome Carbon Dioxide deposits. Mr. Allen stated:

> "Yes, sir, I believe that was our intent the whole intent of the unit is to develop in an orderly and efficient manner and to develop on a basis that would effectively and efficiently drain that reservoir, whether it be 640 or somewhat less, 320." (Transcript of Rehearing, P. 100)

EVEN OPPONENTS AGREE UNITIZATION IS BENEFICIAL

This evidence, when coupled with the lack of evidence presented by Petitioners herein to refute such conclusions, supports the Commission's decision that unitization is an appropriate step and would act to prevent waste. In fact,

Mr. F. H. Callaway, appearing on behalf of Petitioners herein at the rehearing of this matter stated:

> "I've always been an advocate of field-wide unitization. I feel like that is the optimum method of operation in order to achieve the maximum recovery of hydrocarbons, in this case gas, and operate under the most efficient circumstances." (Transcript of Rehearing, p. 154)

Section 70-2-3 NMSA, 1978, defines waste. Other sections of the Oil and Gas Act require that the Oil Conservation Commission act to prevent waste. The Commission, both at the hearing of July 21, 1980, and the rehearing held on October 9, 1980, was presented with substantial evidence that the Bravo Dome Carbon Dioxide Unit Agreement operated to prevent waste by preventing the construction of unnecessary surface facilities, by preventing the drilling of unnecessary wells to efficiently and effectively drain the carbon dioxide reservoir in question, and by providing for orderly and efficient development of this resource in a manner which would act to most appropriately utilize and prevent the dissipation of reservoir energy.

B. THERE IS SUBSTANTIAL EVIDENCE THAT THE ORDERS UNDER REVIEW ACT TO PROTECT THE CORRELATIVE RIGHTS OF INTEREST OWNERS.

CORRELATIVE RIGHTS DEFINED

One of the purposes of the regulatory authority granted to the New Mexico Oil Conservation Commission is the protection of "correlative rights." The definition of these rights is set

forth in the New Mexico Oil and Gas Act at §70-2-33.H. That section states:

> "correlative rights: means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil and gas, or both, under such property bears to the total recoverable oil and gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy;"

Since the drilling of wells on each individual interest owner's property might violate the principles of prevention of waste, protection of correlative rights is accomplished by equitable sharing of the proceeds of production from interests owned by separate individuals. In this manner, each interest owner receives a fair share of the proceeds of production of the resources which he is entitled to produce and greater ultimate resource recoveries are obtained by the prevention of waste.

FINDINGS THAT UNIT AGREEMENT PROTECTS CORRELATIVE RIGHTS

In its findings in Order No. R-6446-B made after the rehearing of October 9, 1980, the Commission made the following findings regarding the protection of correlative rights:

> "(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, the unit must be considered to be an exploratory unit.
>
> (14) That the evidence presented demonstrated that there are two methods of participation which would protect

the correlative rights of the owners within the exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(A) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(B) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time. (Record p. 36)

TESTIMONY ON BEST WAY TO PROTECT CORRELATIVE RIGHTS

These findings are supported by substantial evidence presented to the Commission by expert witnesses for both parties to the dispute. This evidence indicated that there are two primary methods of determining how production is to be shared. (Transcript of Rehearing, pgs. 23, 32-33, 179 and 185.)

Evidence was also presented to the Commission that a participation formula which allocated production from the unit based upon the percentage of the unit owner's acreage in the total unit area was the most appropriate method of participation for large exploratory units in which the concentration of extensive reserves was unknown. The Transcript of Rehearing contains the following exchange between counsel for Amoco Production Company and one of the expert witnesses, Mr. Neal Williams:

> "Q. All right, sir. Let me ask you this question, since you have studied the unit agreement, Exhibit No. 1, you're familiar with the transcript, you're aware of the fact that in the Bravo Dome Unit all people who have voluntarily committed their interest to the unit will participate in the unit production from the time of first sale.
>
> "A. That is correct.
>
> "Q. Do you see anything wrong based upon your experience with exploratory units with having, I believe you experts in the field call it an undivided participation from the outset, do you see anything wrong with participation in that manner?
>
> "A. No, I do not. In fact, it's probably the most ideal situation to have in exploratory units."
>
> (Transcript of Rehearing p. 16)

At its hearing, the Commission was presented with certain ratifications of the unit agreement which implicitly indicated that those interest owners voluntarily participating in this unit had agreed that the participation formula set forth in such agreement was a just and equitable method of protecting their

interests. Other evidence was introduced to indicate that some of the interests which had been added to the unit agreement were added under terms of the various lease agreements which allowed the lessee to join unit agreements. These leases indicate that the opportunity. . .to produce without waste his just and equitable share. . ." has been transferred to the lessee and he has been authorized to use and is responsible to the lessor for protecting the lessors "correlative rights".

It is not within the responsibility, authority, or expertise of the Oil Conservation Commission to resolve individual contract disputes. The decision of the Oil Conservation Commission was rendered outside the consideration of these difficulties over private contractual arrangements. The Commission has decided only that based upon the substantial evidence presented to it, the Bravo Dome Carbon Dioxide Unit Agreement, being an agreement providing for voluntary participation, provided an appropriate means of protecting the correlative rights of those individual interest owners participating in such unit.

CORRELATIVE RIGHTS OF NON-PARTICIPANTS NOT AFFECTED

The correlative rights of parties who do not participate in the unit by voluntarily joining the Bravo Dome Carbon Dioxide Unit or by authorizing others to unitize their interests are unaffected by the Commission's approval of the agreement.

Nothing in the agreement or the Commission's approval of that agreement has any affect upon such non-joining interest owners' right "to produce without waste his just and equitable share of oil and gas. . .so far as can be practicably determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil and gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool,. . ." Such non-participating interest owners will have available to them the same rules and regulations and will have placed upon them the same requirements as would have been applicable if there had been no agreement or approval of such agreement.

PROVISION MADE FOR FUTURE REVIEW OF CORRELATIVE RIGHTS

In addition, in order to more appropriately carry out its mandate to prevent waste and protect correlative rights, the Oil Conservation Commission retained jurisdiction over this matter and placed upon applicant Amoco Production Company certain planning and reporting requirements which in the future will act to assure the most appropriate present and future actions on the part of unit operators to prevent waste and protect correlative rights. These requirements and the findings supporting them are set forth in Order No. R-6446-B at findings No. 24 through 36 and Order paragraphs numbered 3 through 11. (Record pps. 37-40)

C. FINDINGS SHOW BASIS OF DECISION

Plaintiff-Appellant attacks the sufficiency of the findings in the challenged order in paragraph 1 of its Application for Rehearing alleging that such findings are not sufficient to show the basis of decision. In response, this Court is referred to the case of Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962) which states in part:

> "We would add that although formal and elaborate findings are not absolutely necessary, nevertheless basic jurisdictional findings, supported by evidence, are required to show that the Commission has heeded the mandate and the standards set out by statute. Administrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but the basis of the Commission's order. (Citations omitted.) 70 N.M. at 321.

A comparison of findings 8 and 9 of the Commission in Order No. R-6446-B (Record p. 35), set out above, and the statutory definition of waste set forth in the New Mexico Oil and Gas Act, demonstrates that the Commission, acting as an expert administrative agency, has tendered findings that meet this standard.

On the correlative rights issue, Petitioner again complains that the findings issued by the Commission in this matter are deficient because they do not "define correlative rights." Again the clarifications set forth by Continental Oil v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962) are

instructive. The findings of the Commission set out above set forth the following: the necessity of providing for equitable participation; the two most commonly accepted participation formulas; the exploratory nature of the Bravo Dome Unit and the very limited development of such area which results in this exploratory nature; and that there is evidence that the participation formula set forth in the Bravo Dome Carbon Dioxide Unit Agreement is appropriate to protect the correlative rights of those interest owners participating in such agreement. Clearly these findings set forth the basis of the Commission's finding that the Bravo Dome Carbon Dioxide Unit Agreement acts to protect correlative rights and should be approved.

POINT II

THE RECORD OF THIS CASE SHOWS THAT ORDERS NOS. R-6446 AND R-6446-B ARE NOT ARBITRARY OR CAPRICIOUS

SUMMARY

The courts which address and define an arbitrary and capricious standard indicate that decisions which rise to this level are those which are unconsidered, willful and irrational.

In view of the evidence presented to the Commission at the hearing of this matter, the decision of the Commission does not violate this standard.

Further, the evidence shows that the prevention of waste required approval by the Commission.

THE ARBITRARY AND CAPRICIOUS STANDARD

The only New Mexico case which has directly attempted to define an arbitrary and capricious standard was Garcia v. New Mexico Human Services Department, 94 N.M. 178, 608 P.2d 154 (Ct. of App. 1979). Although this case was subsequently reversed on the basis of a substantial evidence review of the decision, the definition set forth by the Court of Appeals in its decision cited above was not disturbed. That Court found:

> Arbitrary and capricious action by an administrative agency is evident 'when it can be said that such action is unreasonable or does not have a rational basis...' and '...is the result of an unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process" [citation omitted] 94 N.M. at 179.

APPLICATION OF THE STANDARD

As summarized above, the consideration of this matter involved two days of hearing and the consideration of voluminous exhibits by the Commission. The material presented was offered by opposing parties in support of their positions.

The record in this case is clear that the Commission in Order No. R-6446 and R-6446-B engaged in a thoughtful reasoned

review and decision process. For a demonstration of this "winnowing and sifting" this Court is referred to Point I above and to Order No. R-6446-B. The findings contained in this order not only provide a clear showing of the basis of decision but they also show that the evidence and arguments presented by both proponents and opponents were carefully considered.

LOGICAL PROCESS SHOWN BY FINDINGS

Without attempting to resummarize the evidence discussed in Point I, the rational basis of decision is made clear by an abstract of the findings. The Commission found:

> 1) That the advantages of unitized over non-unitized operation would act to prevent waste by reducing average well costs, extending economic well life, and increase the ultimate recovery of carbon dioxide. (Findings 8 and 9, Record p. 125)
>
> 2) That at least two alternative methods of allocating the proceeds of production exist and that the Commission recognizes advantages and limitations of each of these methods. (Findings 14 and 15, Record p. 126)
>
> 3) That the proposed Unit Agreement method of participation is reasonable and fair at this time. (Finding 17, Record p. 126)
>
> 4) That the information now available does not allow a determination of the optimum long term method of development and operation. (Finding 26, Record p. 127)
>
> 5) That the Commission should retain jurisdiction of this matter to take whatever future actions are required to continue to prevent waste and protect correlative rights. (Finding 29, Record p. 128)
>
> 6) That the unit operator should demonstrate to the Commission at a public hearing at least every four (4) years that the unit agreement is acting to prevent

waste and protect correlative rights. (Findings 31 and 32, Record p. 128)

7) That all plans of development and operation must be submitted to the Commission for approval. (Finding 33, Record p. 128)

Certainly such recognition of conflicting advantages and limitations and provision for future review and adjustment are hallmarks of carefully reasoned decision making.

POINT III

APPROVAL OF THE UNIT AGREEMENT WAS NOT PREMATURE

TIMELINESS OF DECISION

In its Petition for Rehearing and Request for Additional Findings Plaintiff-Appellants claim that the orders in question are premature. Argument on this point is directed to the fact that the unit area is substantially undeveloped and that future development is expected to add information which could help clarify the best methods of preventing waste and protecting correlative rights.

This argument does not overcome the duty of the Commission to do whatever is necessary to prevent waste and protect correlative rights. The Commission found that unitized operation prevented waste. Exploration and development of the

area without the benefit of unitization is not as efficient and therefore threatens waste.

FINDING THAT APPROVAL WAS TIMELY

The findings made by the Commission which relate to whether or not unit approval is necessary, are instructive of the thoughtful consideration given to a very complex matter. The Commission found that:

> 1) There is a need for carbon dioxide from the unit to help increase crude oil recovery from depleted oil reservoirs. (Finding 18, Record p. 37)
>
> 2) That approval of the unit will not make carbon dioxide available before it is needed or make more carbon dioxide available than is needed. (Finding 19, Record p. 57)
>
> 3) That two governmental bodies, the Commissioner of Public Lands and the United States Geological Survey had committed lands to the unit. (Finding 20, Record p. 37)
>
> 4) That the application was not premature. (Finding 21, Record p. 37)

SUBSTANTIAL EVIDENCE OF TIMELINESS

That there is a present need for the carbon dioxide and that therefore approval of the unit agreement is not premature is best shown by the testimony of J. R. Enloe. Mr. Enloe appeared to testify as the representative of Cities Service which both owns a working interest in the unit and needs carbon dioxide for crude oil recovery operations. When asked if he thought approval was premature, he stated:

> Absolutely not. We've said it will be in competition with other sources of supply. We have stated that we need this CO_2 at least by January 1, 1983. We have further told the working interest owners in the Seminole-San Andres unit that Amerada Hess expects to furnish the share of CO_2 allocable to its working interest in kind.
>
> Now, indeed, if Amerada Hess furnishes that share of CO_2 to Seminole in kind, we expect it to come from the Bravo Dome Unit. Certainly if we're going to have to supply our share in kind, or if we want to supply our share in kind, which will represent somewhere around 83-million cubic feet a day, it looks to me that there's going to be a substantial market available to Bravo Dome producers and royalty owners, and with the lead time necessary to drill wells, design facilities, procure equipment, and install that equipment, and make the CO_2 source ready for production, certainly the formation of the Bravo Dome Unit is not premature. (Transcript of Rehearing, p. 127) [emphasis added]

This testimony is supported by further testimony of Mr. E. F. Motter at pages 136 through 147 of the transcript of rehearing and is demonstrated by Mr. Motter's graphic exhibit of carbon dioxide requirements. This position on the timeliness of the unit agreement is agreed with by other witnesses at pps. 80 and 185 of the transcript of rehearing.

In view of the evidence of the need for carbon dioxide, the necessity of development prior to production, and the provisions for continuing review of operations which are discussed in Point I, approval of the Bravo Dome Carbon Dioxide Unit Agreement was not premature.

CONCLUSION

In issuing Orders No. R-6446 and No. R-6446-B, the New Mexico Oil Conservation Commission was responding to a request of applicant and others that it exercise its specific expertise to determine whether or not that certain agreement known as the Bravo Dome Carbon Dioxide Unit Agreement operated to prevent waste of carbon dioxide and to protect the correlative rights of the interest owners in such product. As summarized above, under both the statutory and case law of the State of New Mexico the evidence presented to the Oil Conservation Commission supported a finding that in fact this agreement would operate to prevent waste and protect such correlative rights.

Therefore, Respondent New Mexico Oil Conservation Commission respectfully prays that the relief sought by Petitioner herein be denied and that Order No. R-6446-B be affirmed.

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CERTIFICATE

I hereby certify that a true and correct copy of the foregoing brief was mailed to opposing counsel of record this 17th day of December, 1982

STATE OF NEW MEXICO

ENERGY AND MINERALS DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE REHEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF AMOCO PRODUCTION COMPANY FOR APPROVAL OF THE BRAVO DOME CARBON DIOXIDE GAS UNIT AGREEMENT, UNION, HARDING AND QUAY COUNTIES, NEW MEXICO.

CASE No. 6967
ORDER No. R-6446

REQUESTED FINDINGS OF FACT
OF AMOCO PRODUCTION COMPANY

COMES NOW, AMOCO PRODUCTION COMPANY in the above-styled and numbered cause and respectfully requests the Commission to adopt the following Findings of Fact:

1. That Applicant, Amoco Production Company (hereinafter called Amoco), as unit operator of the Bravo Dome Carbon Dioxide Gas Unit (hereinafter called the Unit) submitted the Bravo Dome Carbon Dioxide Gas Unit Agreement (hereinafter called Unit Agreement) to the New Mexico Commissioner of Public Lands for his approval.

2. On January 8, 1980, the New Mexico Commissioner of Public Lands preliminarily approved the Unit Agreement as to form and content, but pursuant to Rule 46 of the State Land Office

Rules and Regulations, postponed his final decision pending action by the Commission. (Tr. RH 184)

3. That due public notice having been given as required by law, this matter is properly before the Commission.

4. That the applicant, Amoco Production Company, seeks approval of the Unit Agreement covering 1,175,255.43 acres, more or less, of state, federal and fee land described in Exhibit A attached hereto and incorporated herein by reference. (Tr. H 6)

5. That the Unit Agreement has received the final approval of the New Mexico Commissioner of Public Lands and the supervisor, United States Geological Survey. (Exhibits RH8 and RH9)

6. That the Unit is a voluntary exploratory unit. (Tr. RH 14, 17, 80, 98)

7. That the outer boundaries of the Unit constitute a reasonable configuration and extent geologically suitable for the orderly development of carbon dioxide from the unitized formation. (Tr. H 58-74, 75, RH 15)

8. That the applicant has obtained voluntary commitment of approximately 91.5% of the working interest and 86% of the royalty interest in the unit area which will give Amoco, as unit operator, reasonable and effective operational control of the unit area. (Tr. RH 15-16)

9. That the rights of non-committed parties to the Unit Agreement are not affected by the Unit Agreement. (Tr. H 27-28, 35, Tr. RH 17)

10. That the Unit Agreement is a voluntary contractual relationship between the parties thereto. (Tr. H 27, Tr. RH 14, 17, 80, 98)

11. That the parties to the Unit Agreement have voluntarily committed their interest to the unit and have mutually agreed to share the risks and benefits associated with unit operation. (Tr. H 45, Tr. RH 32, 34)

12. That the parties to the Unit Agreement have by contract mutually agreed that their respective correlative rights are reasonably protected by the terms of the Unit Agreement. (Tr. H 45)

13. That the method of allocation of production on a straight acreage basis for this exploratory unit is fair and reasonable. (Tr. RH 32)

14. That approval of the proposed Unit Agreement will afford an opportunity to the parties thereto to receive their just and equitable share of the benefits from unit production. (Tr. RH 32, 34, 176)

15. That approval of the proposed Unit Agreement will promote the protection of correlative rights of the interest owners within the unit area. (Tr. H 28-29)

16. That without unitized operation of the unit area, certain leases will have to be developed under the current spacing practice by drilling one well on each 160 acre tract. (Tr. RH 39, 45)

17. That the data ultimately obtained from further development of the unit area may show that wells will drain in excess of 160 acres. (Tr. RH 46)

18. That unit operations will enable Amoco, as unit operator, to drill only such wells as are necessary to efficiently and effectively produce the carbon dioxide in the unit area. (Tr. RH 46, 87)

19. That absent unitization, development of certain tracts under the present 160 acre spacing practice will require the drilling of offset wells to protect adjoining tracts from drainage, many of which may be unnecessary to effectively and efficiently produce carbon dioxide from the unit area. (Tr. H 35, Tr. RH 48)

20. That approval of the application and unitized operations thereunder would avoid the drilling of unnecessary wells thereby decreasing the costs of unit operation and preventing economic waste. (Tr. RH 77, 140)

21. That unitized operation will result in the most efficient equipping, operating, and producing methods and will reduce the costs of carbon dioxide production from the unit area. (Tr. RH 63, 77)

22. That reducing the costs of carbon dioxide production by unitized operations will extend the economic lives of the wells in the unit area. (Tr. RH 63-64)

23. That extending the economic life of the carbon dioxide wells in the unit area will result in greater ultimate recovery of carbon dioxide therefrom. (Tr. RH 64, 97)

24. That approval of the Unit Agreement and operations thereunder will tend to increase the quantity of carbon dioxide produced from the unit area, thereby preventing underground waste. (Tr. RH 64)

25. That approval of the proposed Unit Agreement will prevent the underground waste of carbon dioxide.

26. That approval of the Unit Agreement and the unitized operation of the Unit will provide for orderly development of carbon dioxide reserves in the unit area. (Tr. H 28, 35, Tr. RH 140)

27. That orderly development of the unit area under unitized operation will result in the installation of fewer surface facilities and will permit the production of carbon dioxide in the unit area with the most efficient development pattern and the

most efficient equipping, operating, and producing practices. (Tr. RH 49-58, 91)

28. That development of the unit area under unit operation will reduce the chances of mechanical malfunction and man-made accidents in the field which would result in the unnecessary and excessive surface loss of carbon dioxide gas without beneficial use. (Tr. RH 106, 108, 120)

29. That approval of the Unit Agreement will prevent the surface waste of carbon dioxide. (Tr. RH 111)

30. That there exists a substantial market for the sale and use of carbon dioxide in enhanced oil recovery projects. (Tr. RH 125, 139, 141)

31. That the carbon dioxide produced from the unit area will be in competition with other sources of carbon dioxide. (Tr. RH 127, 130, 137, 148)

32. That the Unit Agreement and the proposed development of the unit area under unitized operations are timely. (Tr. RH 14, 80)

33. That all plans of development and operations and all expansions or contractions of the unit area should be submitted to the director of the Oil Conservation Division for approval. (Tr. H 51)

34. That the Unit Agreement should be approved.

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Certificate of Service

I hereby certify that a true copy of the foregoing pleading was mailed to all counsel of record this 24th day of October, 1980.

William F. Carr
William F. Carr

STATE OF NEW MEXICO

ENERGY AND MINERALS DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE REHEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

CASE No. 6967
ORDER No. R-6446

APPLICATION OF AMOCO PRODUCTION COMPANY FOR APPROVAL OF THE BRAVO DOME CARBON DIOXIDE GAS UNIT AGREEMENT, UNION, HARDING AND QUAY COUNTIES, NEW MEXICO.

MEMORANDUM BRIEF IN SUPPORT
OF CONFIRMATION OF
BRAVO DOME CARBON DIOXIDE GAS UNIT

AMOCO PRODUCTION COMPANY ("Amoco"), unit operator of the Bravo Dome Carbon Dioxide Gas Unit ("Unit") submitted the Bravo Dome Carbon Dioxide Gas Unit Agreement ("Unit Agreement") to the New Mexico Commissioner of Public Lands pursuant to statutory dictate, 19-10-46 NMSA (1978). The Commissioner gave preliminary approval to the Unit Agreement as to form and content on January 8, 1980, but, pursuant to Rule 46 of the State Land Office Rules and Regulations, postponed his final decision pending action by the Oil Conservation Division.

The Company also submitted the Unit Agreement to the United States Geological Survey. The Survey likewise approved the Unit Agreement as to form and content.

On May 28, 1980, Amoco requested a hearing before the Oil Conservation Commission for an Order approving the Unit Agreement. The Commission held a public hearing on July 21, 1980 and on August 14, 1980 entered its Order No. R-6446 approving the Unit Agreement. A copy of the Commission's Order is attached hereto as Exhibit "A".

On August 28, 1980, the Commissioner of Public Lands, acting pursuant to statutory authority, gave final approval and consent to the Unit Agreement finding, among other things, that the Unit Agreement "will tend to promote conservation of Unitized Substances" and "is in other respects for the best interests of the State". A copy of the Commissioner's Order is attached hereto as Exhibit "B".

On August 29, 1980, the Conservation Manager of the United States Geologic Survey likewise granted final approval to the Unit Agreement. A copy of such Certification - Determination is attached hereto as Exhibit "C".

On September 2, 1980, certain petitioners filed an Application for Rehearing with the Commission. By Order dated September 12, 1980, the Commission granted the Application for the purpose of additional consideration of certain particulars, including the prevention of waste and the protection of correlative rights within the unit area.

A second public hearing was held before the Commission on October 9, 1980. Amoco tendered additional testimony and exhibits on the questions raised in the Commission's Order granting rehearing.

This Memorandum Brief is submitted in support of the confirmation of the Commission's previous approval of the Unit Agreement. The Company urges confirmation of the Order on two independent grounds. Initially, Amoco submits that in a voluntary unit where all mineral and royalty owners are paid on a fixed prorated basis regardless of the actual production on any tract within the unit, the correlative rights of all committed parties within the unit area are ipso facto protected. Secondly, and more importantly, the Company submits that the record evidence in both the original and rehearings overwhelmingly supports the Commission's initial conclusion that the Unit Agreement prevents waste and protects the correlative rights of all parties.

POINT I-

IN A VOLUNTARY UNIT WHERE ALL OWNERS MUTUALLY AGREE TO BE PAID ON A PRO RATA BASIS REGARDLESS OF THE ACTUAL PRODUCTION ON ANY TRACT WITHIN THE UNIT, THE CORRELATIVE RIGHTS OF ALL PARTIES ARE IPSO FACTO PROTECTED

There is an irrefutable distinction between voluntary unitization and forced or compulsory unitization. The former is a contractual agreement among parties for the purpose of primary production of resources. See generally, William & Meyers, Oil and Gas Law, Vol. 6, §924, at 508. The latter is usually a statutory proceeding to compel non-consenting interest owners to unitize acreage for purposes of secondary or enhanced recovery. See, for example, the New Mexico Statutory Act, 70-7-1 et seq, NMSA (1978).

Accordingly, the procedure governing approval of compulsory unitization, given its involuntary and adversarial nature, must provide safeguards and protection for non-consenting interest owners. For example, all compulsory unitization statutes, including New Mexico's, provide for full notice and hearing prior to Commission approval. 70-7-6A NMSA (1978). And again because of the adversarial nature of the proceeding, the Commission must determine whether the participation formula for unitization is fair, reasonable and equitable to both consenting and non-consenting parties.

But the elements of conflict and adversity between parties are simply not present in voluntary unitization. Because such unitization is effected through negotiation and agreement of the parties, there is no conflict which the Commission must resolve: The parties themselves have mutually agreed as to how their correlative rights will be protected.

Indeed, the element of correlative rights provides the primary illustration of the principles involved. In a voluntary unit, only two sets of parties are effected: those who are committed to the unit and those who are not. The very nature of voluntary unitization assures, ipso facto, that the correlative rights of committed parties are protected. The correlative rights of those not committed to the unit exist independently of the unit and are otherwise protected by lease agreements.

The Unit Agreement in issue here provides for allocation of produced carbon dioxide on a straight, fixed pro rata acreage basis, regardless of the actual production on any tract within the unit. The validity and fairness of such an allocation formula is beyond peradventure. Each interest owner in the Unit Area was notified of the formula, and the vast majority of such owners acknowledged the equity of the formula by contractually ratifying the Unit Agreement.

Amoco submits that those owners whose interests have been joined through commitment to the Unit Agreement have contractually acknowledged the protection of their respective correlative rights. Such committed owners have consented to unitization and allocation on the basis of the Unit Agreement. Indeed, there is no justiciable issue of correlative rights with respect to such committed owners.

In Syverson v. North Dakota State Industrial Commission, 111 NW2d 128 (W.D. 1960), the North Dakota Supreme Court addressed the issue of the correlative rights of both joining and non-joining parties in a voluntary unit. The Court affirmed a regulatory commission order approving a voluntary unit. In so doing, the decision asserted that the correlative rights of joining interest owners are ipso facto protected by an allocation formula based on a pro rata acreage basis:

"Where all mineral and royalty owners under a voluntary unitization agreement . . . are paid on a fixed prorata basis regardless of the actual production on any tract within the unit, finding by the Industrial Commission that such agreement would be in the public interest, protective of correlative rights . . . will not be disturbed in the absence of affirmative proof to the contrary that such agreement is not in the public interest." 111 NW2d at 129, hdw.6. (emphasis added).

Here, there is a complete "absence of affirmative proof" by Protestants that the allocation of the unitized substance under the Unit formula is not in public interest. In the absence of such proof, the allocation formula, consented to by committed parties, establishes the protection of the correlative rights of such parties ipso facto.

The correlative rights of non-committed owners have been made an issue in this proceeding. But again, the nature of a voluntary unit allows for the protection of such rights ipso facto. The proposed Unit is wholly voluntary. No one can be compelled to join it. The correlative rights of non-committed parties, vis a vis the unit operation, are amply protected by the terms of their individual leases, but they here complain of the unit agreement which, absent their commitment, does not affect their rights.

The Court in Syverson, supra, outlined the undeniable mechanics of voluntary unitization with respect to non-committing parties:

"The provisions of the unitization agreement submitted to the owners of mineral and royalty interests in the field were to be binding only upon those persons having interests in the proposed unit who agreed in writing to such unitization. The appellants, by refusing to sign such agreement, are not affected thereby. Their rights are independent of this agreement and the order approving the unit agreement . . . affect(s) only those owners who have joined in this agreement." 111 NW2d at 133 (emphasis added).

With specific respect to the correlative rights of non-committing parties in a unit area, the North Dakota Supreme Court acknowledged that such rights cannot be affected or impaired by approval of the voluntary unit agreement:

> "By refusing to sign the unitization, as the appellants had the rights to do . . . , they are left in the same position that they would be in if there had been no unit agreement proposed. The respondent, as lessee under the lease with appellants, will be compelled to live up to all of its obligations under such lease. Respondent will be compelled to continue . . . the oil wells upon the appellants lands . . . We fail to see how the appellants are in any way injured by the order appealed from on the record that is before us." Id. (emphasis added).

Here, Amoco, and all lessees participating in the Unit Agreement, must abide by the terms and obligations specified in their leases with non-committing lessors. As in Syverson, we fail to see how non-committing interest owners could be injured by approval of the Unit Agreement.

To the contrary, the claims of protestants here appear to be nothing less than thinly-veiled attempts to frustrate and impair the voluntary efforts of the overwhelming majority of interest owners in the area. It should not be permitted. The holding of the Court in Syverson is equally applicable here:

> "By refusing to join such agreement, however, appellants, may not, at the same time, prevent other interests in the field from developing adjoining tracts under such agreement. They have had an equal opportunity with the other owners within the area of the proposed unit to become parties to such agreement on the same basis as all other owners in the field. Whatever the result would be if the appellants could show actual damages, they certainly are not entitled to complain in the absence of such showing." Id. at 134. (emphasis added).

See also, Baumgartner v. Gulf Oil Corporation, 184 Neb. 384, 168 NW2d 510 (1969).

In summary, Amoco submits that the correlative rights of parties committed to the unit are protected ipso facto by the voluntary Unit Agreement. Those interest owners have acknowledged that the allocation formula adequately protects their correlative rights. The correlative rights of those interest owners who have refused to join the Unit are not affected by unit operation, and such rights are adequately protected by their respective leases.

More importantly, Amoco submits that the record evidence in both the first and second hearings overwhelmingly supports the Commission's initial conclusion that the Unit Agreement prevents waste and protects the correlative rights of parties to the Unit agreement and could not in any way adversely effect the correlative rights of non-committed parties.

POINT II

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ALL FINDINGS NECESSARY FOR A VALID ORDER APPROVING THE BRAVO DOME UNIT AGREEMENT

In Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962), the New Mexico Supreme Court noted that the Oil Conservation Commission is vested with statutory jurisdiction over matters relating to the conservation of oil and gas. The basis of its power is founded on the fundamental duites to prevent waste and to protect correlative rights. Id. at 814. To enter a valid order carrying out these duties, the Commission must make basic findings with respect to waste and correlative rights. Id. at 816. In both the original hearing and the rehearing in this case, substantial evidence was presented to support all necessary findings for a valid Commission order.

Substantial evidence was defined by the New Mexico Supreme Court in Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939 (1975) as " . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In determining whether or not there is substantial evidence which would enable an administrative body to make a finding, the record will be examined on review to determine only if the administrative body could reasonably make the finding. See, Davis, Administrative Law Treatise, Section 29.01 (1958).

In Continental v. Oil Conservation Commission, supra, and again in Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975), the New Mexico Supreme Court announced the standards to be applied when the sufficiency of the findings in an Oil Conservation Commission order are at issue. The Court found that the Commission order must contain "sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings" on waste and correlative rights and further found that "administrative findings by an expert administrative Commission should be sufficiently extensive to show the basis of the Commission's order." Fasken v. Oil Conservation Commission, supra, at 590.

Correlative rights

The Supreme Court of New Mexico in the Continental decision stated that correlative rights were not absolute or unconditional but noted that the Legislature had enumerated in the definition of correlative rights (Section 7-2-33, N.M.S.A., 1978 Compilation) the following definite elements contained in such a right:

> " . . . (1) an opportunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of the gas in the pool." Continental Oil Company v. OCC, supra, at 818.

In Continental, the Court further noted that " . . . the protection of correlative rights must depend upon the Commission's findings as to the extent and limitations of the rights." Id. It further enumerated specific correlative rights findings to be made by the Commission, if practicable to do so, prior to the entry of an Order. Id.

In the original hearing in this case and in the rehearing, as more specifically shown in the requested findings submitted herewith, substantial evidence was offered that approval of the unit agreement will afford an opportunity to the interest owners committed thereto to receive their fair share of the benefits from unit production. (Tr. RH 32, 34, 176).

The strict test announced in Continental concerning correlative rights findings was reviewed by the Court in Rutter & Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). This case involved an attack on an Oil Conservation Commission order approving oversized proration units for failing to contain all findings on correlative rights required by the Continental decision. In announcing its decision in Rutter & Wilbanks, the Court stated:

> "When the Commission exercises its duty to allow each interest owner in a pool 'his just and equitable share' of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by Section 65-3-29 (H), N.M.S.A. 1953 [Section 70-2-33, N.M.S.A., 1978 Compilation] is subject to the qualification 'as far as it is practicable to do so.' See, Grace v. Oil Conservation Commission. While the evidence lacked many of the

> factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute 'substantial evidence' or that the orders were improperly entered or that they did not protect the correlative rights of the parties 'so far as [could] be practicably determined . . . '" 532 P.2d at 588. (emphasis added).

The record in this case contains substantial evidence showing that the correlative rights of all property owners will be protected. (Tr. H 27-29, 45, Tr. RH 14, 17, 32, 80, 98). The only limitations on the evidence presented result from the very nature of exploratory units in that certain evidence is not obtainable until after the unit is approved and the acreage involved is more fully developed.

Requested Findings 10 through 15, submitted with this brief, are sufficient to meet the tests announced by the New Mexico Supreme Court and are supported by substantial evidence as appears from the transcript references set out in parenthesis following each of the findings.

Waste

The definition of waste in the New Mexico Oil and Gas Act reads in part as follows:

> "As used in this act, the term 'waste' in addition to its ordinary meaning, shall include:

A. 'Underground waste' as those words are generally understood in the oil and gas business and in any event to embrace the efficient, excessive, or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producting, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas.

B. 'Surface Waste' as those words are generally undevstood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however, caused, of natural gas in any type or in any form or crude petroleum oil, or any product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells . . . " 70-2-3 NMSA (1978).

The record in this case contains substantial evidence that granting the application for approval of the Bravo Dome Carbon Dioxide Gas Unit will tend to increase the total quantity of carbon dioxide ultimately recovered from the unit area, thereby preventing underground waste. See, Findings 25 through 29 and accompanying transcript references.

The record also contains substantial evidence showing that unitized operations will tend to reduce mechanical malfunctions and man-made error, thereby reducing the unnecessary or excessive surface loss or destruction of carbon dioxide without beneficial use. See, Findings 21 through 24 and accompanying transcript references.

Conclusion

For all of the above-stated reasons, Amoco requests an Order approving the Bravo Dome Carbon Dioxide Gas Unit Agreement.

Respectfully submitted,

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Post Office Box 2208
Santa Fe, New Mexico

By William F. Carr
William F. Carr

Attorneys for Amoco
Production Company

Certificate of Service

I hereby certify that a true copy of the foregoing pleading was mailed to all counsel of record this 24th day of October, 1980.

William F. Carr

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 6967
Order No. R-6446

APPLICATION OF AMOCO PRODUCTION COMPANY FOR APPROVAL OF THE BRAVO DOME CARBON DIOXIDE GAS UNIT AGREEMENT, UNION, HARDING, AND QUAY COUNTIES, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 a.m. on July 21, 1980, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 14th day of August, 1980, the Commission, a quorum being present, having considered the the testimony, the record, and the exhibits, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement covering 1,174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

(3) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Director of the Oil Conservation Division, hereinafter referred to as the Division, for approval.

(4) That approval of the proposed unit agreement should promote the prevention of waste and the protection of correlative rights within the unit area.

EXHIBIT A

IT IS THEREFORE ORDERED:

(1) That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved.

(2) That the plan contained in said unit agreement for the development and operation of the unit area is hereby approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement, this approval shall not be considered as waiving or relinquishing, in any manner, any right, duty, or obligation which is now, or may hereafter be, vested in the Division to supervise and control operations for the exploration and development of any lands committed to the unit and production of carbon dioxide gas therefrom.

(3) That the unit operator shall file with the Division an executed original or executed counterpart of the unit agreement within 30 days after the effective date thereof; that in the event of subsequent joinder by any party or expansion or contraction of the unit area, the unit operator shall file with the Division within 30 days thereafter counterparts of the unit agreement reflecting the subscription of those interests having joined or ratified.

(4) That all plans of development and operation and all expansions or contractions of the unit area shall be submitted to the Director of the Oil Conservation Division for approval.

(5) That this order shall become effective 60 days after the approval of said unit agreement by the Commissioner of Public Lands for the State of New Mexico and the Director of the United States Geological Survey; that this order shall terminate ipso facto upon the termination of said unit agreement; and that the last unit operator shall notify the Division immediately in writing of such termination.

(6) That 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

ALEX J. ARMIJO, Member

EMERY C. ARNOLD, Member

JOE D. RAMEY, Member & Secretary

S E A L

fd/

UNION COUNTY, NEW MEXICO

TOWNSHIP 18 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 35 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 36 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 37 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 19 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 19 NORTH, RANGE 35 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 19 NORTH, RANGE 36 EAST, NMPM
Section 16: All
Section 18: S/2
Sections 19 and 20: All
Section 21: W/2, W/2 NE/4 and SE/4 NE/4
Section 26: S/2 S/2
Section 28: W/2 and SW/4 SE/4
Sections 29 through 36: All

TOWNSHIP 20 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 20 NORTH, RANGE 35 EAST, NMPM
Section 3: W/2
Sections 4 through 10: All
Section 11: SW/4
Section 14: NW/4
Sections 15 through 22: All
Section 23: NW/4
Sections 27 through 34: All

TOWNSHIP 21 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 21 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 24: All
Section 25: N/2 and SW/4
Section 26: All
Section 27: NE/4 and N/2 NW/4
Sections 28 through 33: All

TOWNSHIP 22 NORTH, RANGE 30 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 22 NORTH, RANGE 31 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 22 NORTH, RANGE 32 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 22 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 22 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 22 NORTH, RANGE 35 EAST, NMPM
Section 5: S/2
Sections 6 through 8: All
Section 9: W/2 and SE/4
Section 10: S/2 S/2
Sections 15 through 21: All
Section 22: N/2
Section 27: SW/4
Sections 28 through 33: All
Section 34: W/2
Section 36: All

TOWNSHIP 23 NORTH, RANGE 30 EAST, NMPM
Section 36: All

TOWNSHIP 23 NORTH, RANGE 31 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 23 NORTH, RANGE 32 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 23 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 23 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 23 NORTH, RANGE 35 EAST, NMPM
Section 31: All

TOWNSHIP 24 NORTH, RANGE 31 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 24 NORTH, RANGE 32 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 24 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 24 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

HARDING COUNTY, NEW MEXICO

TOWNSHIP 17 NORTH, RANGE 29 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 30 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 31 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 32 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 29 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 30 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 31 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 32 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 18 NORTH, RANGE 33 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 16 NORTH, RANGE 34 EAST, NMPM
Section 3: Lots 3 through 6, 11 and 12
Section 4: Lots 1, 2, 5 through 12, N/2 SE/4 and SW/4

TOWNSHIP 16 NORTH, RANGE 35 EAST, NMPM
Section 1: Lots 1 through 8, NW/4 SW/4 and S/2 SW/4
Sections 2 through 6: All
Section 7: Lots 1, 2, E/2 NW/4 and E/2
Sections 8 through 10: All
Section 11: NW/4, N/2 SW/4 and N/2 S/2 SW/4

TOWNSHIP 16 NORTH, RANGE 36 EAST, NMPM
Section 5: Lots 4 and 5
Section 6: Lots 1 through 8 and 10

TOWNSHIP 17 NORTH, RANGE 34 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 35 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 36 EAST, NMPM
Sections 1 through 36: All

TOWNSHIP 17 NORTH, RANGE 37 EAST, NMPM
Sections 1 through 36: All

NEW MEXICO STATE LAND OFFICE
CERTIFICATE OF APPROVAL
COMMISSIONER OF PUBLIC LANDS, STATE OF NEW MEXICO
BRAVO DOME CARBON DIOXIDE GAS UNIT
UNION, HARDING AND QUAY COUNTIES, NEW MEXICO

There having been presented to the undersigned Commissioner of Public Lands of the State of New Mexico for examination, the attached Agreement for the development and operation of acreage which is described within the attached Agreement dated April 9, 1979, which has been executed, or is to be executed by parties owning and holding oil and gas leases and royalty interests in and under the property described, and upon examination of said Agreement, the Commissioner finds:

(a) That such agreement will tend to promote the conservation of Unitized Substances and the better utilization of reservoir energy in said area.

(b) That under the proposed agreement, the State of New Mexico will receive its fair share of the recoverable Unitized Substances in place under its land in the area.

(c) That each beneficiary Institution of the State of New Mexico will receive its fair and equitable share of the recoverable Unitized Substances under its lands within the area.

(d) That such agreement is in other respects for the best interests of the state, with respect to state lands.

NOW THEREFORE, by virtue of the authority conferred upon me under Sections 19-10-45, 19-10-46, 19-10-47, 19-10-53, and 19-10-54, New Mexico Statutes Annotated, 1978 Compilation, I, the undersigned, Commissioner of Public Lands of the State of New Mexico, for the purpose of more properly conserving the Unitized Substances resources of the State, do hereby consent to and approve the said Agreement, and any leases embracing lands of the State of New Mexico within the area shall be and the same are hereby amended to conform with the terms and conditions thereof, and shall remain in full force and effect according to the terms and conditions of said Agreement. This approval is subject to all of the provisions of the aforesaid statutes and conditioned as follows:

1. That the State of New Mexico shall have the right to take in kind,

at any time, its royalty share of unitized substances and upon request by the Commissioner the Unit Operator shall transport through any pipeline which it may own or have the right to use, unitized substances so taken in kind or otherwise purchased under 19-14-1 through 19-14-3 NMSA 1978 Comp., or under the provisions of Article 7 Paragraph 7.6 of the Unit Agreement. The owner of such unitized substances shall compensate or otherwise reimburse the unit operator for the actual cost of such transportation.

2. That the allocation of Carbon Dioxide provided in Article 7 Paragraph 7.6 of the unit agreement shall be made available within a reasonable time after expiration of the notice period not with-standing the language of lines 21 through 28 of Paragraph 7.6 at page 14 of the Unit Agreement.

3. That not withstanding any Storage, Balancing, Take or Pay agreements or provisions of this unit agreement to the contrary the State of New Mexico shall receive payment for its allocated royalty share of all unitized substances produced and marketed from the unit area. Payment to be made on the 20th day of each month for all royalties due the lessor for the preceeding month.

IN WITNESS WHEREOF, this Certificate of Approval is executed, with seal affixed, this 28th. day of August 19 80.

COMMISSIONER OF PUBLIC LANDS
of the State of New Mexico

CERTIFICATION--DETERMINATION

Pursuant to the authority vested in the Secretary of the Interior, the act approved February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. secs. 181, et seq., and delegated to the Conservation Manager of the Geological Survey, I do hereby:

A. Approve the attached agreement for the development and operation of the Bravo Dome Unit Area, State of New Mexico.

B. Certify and determine that the unit plan of development and operation contemplated in the attached agreement is necessary and advisable in the public interest for the purpose of more properly conserving the natural resources.

C. Certify and determine that the drilling, producing, rental, minimum royalty, and royalty requirements of all Federal leases committed to said agreement are hereby established, altered, changed, or revoked to conform with the terms and conditions of this agreement.

1. The provisions of Article 5.2 "Redetermination of Tract Participations", will be subject to approval by the Conservation Manager of the Geological Survey.

2. The provisions of Article 6.3(b) shall not apply to the Federal lands and the United States reserves the right to establish higher minimum values for Federal substances.

3. The provisions of Article 7.3 requiring a party to bear any extra expenditure incurred in the taking in kind or separate disposition of share of the production shall be ineffective as to any royalty which may be taken in kind by the Federal Government.

4. Require the Unit Operator to furnish that the U. S. Geological Survey at Albuquerque, New Mexico, two copies of:

(a) All notices and reports of unit operations including revisions and changes to the unit agreement.

James W. Sutherland
Conservation Manager, SCR
United States Geological Survey

29 AUG 1980
Dated

14-08-0001-18438
Contract Number

EXHIBIT C

TRANSCRIPT REFERENCES
OIL CONSERVATION COMMISSION
ORDER NO. R-6446-B

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof with respect to prevention of waste and protection of correlative rights.

Record:
Affidavits of Publication: Santa Fe New Mexican, September 26, 1980; Quay County Sun, September 24, 1980; Union County Leader, September 24, 1980.

(2) That the applicant, Amoco Production Company, seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement (Unit) covering 1, 174,225.43 acres, more or less, of State, Federal and Fee lands described in Exhibit A attached hereto and incorporated herein by reference.

Record: Application of Amoco Production Company, May 28, 1980.

(3) That this matter originally came on for hearing before the Commission on July 21, 1980.

Record:
Order R-6446

(4) That on August 14, 1980, the Commission entered its Order No. R-6446 approving said Bravo Dome Carbon Dioxide Unit Agreement.

Record:
Order R-6446

(5) That the Commission received a timely application for rehearing of Case No. 6967 from Abe Casados, et al(petitioners).

Record:
Application for Rehearing, August 29, 1980

(RTR. 150 - Question from Mr. Kerr)
"I hand you from the Commission's files the original of the application for rehearing an request for additional findings which bears a file mark of received, September 2, 1980, and particularly would I direct your attention to the provisions of Exhibit A attached hereto."

(6) That petitioners alleged, among other things, that the application was premature, that the Commission's findings and conclusions were based on insufficient evidence, and that additional findings concerning prevention of waste and protection of correlative rights should be made by the Commission.

Record:
Application for Rehearing: August 29, 1980

(7) That on October 9, 1980, a rehearing was held in Case No. 6967 for the purpose of permitting all interested parties to appear and present evidence relating to this matter, including the following particulars:

(a) prevention of waste within the unit area,

(b) protection of correlative rights within the unit area as afforded by the unit agreement, its plan and participation formula, and

(c) whether the unit agreement and its plan are premature.

Record:
R-6446-A

(8) That the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease by lease basis:

(a) more efficient, orderly and economic exploration of the unit area; and

(TR-28 - Mr. Landis)
"I would expect without such an agreement that te development would be utterly chaotic.
Certainly, this unit agreement will provide for an orderly and efficient development of this entire area."

(TR-35 - Mr. Landis)
"All right. First of all, with respect to conservation of CO_2. Where you have an orderly and efficient development, where it can be planned ahead, and where you are not running into competitive operators who have desperately to drill offset obligations, and so on, you are conserving the unitized substances. You are preventing waste in the drilling process. You are preventing waste in the completion process.

"From there on you are handling that in the most orderly fashion with respect to the reservoir, producing whatever fluids there are from the best places possible."

(RTR, 40-50 - Testimony of Mr. Allen concerning the number of wells required to develop the unit area without unitization.)

Testimony Attached.

(RTR, 61-63 - Testimony of Mr. Allen in re initial drilling plans without unitization.)

Testimony Attached.

(RTR 87 - Mr. Allen)
"I think the primary concern of us forming this unit, and it has been all along, is to develop what is known as a very valuable resource in an orderly and efficient manner. And that's to my knowledge, the purpose for forming the unit."

(RTR 100 - Mr. Allen)
"Yes, sir, I believe that was our intent. The whole intent of the unit is to develop in an orderly and efficient manner and to develop on a basis which would effectively and efficiently drain that reservoir, whether it be 640 or somewhat less, 320."

(RTR 140 - Mr. Motter)
"I think any time you can operate a large unit this way and collectively do your work, and all this, that it's just a much more efficient operation."

(RTR 154 - Mr. Callaway)
"I've always been an advocate of field-wide unitization. I feel like that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons, in this case gas, and operates under the most efficient circumstances."

Exhibits
RH 1,
RH 2,
RH 3

(b) more economical production, field gathering, and treatment of carbon dioxide gas within the unit area.

(TR 28 - Mr. Landis)
"I would expect without such an agreement that the development would be utterly chaotic.
Certainly, this unit agreement will provide for an orderly and efficient development of this entire area."

(RTR 50-61 - Testimony of Mr. Allen concerning the number of surface facilities required without unitization)

Look at this at get a definitive figure

Testimony Attached.

(RTR 63-64 - Question from Mr. Buell - Answer by Mr. Allen)
Q. "...in your opinion would six surface facilities installations serving 324 wells each be able to be operated a longer economic life than 4435 individual surface facility installations serving this unit area on a lease basis?"
A. "In my opinion, Mr. Buell, I think it would be considerably cheaper to operate on a unit basis and as such, we would have a longer individual life, well life."
Q. "So under unit operation a greater amount of CO_2 would be recovered than would be recovered under individual lease operations."

(RTR 87 - Mr. Allen)
"I think the primary concern of us forming this unit, and it has been all along, is to develop what is known as a very valuable resource in an orderly and efficient manner. And that's to my knowledge, the purpose for forming the unit."

(RTR 97 - Question from Mr. Stamets - Answer of Mr. Allen)
Q. "Mr. Allen, I've got one final question. What you discussed here relative to these facilities, is that only indicative of the overall type of operation that you'd have relative to unit facilities, meaning that because of being able to operate this large unit as a whole, you'd be able to achieve a number of economies which can result then in greater recovery from the unit?"
A. "I believe that's right, yes, sir, if I understood you correctly."

(RTR 154 - Mr. Callaway)
"I've always been an advocate of field-wide unitization. I feel like that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons, in this case, gas, and operates under the most efficient circumstances."

Exhibits
RH-3,
RH-4,
RH-5,
RH-6,
RH-7

(9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

(RTR 63-64 - Question from Mr. Buell - Answer of Mr. Allen)
A. "In my opinion, Mr. Buell, I think it would be considerably cheaper to operate on a unit basis and as such, we would have a longer individual life, well life."
Q. "So under unit operation a greater amount of CO_2 would be recovered than would be recovered under individual lease operations."
A. "Yes, sir, in my opinion."
Q. "That would thus prevent reservoir waste in that you'd be recovering the maximum amount of CO_2 possible."
A. "Yes, sir."

(RTR 97 - Question from Mr. Stamets - Answer of Mr. Allen)
Q. "Mr. Allen, I've got one final question. What you discussed here relative to these facilities, is that only indicative of the overall type of operation that you'd have relative to unit facilities, meaning that because of being able to operate this large unit as a whole, you'd be able to achieve a number of economies which can result then in greater recovery form the unit?"
A. "I believe that's right, yes, sir, if I understood you correctly."

(RTR 140 - Mr. Motter)
"I think any time you can operate a large unit this way and collectively do your work, and all this, that it's just a much more efficient operation."

(10) That the unit area is a large area with carbon dioxide gas potential.

(TR 75 - Question from Mr. Buell - Answer of Mr. May)
Q. "From a reasonable basis do you feel that the acreage included within the unit area, on a reasonable basis, could be considered as productive of CO_2 from the unitized interval?"

A. "Yes."

(RTR 99 - Mr. Allen)
"I think we've shown that the Tubb is contiguous throughout this entire area..."

(RTR 101 - Mr. Allen)
"...this is an awfully large unit, but even at that, it's limited on data that's available for this size, but I think it clearly shows that this entire area could reasonably be considered productive,...."

(11) That at the time of the hearing and the rehearing some areas within the unit boundary had experienced a long history of production.

(RTR 27-28 - Question from Mr. Buell - Answer of Mr. Landis)
Q. "You are aware, are you not, that -- that parts of the area within the Bravo Dome have been productive on some commercial basis for nearly forty years, are you not?"
A. "I believe, yes, that some area within that unit outline has been productive."

(12) That at the time of the hearing and the rehearing a number of exploratory wells had been completed in scattered parts of the unit.

(TR 42 - Mr. Landis)
"Probably, but, Mr. Nutter, these wells, as you will find in later testimony, the locations of these wells, and they certainly are not concentrated in the area of 6000 acres, they are gathered around the periphery of this unit area."

(RTR 28 - Mr. Williams)
"I believe, yes, that some area within that unit outline has been productive."

(RTR 74-75 - Question by Mr. Kerr - Answer of Mr. Allen)
A. "There's some completed wells in there, yes, sir."
Q. "And are those as you spoke of, called shut-in wells?"
A. "I would call them that."

(RTR 169 - Mr. Callaway)
"Yes, sir. I think that -- I think the testimony is that there have been 42 holes drilled in this unit area, consisting of some 50 townships, which I believe is 1,834 sections, which is 51 townships."

(13) That the developed acreage within the proposed unit is very small when compared to the total unit area and when viewed as a whole, the unit must be considered to be an exploratory unit.

(RTR 14 - Question by Mr. Buell - Answer of Mr. Williams)
Q. "In your opinion is the Bravo Dome Unit an exploratory unit by its very nature and concept?"
A. "It is."

(RTR 30-31)
Mr. Buell: "May it please the Commission, I object to that question. We're dealing here with an exploratory unit and not a secondary recovery unit. It has no pertinancy or germaneness to this record."

Mr. Ramey: "The Commission has to agree with Mr. Buell. We're talking about an exploratory unit and--."

Mr. Kerr: "Your Honor, in this particular instance we are also dealing with a portion of this that is a developed field. A portion of this unit is developed property; has been developed and has been commercially productive for years, and to bring those -- and also the last drilling, which I believe the record will show for the prior hearing, we have got additional drilling, which I believe has indicated that we have proven and disproven the existence of producing capability in other parts that have not yet been put on production. So we're dealing with partially, perhaps, an exploratory unit. I think certainly that is true. Muc of this unit area is unknown, but a lot of it is known, and yet a sharing arrangement is proposed that is the same. So I don't think that we can really quite say that it is wholly one and not part another."

(14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same propertion as each owner's acreage interest in the unit bears to the total unit acreage, and

(RTR-23 - Question by Mr. Kerr - Answer of Mr. Williams)
Q. "Yes, sir, and you're familiar with the fact that in this particular unit the participation, tract participation that is assigned is on an acre basis."
A. "Surface acre basis."

(RTR 32-33 - Mr. Williams)
"In exploratory units the participation is based on the surface acre basis and where you are able to get all of the landowners and working interest owners to agree to participate in the whole unit, they are all then sharing in the risk and sharing in the benefits proportionate to their acreage as to the whole, regardless to where the production is found."

(RTR 179 - Mr. Callaway)
"I believe Mr. Williams indicated that there were basically two types of participation formulas relative to exploratory units; the one being total participation right from the beginning based on acreage; ..."

(RTR 185 - Statement of Mr. Jordan)
"And this was brought out by the last witness where he pointed out that there are two types of -- he discussed here the two types of participation, a total participation in the entire area, in an exploratory area, a relatively unknown area, or unknown reservoir area, and then the participating area. We have units of both kinds that have been approved through the years."

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(RTR 179 - Mr. Callaway)
"...and the second one being participation following discovery and expansion of the designated participating area."

(RTR 185 - Statement of Jordan)
"And this was brought out by the last witness where he pointed out that there are two types of -- he discussed here the two types of participation, a total participation in the entire area, in an exploratory area, a relatively unknown area, or unknown reservoir area, and then the participating area. We have units of both kinds that have been approved through the years."

(RTR 34 - Questions by Mr. Kerr - Answers of Mr. Williams)
Q. "Are there other types of formulas used in exploratory units?"
A. "The one that I just mentioned before."
Q. "The Federal type?"
A. "That's correct."
Q. "Okay, those are the only two types that you are aware of?"
A. "In exploratory units, yes, sir."
Q. "Okay. Now why is the -- in your own opinion, what factors make the type that's included in this unit superior to the type utilized in the Federal exploratory units?"
A. "Well, geology is not an exact science, so therefor, by all the parties voluntarily agreeing to share whatever there might be, is an ideal situation, in my opinion, regardless of where the production is, because you don't know that to begin with."
Q. "Well, is your opinion then in this unit based on a lack of geological evidence?"
A. "Well, I understand there's not a sufficient."

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(TR 36-37 - Question by Mr. Padilla - Answer of Mr. Landis)
Q. "My concern with this line and type of questioning involves correlative rights where someone, say, in the -- committed to the unit in the northwest section of the unit participates equally with someone, say, in the southeast, irrespective of geology or -- or engineering. Would you elaborate or do you have any comment on that?"
A. "Yes. Many, many such type units, that we are talking about here today, have been formed, certainly not of this magnitude; however, they have been formed on the same basis of participation that we're using here, which is the acreage, because there is not at the

outset sufficient information upon which to base -- make any other judgment. Here we have the one positive thing that we can measure directly and put everybody in on the same basis.

Q. "Now, this agreement, as I testified previously, does have a provision to correct this if there is such inequity in the beginning, after the period of time that I mentioned, because then you are going to have the information available that will tell you where the productive acres are."

(TR 45-46 - Mr. Landis)
"The participating area concept works very well if you have no obligations outside of that area that destroy the concept of the orderly and efficient development. That works very well in that case, but it does not where you have other obligations outside the participating area; certainly not."

(RTR 180 - Mr. Callaway)
"It [a unit that contemplates periodic expansion of participating areas] would not be as precise in protection of correlative rights as would a -- a participation formula based upon the recoverable reserves under each tract, but it would be better than straight acreage whether productive or not."

(RTR 186-187 - Statement of Jordan)
"We have enough acreage in that type of a unit and it's just as good as the participating ones. As a matter of fact, we've had some problems with participating ones. We find that the wells are not drilled where it's most likely to be, but we have found from time to time there are side agreements, and one of the first ones I got stung on when I came to work in this office many years ago, was where they had a participating area and they drilled the well -- they agreed if someone would commit their acreage, they'd drill then a well right away. So we had a unit there with about half State acreage in it, and there wasn't a well on any State land which was producing, and then we were being drained by adjoining wells.
So you can have abuses anywhere. I don't know whether you understand what I'm trying to say, but if you start out with a participating area, and say it's the north half of the section and the south half, the east or the west, 320 acre spacing, we found that all through this unit there was not a single well being drilled, and the unit operator was saying we're drilling where we think we should. It's more likely to find the production.

Well, we found out when they got into a bind and needed us to approve a further participating deal under the unit, going to cancel the unit for that failure to comply with, they came in and admitted to us they'd made deals with different other people if they'd come into this unit, they'd drill them a well right away. So some of those people had to give up theirs so we could get some wells on ours because we were being drained. So you can get hurt with either type of these units."

(RTR 16 - Question by Mr. Buell - Answer of Mr. Williams)
Q. "Do you see anything wrong based on your experience with exploratory units with having, I believe you experts in the field call it an undivided participation from the outset, do you see anything wrong with participation in that manner?"

A. "No, I do not. In fact, it's probably the most ideal situation to have in exploratory units."

(RTR 32-33 - Mr. Williams)
"In exploratory units the participation is based on the surface acre basis and where you are able to get all of the landowners and working interest owners to agree to participate in the whole unit, they are all then sharing in the risk and sharing in the benefits proportionate to their acreage as to the whole, regardless to where the production is found."

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

No evidence in record - as stated.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

(RTR 16 - Questions by Mr. Buell - Answers of Mr. Williams)
Q. "All right, sir. Let me ask you this question, since you have studied the unit agreement, Exhibit Number One, you're familiar with the transcript, you're aware of the fact that in the Bravo Dome Unit all people who have voluntarily committed their interest to the unit will participate in unit production from the time of first sale."

A. "That is correct."

Q. "Do you see anything wrong based on your experience with exploratory units with having, I believe you experts in the field call it an undivided participation from the outset, do you see anything wrong with participation in that manner?"

A. "No, I do not. In fact, it's probably the most ideal situation to have in exploratory units."

(RTR 32-33 - Mr. Williams)
"In exploratory units the participation is based on the surface acre basis and where you are able to get all of the landowners and working interest owners to agree to participate in the whole unit, they are all then sharing in the risk and sharing in the benefits proportionate to their acreage as to the whole, regardless to where the production is found."

(RTR 34 - Mr. Williams)
"Well, geology is not an exact science, so therefor, by all the parties voluntarily agreeing to share whatever there might be, is an ideal situation, in my opinion, regardless of where the production is, because you don't know that to begin with."

(18) That the evidence presented at the rehearing demonstrated a clear need for the carbon dioxide gas projected to be available from the unit for purposes of injection for the enhanced recovery of crude oil from depleted reservoirs.

(RTR 124-128 Testimony of Mr. Enloe concerning the needs Amerada Hess for CO_2 in the near future.

Testimony Attached

(RTR 129-130 - Questions by Mr. Kerr - Answers of Mr. Enloe)
Q. "All right. Do you have any idea -- did I understand -- let me put it this way. Did I understand you to say that you were talking about using your CO_2 from the Bravo Dome area to fulfill your working interest share of the Seminole Field supply of CO_2?"

A. "That's correct."

Q. "And you'll try to take your share of the CO_2 from the Bravo Dome area to the Seminole area to use for your own --"

A. "That's correct."

(RTR 136-139 - Testimony of Mr. Motter concerning needs of Cities Service for CO_2)

Testimony Attached.

(RTR 140-141 - Mr. Motter explaining Cities Service Exhibit Two)
"The dark line is the amount of CO_2, and by the way, this is billion cubic feet per year, that the company requirements would be for the projects we operated. And the dotted line down below is the outside operated, and I perhaps should explain, starting in '80 there, you'll note that there are some CO_2 requirements being met there, and that comes, if you'll refer back to my first exhibit, that's for Cities' interest in the Sacrock (sic) Unit, where we have a fairly substantial interest, and also have an interest in Canyon _____ that supplies the CO_2 up there. This CO_2 comes out of a couple of fields in Val Verde Basin, Gray Ranch and Puckett, basically, and capable of handling about 200-million a day, but that's the only reason I refer to that, since it starts out in '80, and by the way, the rest of this space, the dark line is the amount that we would like to have delivered by pipeline, and as I'll express our opinion, as Amerada, if we could move this to the left, we feel like it would be a lot better off."
Now we do plan to start injecting CO_2 in 1981 in some of these initial phases of these projects we're working on. It will be liquid CO_2, which will be trucked in. An so if we can get this by pipeline, we just feel like we'd be better off."

(RTR 144 - Mr. Motter)
"And do you visualize that perhaps other operators in the Bravo Dome area would be able to sell Cities gas? Is that what you anticipate?"

"Well, either sell it or if they have interest in units we operate, to deliver it in kind."

(RTR 147 - Questions by Mr. Kerr - Answers of Mr. Motter)
Q. "Well now, are you -- are you not in effect, Cities Service, supplying a market demand for sale of CO_2 --
A. "Certainly, and it --
Q. "-- at an earlier date than, say, 1984?"
A. "Yes, we are."

Q. "All right, and if in fact you spaced this out so that it merely supplies the demands of the producer, that's not going to help you, is it?"
A. "No, I don't think I can say that. I think that the quicker we can get it through the pipeline, the better off we'll be."

Exhibit: Cities Service Company #2

(19) That approval of the unit and development of the unit area at this time will not result in the premature availability or excess capacity of carbon dioxide gas for injection for enhanced recovery purposes.

(RTR 126-128 - Testimony of Mr. Enloe concerning needs of Amerada for CO_2.)
Testimony Attached

(RTR 136-139 - Testimony of Mr. Motter concerning needs of Cities Service for CO_2)
Testimony Attached

(RTR 140-141 - Mr. Motter explaining Cities Service Exhibit Two - see transcript reference for finding 18, supra.)

(RTR 147 - see transcript reference for finding 18, supra.)

(20) That the Commissioner of Public Lands and the United States Geological Survey have approved the proposed unit with respect to state and federal lands committed to the unit.

(RTR 185 - Statement of Jordan)
"Now, the Commissioner, when he made his final approval, and when it came back with the signatures on it, made his final approval, he made that final approval, we feel that he made a determination then at that time that correlative rights, as far as the land -- State lands was concerned, was protected. He made that finding. He's not challenging that now, and I wanted to explain why he's not challenging that; it does not affect him."

Exhibits: RH8, RH9

(21) That the application is not premature.

(RTR 80 - Mr. Allen)
"Mr. Kerr, in general, yes, it is true, and of course you'd always like to have production data. But we're looking at a substantial area to be developed, and I certainly don't see how it can be premature. We can't wait, you know, until after all the wells that are necessary to be drilled, that really aren't necessary are already drilled.
In my opinion in this particular unit everything is voluntary. It's been joined on a voluntary basis, and I really don't see that -- I don't think it's premature at all, in my opinion."

(22) That this is the largest unit ever proposed in the State of New Mexico, and perhaps the United States.

(RTR 25 - Mr. Williams)
"Yes. It is true we do have an area of 1,174,000 acres, and it could be enlarged under the provisions of Article 12 of the unit agreement."

(TR 112 - Questions by Mr. Kerr - Answers of Mr. Landis)
Q. "Mr. Landis, I believe this morning in your testimony you made the point that -- that this is an exceptionally large unit in terms of your experience in dealing with units.

A. "I agreed that that was such. I didn't make a point."

(TR 35-36 - Questions by Mr. Padilla - Answer of Mr. Landis)
Q. "Mr. Landis, you've testified you've had 29 years experience working with units. Have you ever participated in a unit of this magnitude?"
A. "Mr. Padilla, I would guess that this has been the only such unit of this magnitude that was ever attempted. I certainly have not."

(RTR 126 - Mr. Enloe)
"...and certainly the Bravo Dome Unit, probably the largest single CO_2 reserve that certainly I know of, as potential sources for the Seminole-San Andres Unit Project."

(RTR 156 - Question by Mr. Kerr - Answers of Mr. Callaway)
A. "Yes, the thing that caught my attention was the size of this unit. I think when you see a map in which you are used to seeing sections of the same magnitude drawn on a map that would be townships on this one, it takes a little mental adjustment. It's difficult to realize

the magnitude of this unit in connection with any other experience I've had."

Q. "I take it from that that you've never seen a unit as large as 1,174,000 acres?"

A. "No, sir."

(23) That there is no other carbon dioxide gas unit in the State.

No evidence in record.

(24) That the Commission has no experience with the long term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas.

No evidence in record.

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.

(TR 28-29 - Mr. Landis)
"I would expect without such an agreement that the development would be utterly chaotic.
Certainly, this unit agreement will provide for an orderly and efficient development of this entire area."

(RTR 18 - Mr. Williams)
"The purpose of a unit, and especially a voluntary unit, is for the conservation of natural resources, the prevention of waste, and the orderly development in the development of such resources, so the Commission should approve a unit of this nature at the end of this hearing. I would recommend so."

(26) That the current availability of reservoir data in this large exploratory unit does not now permit the presentation of evidence or the finding that the unit agreement provides for the long term development of the unit area in a method which will prevent waste and which is fair to the owners of interests therein.

(TR 36 - Mr. Landis)
"Yes. Many, many such type units, that we are talking about here today, have been formed, certainly not of this magnitude; however, they have been formed on the

same basis of participation that we're using here, which is the acreage, because there is not at the outset sufficient information upon which to base -- make any other judgment.
Here we have the one positive thing that we can measure directly and put everybody in on the same basis."

(RTR 101 - Mr. Coker)
"...this is an awfully large unit, but even at that, it's limited on data that's available for this size, but I think it clearly shows that this entire area could reasonably be considered productive, and from that basis, whether it's one or two or three pools, I think the voluntary unitization is the way to develop it."

(27) That further development within the unit area should provide the data upon which such determinations could, from time to time, be made.

(TR 36-37 - Mr. Landis)
"Now, this agreement, as I testified previously, does have a provision to correct this if there is such inequity in the beginning, after the period of time that I mentioned, because then you are going to have the information available that will tell you where the productive acres are. There is nobody in the world that can tell you where the productive acres today."

(RTR 170 - Question by Mr. Kerr - Answer of Mr. Callaway)
Q. "A well to every four sections, for instance, would that assist any in being able to determine what -- how to protect the rights in a given tract of land, as far as their fair share of production is concerned?"
A. "It would -- it would assist enormously in not only allocating a reasonably fair share of production in the various tracts, but also in planning a development and production program for the unit as a whole, for the area as a whole."

(28) That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights.

Statement of OCC Authority.

(29) That the Commission may and should exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions as may, in the future, be required to prevent waste and protect correlative rights therein.

Statement of OCC Authority.

(30) That those matters or actions contemplated by Finding No. (29) above may include but are not limited to: well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the unit agreement.

Not a finding of fact
Erroneous statement of OCC authority

(31) That the unit operator should be required to periodically demonstrate to the Commission that its operations within the unit are resulting in prevention of waste and protection of correlative rights on a continuing basis.

No evidence in record
Not a finding of fact

(32) That such a demonstration should take place at a public hearing at least every four years following the effective date of the unit or at such lesser intervals as may be required by the Commission.

No evidence in record
Not a finding of fact

(33) That all plans of development and operation and all expansions or contractions of the unit area should be submitted to the Commission for approval.

(TR 26 - Mr. Landis)
"And annual plan of development must then be filed in each succeeding year for approval by the Land Commissioner."

(TR 51 - Mr. Landis)
"--we have said, I'll read you, Mr. Ramey, within two years after the effective date unit operator shall submit for approval of the Commissioner and the

Division an acceptable plan of development, so you are on the list, yes, sir."

Not a finding of fact

(34) That in addition to the submittal of plans of development and operation called for under Finding No. (33) above, the operator should file with the Commission tentative four-year plans for unitized operations within the unit.

No evidence in record
Not a finding of fact

(35) That said four-year plan of operations should be for informational purposes only, but may be considered by the Commission during its quadrennial review of unit operations.

No evidence in record
Not a finding of fact

(36) That the initial four-year plan should be filed with the Commission within 60 days following the entry of this order, and that subsequent plans should be filed every four years within 60 days before the anniversary date of the entry of this order.

No evidence in record
Not a finding of fact

(37) That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

No evidence in record concerning safeguards

CHAMBERS OF
JOSEPH E. CALDWELL
DISTRICT JUDGE
DIVISION II

STATE OF NEW MEXICO
EIGHTH JUDICIAL DISTRICT

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May 6, 1982

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Re: Robert Casados, et al vs. Oil Conservation Commission, et al
Taos County Cause No. 81-176

Gentlemen:

Enclosed herewith please find a conformed copy of the Judgment signed by Judge Caldwell and entered today in the above-entitled cause.

Sincerely yours,

Connie Pacheco

Connie Pacheco
Secretary to Judge Caldwell

cp

Enclosure

STATE OF NEW MEXICO

IN THE DISTRICT COURT

COUNTY OF TAOS

ROBERT CASADOS, et al,

Plaintiffs,

CONSOLIDATED CAUSE
No. 81-176

vs.

OIL CONSERVATION COMMISSION, et al,

Defendants.

JUDGMENT

This matter came before the Court on December 7, 1981, for judicial review of the New Mexico Oil Conservation Commission Order No. R-6446 and R-6446-B approving the Bravo Dome Carbon Dioxide Unit Agreement.

The Court having considered the pleadings on file, the record of the hearing before the Commission, arguments and briefs of counsel, and having entered its Memorandum Decision on April 5, 1982, finds: that the Commission's findings of fact are supported by substantial evidence; that the conclusions reached in the orders of the Commission are supported by the findings of fact; that the Commission acted within its authority in approving the preliminary unitization agreement; that the decision of the Oil Conservation Commission should be sustained; and that the defendants are entitled to their costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Orders No. R-6446 and R-6446-B approving the Bravo Dome Carbon Dioxide Unit Agreement are affirmed and that defendants are entitled to recover their costs.

DONE BY THE COURT this 7th day of May,
1982.

DISTRICT JUDGE

APPROVED:

W. PERRY PEARCE
Special Assistant Attorney
General for Defendant
Oil Conservation Commission

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J. SCOTT HALL
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Commissioner of Public Lands

W. THOMAS KELLAHIN
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For Defendants
Amerada Hess Corporation and
Cities Service Corporation

OUTLINE OF ARGUMENT

Motion to Strike Issues on Appeal
of Defendant Appellee Amoco Production Company

I. Move to Strike

A. Appellants failed to exhaust administrative remedies

B. Court lacks jurisdiction to decide these issues-raised in brief in chief

II. Summary of Facts

A. May 28, 1980: Amoco filed application for approval of Bravo Dome Carbon Dioxide Gas Unit Agreement

B. July 21, 1980: Hearing

C. August 14, 1980: Order R-6446 approved the unit agreement

D. September 2, 1980: Appellant filed application for rehearing

- set out ways in which order believed to be defective

E. October 9, 1980: Hearing on application for rehearing

F. January 23, 1981: Order R-6446-A entered

- new matters decided

- Appellants now want to attack

G. Petition to appeal filed with district court

- no rehearing

- Amoco's position - failed to exhaust administrative remedies

III. Procedures strictly defined by statutory provisisions ("the statutes, rules and regulations make no provision for (or time allowance for) second or additional motions for rehearing before the Commission" page 4 Appellant's brief answering motion of Amoco Production Company to strike issues on appeal)

- procedures to follow are clear

A. Section 70-2-25A provides:

"Within 20 days after entry of any order or decision of the Commission, any party of record adversely affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous.

B. Section 70-2-25B provides in part:

"Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision by filing a petition for review of the action of the Commission within 20 days after the entry of the order following rehearing or after the refusal of rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the Commission and shall set forth the order or decision of the Commission complained of in the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the Commission by the application for rehearing.

- any order -- Application for Rehearing -- appeal those issues -- procedure clear

IV. Case Law

A. A review of all cases involving Oil Conservation Commission decisions which have come before the Supreme Court of New Mexico shows only one situation where, following rehearing, a second order was entered which was different in any significant fashion from the first.

B. Involved Amendment of an existing proration formula

C. Following Commission denial of Consolidated's application it timely filed for rehearing

D. On rehearing Commission entered its order amending the proration formula

E. Following rehearing Pubco filed a petition for review in the district court of San Juan County without first filing an application for rehearing with the Commission

F. District dismissed petition on grounds that administrative remedies had not been exhausted by Pubco

G. Supreme Court affirmed

H. Noted "the purpose of this statute is to afford the Commission an opportunity to reconsider and correct an erroneous decision

I. The court reached "the conclusion that appellant (Pubco) had failed to exhaust its statutory administrative remdies"

J. That as a result of this failure to exhaust administrative remedies "the court was without jurisdiction to review the order"

K. Same situation also resulted in an appeal by El Paso Natural Gas Company

L. Following entry of order on rehearing, El Paso filed new (2nd) application for rehearing setting forth the respects in which certain issues raised in the new order were alleged to be erroneous

M. Supreme Court considered these issues -- properly before them

N. Court rules - limit availability of judicial review designed premature or unnecessary resort to the court

O. New Mexico rule - "before he can apply to the courts for relief, the protestant must exhaust his administrative remedies." (cites)

V. Issues raised by application for rehearing

A. Set out in detail on page 6 of our memorandum in support of our motion to strike issues on appeal

B. Issues are

1. Was this substantial evidence to support the Commission's findings on waste and correlative rights

2. Findings were inadequate to disclose the Commission's reasoning

3. Without additional data the decision was arbitrary and capricious

C. "Prematurity issue" relates either to substantial evidence or arbitrary or capricious

D. New issues

1. Commission threatened to act outside its authority

2. Iss - Procedurely not before the court

VI. Order R-6446-B

A. Appellant's statements about order are misleading

1. "The Commission, on rehearing, found that it could not from the evidence available, determine whether waste would be prevented and correlative rights protected under the agreement" Answer brief, page 5

2. Appellants state that they attacked the findings on waste and correlative rights and that these findings were repudiated on appeal, page 6, Answer brief

B. Findings on waste (findings 8 and 9)

C. Findings on correlative rights (findings 13, 14, 15)

D. Findings on safeguards (findings 28, 31 and 33)

E. Findings stating Commission conclusion: 37 "the approval of the unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area IT IS THEREFORE ORDERED:

(1) That the Bravo Dome Carbon Dioxide Gas Unit Agreement is hereby approved

VII. Rule 11 Argument

A. Questions involving

1. General public interest

2. Fundamental rights of parties

3. Facts or circumstances arising, or becoming known after the trial court lost jurisdiction

B. Only reported case where a new issue was decided on appeal was Sangre de Cristo Development Corporation v. City of Santa Fe, 84 N.M. 343, 503 P.2d 223 (1972) where both sides brief the questions and indicated a desire to have the question decided

C. Only asked in this case to consider issue of what might happen if OCD acted in certain ways

1. Issue not even ripe for determination until OCC acts

2. Appellants state that what Commission's order does is set forth a "mode of government regulation" -- "dangers to free society" -- "if pursued"

3. Appellants also concerned about their ability to raise questions about the OCC's "theories of its power" (page 6 Answer Brief)

4. Hypothetical questions and threatened administrative action can fall outside court imposed limitations of review. The defendants attack the OCC's threat to act in the future in accordance with powers it reserved to itself. "Judicial relief or review is often denied for lack of finality where action of the administrative agency is only anticipoated, even though threatened." 2 Am. Jur. 2d §586. It is a fair argument here to state that jurisdiction lies in the OCC as to these threatened acts and not with the court.

5. Citing Thomas v. Ramberg, et al, 60 N.W.2d 18 (Minn. 1953) Am. Jur. 2d states that courts "will not render a decree in advance of the agency's action and thereby render such action nugatory." Section 586.

6. Further, "until the administrative agency has acted, the complainant can now show no more than apprehension that it will perform its duty wrongly." Id. Citing Scott v. Lowe, 78 So.2d 452 (Miss. 1952) the text further states: "to interfere with action which is simply 'threatened' would render a statutory unworkable and unenforceable and would unduly hamper the discharge of administrative agencies of their responsibilities." Id.

D. Eleventh hour attempt to change direction of case with issues not before the court

E. No issue of general public interest or fundamental property right before this court -- certainly not now before OCC acts

VIII. Asking for order striking issues not properly before the so briefing schedule can proceed

pellant Church represented public organizations was it able to achieve a settlement with KTAL which served the public interest in Texarkana. When such substantial results have been achieved, as in this case, voluntary[38] reimbursement which obviously facilitates and encourages the participation of groups like the Church in subsequent proceedings is entirely consonant with the public interest.[39]

VI.

Remand

[8, 9] The operative principle established in Part IV thus remains—when the settlement of issues and termination of a petition to deny between the public and a broadcaster is in the public interest, voluntary reimbursement of the public group may be allowed. The Commission has already examined the underlying settlement and agreement to withdraw in this case and found them to be in the public interest.[40] However, the expenses submitted by the Church have not yet received the Commission's scrutiny. While it is difficult to believe that they will not be found to be "legitimate and prudent" in accordance with the standard of 47 U.S.C. § 311(c), the Commission must be given the opportunity to pass on them.

Accordingly, this case is remanded to the Commission for a determination of whether the expenses submitted by appellant meet this standard.

38. *Amicus Curiae*, Friends of the Earth, contends that §§ 154(i) and 303(r) of the Communications Act give the Commission ample authority to order a licensee to reimburse citizen groups which have filed petitions to deny. Compare these sections with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), and the broad authority it vests in the National Labor Relations Board. International Union of Electrical, Radio and Mach. Workers v. N.L.R.B., 138 U.S.App.D.C. 249, 426 F.2d 1243 (1970).

39. Commissioner Cox in his dissent posed this issue to his colleagues and developed from his experience and expertise an analysis which applies to the facts of this case. Commissioner Cox wrote:
"I think that to allow reimbursement of the expenses of public groups who have been interested enough in the public's broadcast service to participate in the renewal process and who have won promises of improved service is clearly in the public interest." 25 F.C.C.2d at 610.

40. *KCMC, Inc.*, *supra* note 3, 19 F.C.C.2d at 110.

ENVIRONMENTAL DEFENSE FUND, INC., Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY and William D. Ruckelshaus, Administrator, Respondents.

No. 71-1365.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 8, 1971.

Decided May 5, 1972.

As Amended May 16, 1972.

Petition to review EPA's failure to suspend registrations of economic poisons. The Court of Appeals, Leventhal, Circuit Judge, held that where EPA initiated proceeding for cancellation of registrations of certain economic poisons but did not order immediate suspension, and EPA made inadequate findings as to benefit but stated that its suspension decisions would be reexamined on receipt of scientific advisory committee's report, reviewing court would remand entire record.

Remanded.

1. Federal Civil Procedure ⇐131

In absence of timely objection, allegation that nonprofit corporation which petitioned Environmental Protection Agency for immediate suspension and ultimate cancellation of two pesticides and which alleged that it was composed

of citizens dedicated to protection of environment was sufficient to give corporation standing to bring action. Federal Insecticide, Fungicide and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

2. Poisons ⇐3

Whenever it appears that registered economic poison may be or has become misbranded, Administrator of EPA is required to issue notice of cancellation. Federal Insecticide, Fungicide and Rodenticide Act, § 2(z) (2), 7 U.S.C.A. § 135(z) (2).

3. Poisons ⇐2

EPA's refusal to immediately suspend economic poison against which proceedings for cancellation of registration had been instituted was final order reviewable immediately.

4. Poisons ⇐2

EPA's decision to issue notices of cancellation for economic poisons merely sets in motion the administrative process and is not a reviewable order. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

5. Health and Environment ⇐25.5
Poisons ⇐2

Evidence sustained EPA's conclusions that vast majority of use of aldrin and dieldrin was restricted to ground insertion which presented little foreseeable damage, that pattern of declining gross use and lower historic introduction of such products into environment left significantly lower environmental residue burden, and that substantial question of safety of registrations was primarily raised by theoretical data, while review of evidence from ambient environment indicated that such potential hazards were not imminent in light of present registrations. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

6. Administrative Law and Procedure
⇐741

In appropriate cases, if necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than formal statement of reasons, court will make reference.

7. Poisons ⇐2

It is not unduly burdensome to ask EPA to explicate, in proceedings for cancellation of all registered uses of aldrin and dieldrin, the nature and extent of incorporation of its DDT statement on carcinogenicity. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

8. Poisons ⇐2

Federal Insecticide, Fungicide, and Rodenticide Act empowers Administrator to take account of benefits or their absence as affecting imminency of hazard. Federal Insecticide, Fungicide, and Rodenticide Act, §§ 2–13, 7 U.S.C.A. §§ 135–135k.

9. Poisons ⇐2

If there is no offsetting claim of any benefit to public from use of economic poison, EPA which instituted registration cancellation proceedings but did not immediately suspend use of products had burden of showing lack of imminent hazard to public. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

10. Poisons ⇐2

Administrator's mere mention of products' major uses, emphasized by EPA, could not suffice as discussion of benefits of economic poisons against which registration cancellation proceedings had been commenced. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

11. Administrative Law and Procedure
⇐303, 489

Sound principle sustains practice of vesting choice of policy with Administrator; but its corollary is that specific decision must be explained, not merely explainable, in terms of ingredients announced by Administrator as comprising agency's policies and standards.

12. Poisons ⇐2

Analysis of benefits of economic poisons against which proceedings for cancellation of registration had been in-

stituted required consideration of whether proposed alternatives were available or feasible, or whether availability was in doubt. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

13. Poisons ⇐2

EPA which initiated registration cancellation proceedings against economic poisons could order limited immediate suspensions for uses without significant benefits. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

14. Poisons ⇐2

EPA has flexibility not only to confine suspensions to certain uses, but also to order conditional suspensions for uses, available only if certain volumes or limits are not exceeded. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

15. Poisons ⇐2

Court must caution against any approach to term "imminent hazard" as used in Federal Insecticide, Fungicide, and Rodenticide Act that restricts it to concept of crisis, and "imminent hazard" exists if there is substantial likelihood that serious harm will be experienced during year or two required in any realistic projection of administrative process for cancellation of registration of economic poisons. Federal Insecticide, Fungicide, and Rodenticide Act, § 4(d), 7 U.S.C.A. § 135b(d).

See publication Words and Phrases for other judicial constructions and definitions.

16. Health and Environment ⇐25.5

EPA has substantial policy choice and discretion but is held to high standard of articulation. Federal Insecticide, Fungicide, and Rodenticide Act, §§ 2–13, 7 U.S.C.A. §§ 135–135k.

17. Administrative Law and Procedure ⇐304

Administrative process is continuing one and calls for continuing reexamination at significant junctures.

18. Poisons ⇐2

Where EPA initiated proceeding for cancellation of registration of economic poisons but did not order immediate suspension, and EPA made inadequate findings as to benefit but stated that its suspension decisions would be reexamined on receipt of scientific advisory committee's report, reviewing court would remand entire record.

Mr. William A. Butler, East Setauket, N. Y., with whom Messrs. Edward Lee Rogers, East Setauket, N. Y., Edward Berlin and James W. Moorman, Washington, D. C., were on the brief, for petitioner.

Mr. Michael C. Farrar, Asst. Gen. Counsel, Environmental Protection Agency, with whom Mr. L. Patrick Gray, III, Asst. Atty. Gen., Messrs. Alan S. Rosenthal, Atty. Dept. of Justice, and Thomas H. Kemp, Atty. Environmental Protection Agency, were on the brief, for respondents.

Before FAHY, Senior Circuit Judge, and LEVENTHAL and ROBINSON, Circuit Judges.

LEVENTHAL, Circuit Judge:

[1] On December 3, 1970, petitioner Environmental Defense Fund (EDF), a non-profit New York corporation,[1] peti-

1. We begin with a few words on standing in view of the Supreme Court's recent decision in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (April 19, 1972).

The case before us is different from *Sierra* in that petitioner was permitted to participate in the administrative proceedings, and the Government did not object that petitioner does not qualify under the FIFRA provision for review in a court of appeals on petition of "any person who will be adversely affected" by an order. 7 U.S.C. 135b(d).

Since this is a statutory rather than a constitutional question, it is not clear whether it is jurisdictional and must be raised sua sponte, a problem suggested by footnote 7 of *Sierra*. However, if it were plain that there was a demonstrable and

tioned the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135–135k, for the immediate suspension and ultimate cancellation of all registered uses of aldrin and dieldrin, two chemically similar chlorinated hydrocarbon pesticides. On March 18, 1971, the Administrator of the EPA announced the issuance of "notices of cancellation" for aldrin and dieldrin because of "a substantial question as to the safety of the registered products which has not been effectively countered by the registrant." He declined to order the interim remedy of suspension, pending final decision on cancellation after completion of the pertinent administrative procedure, in light of his decision that "present uses [of aldrin and dieldrin] do not pose an imminent threat to the public such as to require immediate action." EDF filed this petition to review the EPA's failure to suspend the registration.

I. SIGNIFICANCE OF EPA'S DECISION ON IMMEDIATE SUSPENSION OF FIFRA REGISTRATION

We begin by reviewing the significance of an EPA decision to issue or withhold an order of immediate suspension of a pesticide registration, pending final administrative consideration.

ineradicable lack of standing, we would not issue this opinion even though it had been argued and prepared prior to *Sierra*. That is not the situation before us. We assume the statute according review to any person adversely affected is substantially equivalent to the Administrative Procedure Act's test of "aggrieved by agency action," 5 U.S.C. § 702. *Sierra* makes clear that the Court is retaining all of its decisions establishing a "modernized law of standing" so as (a) to embrace injury in fact, suffered or anticipated, to environmental—including aesthetic, conservational and recreational—as well as economic interests; (b) to prohibit dismissal of a litigation where there is an "arguable" claim of injury; and (c) to permit the person who has standing by virtue of present or future injury to particular interests to urge grounds of objection based on "public interest," acting in this respect as a "private attorney general." See *Sierra* at 92 S.Ct. 1371, reiterating approval of the trend of cases voiced in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

Sierra in no wise supports or countenances the contention that FIFRA affords review only to registrants and applicants for registration. Insofar as it rejects that contention, Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App. D.C. 391, 428 F.2d 1093 (1970), remains undiminished by *Sierra*.

Sierra permits an organization to conduct litigation on the basis of injury to its members. This court recognized that as the basis of standing in National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971), where we discoursed on the reasons for recognizing associations to present the interests of members and added that a court would not be inclined to take issue with such assertion of interest if recognized by the executive branch.

As for the particular case, we think EDF's allegation that it is composed of "citizens dedicated to the protection of our environment" is adequate to cover protection from carcinogenic inputs as well as other matters, and such danger obviously affects the health of the individual members of petitioner. As the Court noted in *Sierra:* "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."

We think it fair to proceed on the basis that the absence of timely objection—which would have permitted ready response—reflects the Government's recognition that any objection to standing based on the wording of petitioner's pleadings would not be consequential, more like a plea of abatement than a plea in bar.

We think the interest of justice is furthered by proceeding with the issuance of this opinion, reflecting the decision already reached on the case, accompanied with a notation that following the remand, the Government may raise the question of standing, if it be so advised, and the petitioner may refine its allegations of interest.

A. *The Statutory Framework of FIFRA*

Since 1970 the Administrator of the EPA has been charged with administering the two systems provided by Congress to regulate the introduction of potentially harmful pesticides into the environment: the establishment of registration and labeling requirements for "economic poisons" under FIFRA, formerly assigned to the Secretary of Agriculture; and the establishment of tolerance limits for shipment in interstate commerce of crops "adulterated" by pesticide residues, under the Food, Drug and Cosmetic Act, 21 U.S.C. 301, et seq., formerly assigned to the Department of Health, Education & Welfare.[2]

Aldrin and dieldrin are "economic poisons" under the definition in § 2 of FIFRA, 7 U.S.C. § 135(a) (1), and hence are required to be registered with EPA before they may be distributed in interstate commerce, 7 U.S.C. § 135b. An economic poison may lawfully be registered only if it is properly labeled—not "misbranded." Section 2(z) of FIFRA, insofar relevant here, provides that an economic poison is "misbranded," 7 U.S.C. § 135(z) (2)—

> (c) if the labeling accompanying it does not contain directions for use which are necessary and if complied with adequate for the protection of the public;
>
> (d) if the label does not contain a warning or caution statement which may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals;
>
> * * * * * *
>
> (g) if in the case of an insecticide, nematocide, fungicide, or herbicide when used as directed or in accordance with commonly recognized practice it shall be injurious to living man or other vertebrate animals, or vegetation, except weeds, to which it is applied, or to the person applying such economic poison.

If an economic poison is such that a label with adequate safeguards cannot be written, it may not be registered or sold in interstate commerce, 7 U.S.C. § 135a(a)(5).

[2] The burden of establishing the safety of a product requisite for compliance with the labeling requirements, remains at all times on the applicant and registrant. Whenever it appears that a registered economic poison may be or has become "misbranded," the Administrator is required to issue a notice of cancellation. EDF v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971).

In § 4 of FIFRA, as amended, 7 U.S.C. § 135b(c), Congress has provided extensive safeguards for those whose FIFRA registrations are challenged. Whenever an application for registration is refused, the applicant may request that the matter be referred to an advisory committee, of a size and membership of experts as determined by the Administrator, or may file objections and request a public hearing. The same options are available in case of a notice of cancellation of registration; cancellation becomes effective within 30 days after service of the notice unless the registrant petitions for reference to an advisory committee, or files objections and requests a public hearing.

In case the committee is requested, the statute provides that the committee shall submit a report and recommendation as to registration as soon as practicable after submission to the committee, but not later than 60 days unless the period is extended by the Administrator for another 60 days. Within 90 days after receipt of the committee's report the Administrator shall make his determination as to registration, by issuing an order with findings of fact. Then the applicant or registrant has 60 days to file objections and request a public

2. Reorganization Plan No. 3 of 1970, effective December 2, 1970, established the EPA, in large part for the purpose of consolidating these functions, 35 Fed.Reg. 15623.

hearing for the purpose of receiving material evidence. The Administrator is required to take action—as soon as possible, but not more than 90 days, after completion of the hearing—by issuing an order granting, denying, or cancelling the registration, or requiring modification of the claims or labeling.

Hence a substantial time, likely to exceed one year, may lapse between issuance of notice of cancellation and final order of cancellation, as provided by the various 60-day and 90-day periods set forth. In addition, there is the possibility that a cancellation order might be stayed pending court review in this court or another appropriate circuit court of appeals. 7 U.S.C. § 135b(d).

The elaborate procedural protection against improvident cancellations emphasizes the importance of the immediate suspension provision available under § 4 of FIFRA, for use when appropriate:

> Notwithstanding any other provision of this section, the Administrator may, when he finds that such action is necessary to prevent an imminent hazard to the public, by order, suspend the registration of an economic poison immediately. In such case, he shall give the registrant prompt notice of such action and afford the registrant the opportunity to have the matter submitted to an advisory committee and for an expedited hearing under this section.

[3] Because of the potential for delay, and consequent possibility of serious and irreparable environmental damage from an erroneous decision on suspension, a refusal to suspend is a final order reviewable immediately, EDF v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093 (1970).[3]

B. *Recent Decisions Concerning DDT*

We now turn to recent decisions concerning EPA's administration of the pesticide control statutes in light of our expanding national commitment to environmental rehabilitation. In EDF v. Hardin, *supra*, we held that EDF had standing to challenge official determinations under the FIFRA as representative of those "adversely affected" by the environmental impact of DDT. We concluded that the Secretary of Agriculture's failure to act on EDF's request for suspension of DDT registrations for an appreciable time was reviewable as "tantamount to an order denying suspension," 428 F.2d at 1099. The case was remanded either for a "fresh determination" on EDF's suspension request or for elucidation of basis for refusal "in sufficient detail to permit prompt and effective review," 428 F.2d at 1100.

Some three months later EDF again sought review of the EPA's explicit refusal either to order suspension or to issue notices of cancellation for all uses of DDT, EDF v. Ruckelshaus, 142 U.S. App.D.C. 74, 439 F.2d 584 (1971). The findings accompanying the EPA's refusal to issue notices of cancellation clearly demonstrated recognition that a "substantial question" existed as to the safety of DDT. Since "that is the standard for the issuance of cancellation notices under the FIFRA," 439 F.2d at 595, we remanded the case again, with instructions to issue notices for all DDT registrations "and thereby commence the administrative process." We adhered to our earlier holding that the decision not to suspend was reviewable immediately. Since the Administrator again had not explained the reasons for his refusal to suspend, we asked "once more . . . for a fresh determination on that issue," *id.* at 596. We left the Administrator free to explain his decision in terms of the general considerations at work in pesticide suspension cases or by discussion of the factors specifically relevant to DDT that influenced his decision. See *id.*:

> If regulations of general applicability were formulated, it would of course be possible to explain individual decisions by reference to the appropriate regu-

3. 7 U.S.C. § 135b–(c) & (d).

lation. It may well be, however, that standards for suspension can best be developed piecemeal, as the Secretary evaluates the hazards presented by particular products.

We emphasized, in both EDF v. Ruckelshaus, and Wellford v. Ruckelshaus, 142 U.S.App.D.C. 88, 439 F.2d 598 (1971), that the "FIFRA confers broad discretion on the [Administrator] . . . not merely to find facts, but also to set policy in the public interest," 439 F.2d at 601. We indicated our reluctance to override his apparent reservation of suspension authority as "an emergency power," [4] to be exercised or not only after careful consideration of "both the magnitude of the anticipated harm, and the likelihood that it will occur."

II. EPA'S REASONS FOR DECLINING TO ORDER IMMEDIATE SUSPENSION OF ALDRIN AND DIELDRIN REGISTRATIONS

1. *The Decisions Taken By The EPA Administrator*

The EPA initiated an administrative investigation into registrations for aldrin and dieldrin that resulted in cancellation of registrations for certain uses. On December 2, 1970, the EDF addressed a petition to the Administrator requesting the suspension and eventual cancellation of registrations for all products containing aldrin and dieldrin. In order to expedite the administrative process, and in light of our January 1971 decisions in EDF v. Ruckelshaus and Wellford v. Ruckelshaus, relating to DDT, and 2, 4, 5–T, the Administrator consolidated the consideration of registrations of DDT; 2, 4, 5–T; aldrin and dieldrin. On March 18, 1971, he issued his Statement of Reasons Underlying the Registrations Decisions concerning these products, the decision to issue notices of cancellation for all registrations for those substances, and also the decision not to order interim suspension of registrations pending administrative decision.

[4] EPA's decision to issue notices of cancellation "merely sets in motion the administrative process" and is not a reviewable order, EDF v. Ruckelshaus, 439 F.2d at 592. As to EDF's petition for suspension of registrations, the Administrator accepted the alternative contemplated in EDF v. Ruckelshaus, to develop suspension criteria case-by-case, pointing out that the "magnitude of the variables intrinsic in particular decisions" made binding general regulations impractical, Statement, p. 7. But in recognition of the "desirability of giving general guidance," the Administrator articulated a framework of "certain general factual and policy variables."

2. *General Approach of EPA Statement of Reasons*

This suffices for an introduction to the Statement of Reasons. We now examine it with greater care, and begin with the considerations voiced by the Administrator as defining EPA's general approach.

Statutory Tests

The EPA's Statement begins with the pertinent Statutory Tests under FIFRA, as presently in force, stating that its thrust is to prohibit—

- those economic poisons which do not contain directions for use which are necessary and adequate for the protection of the public;
- those economic poisons which do not contain a warning or caution statement which is adequate to prevent injury to man, vertebrate animals, vegetation and useful invertebrate animals; and
- those insecticides or herbicides which, when used as directed or in accordance with commonly recognized practice, are injurious to man, vertebrate animals or vegetation (except weeds).

4. Wellford v. Ruckelshaus, *supra*, 439 F.2d at 601.

The EPA points out that the final decision on registration depends on a balance struck between benefits and dangers to the public health and welfare from the product's use, and comments that the concept of safety of the product is under evolution and refinement in the light of increasing knowledge.[5]

Suspension

The EPA's Statement points out that whereas a notice of cancellation is appropriate whenever there is "a substantial question as to the safety of a product," immediate suspension is authorized only in order to prevent an "imminent hazard to the public," and to protect the public by prohibiting shipment of an economic poison "so dangerous that its continued use should not be tolerated during the pendency of the administrative process." The EPA described its general criteria for suspension as follows:

> [T]his Agency will find that an imminent hazard to the public exists when the evidence is sufficient to show that continued registration of an economic poison poses a significant threat of danger to health, or otherwise creates a hazardous situation to the public, that should be corrected immediately to prevent serious injury, and which cannot be permitted to continue during the pendency of administrative proceedings. An "imminent hazard" may be declared at any point in a chain of events which may ultimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to a determination that an "imminent hazard" exists. In this connection, significant injury or potential injury to plants or animals alone could justify a finding of imminent hazard to the public from the use of an economic poison. The type, extent, probability and duration of potential or actual injury to man, plants and animals will be measured in light of the positive benefits accruing from, for example, use of the responsible economic poison in human or animal disease control or food production.

General Standards

Part II of the Statement of Reasons, captioned "Formulation of Standards," begins with the general standards deemed pertinent to the administration of FIFRA.

EPA points out that, in general, economic poisons, including those under present consideration, are "ecologically crude"—that is, by reason of technology limitations, are toxic to non-target organisms as well as to pest life. Thus continued registration for particular ecologically crude pesticides "are acceptable only to the extent that the benefits accruing from use of a particular economic poison outweigh" the adverse results of effects on nontarget species. EPA cites "dramatic steps in disease control" and the gradual amelioration of "the chronic problem of world hunger" as examples of the kind of beneficial effect to be looked for in balancing benefits against harm for specific substances. But it cautions that "triumphs of public health achieved in the past" will not be permitted to justify future registrations, recognizing that fundamentally different considerations are at work in evaluating use of a dangerous pesticide in a developed country such as the United States rather than in a developing non-industrial nation.

The immense difficulties of achieving a comprehensive solution to pesticide control are manifest from the Administrator's Statement of Reasons. It records that there are nearly 45,000

5. "In applying these statutory tests, the final decision with respect to whether a particular product should be registered initially or should continue to be registered depends on the intricate balance struck between the benefits and dangers to the public health and welfare resulting from its use. The concept of the safety of the product is an evolving one which is constantly being further refined in light of our increasing knowledge."

presently outstanding pesticide registrations for "hundreds" of substances in use over approximately five percent of the total land area of the United States. Available data show wide variety among individual substances both as to effectiveness against target species and as to potential harm to non-target species. Laboratory tests with some substances have raised serious questions regarding carcinogenicity that "deserve particular searching" because carcinogenic effects are generally cumulative and irreversible when discovered. Threats presented by individual substances vary not only as to observed persistence in the environment but also as to environmental mobility—which in turn depends in part on how a particular pesticide is introduced into the environment, either by ground insertion or by dispersal directly into the ambient air or water.

Based on the discussion of these general considerations, the EPA concludes that individual decisions on initial or continued registration must depend on a complex administrative calculus, in which the "nature and magnitude of the foreseeable hazards associated with use of a particular product" is weighed against the "nature of the benefit conferred" by its use.

3. *Discussion of Aldrin and Dieldrin*

The EPA's general analysis for suspension, set forth above, is supplemented in the Statement of Reasons by discussions concerning the particular products. Part IV, Dieldrin and Aldrin, comprises slightly more than two pages of the Statement.

Dangers Presenting Substantial Questions to Safety

We set forth the paragraphs pertinent to the dangers of aldrin and dieldrin considered to present substantial questions as to safety, even though the decision to issue notices of cancellation is not subject to review, because they provide perspective for the questions we must consider.

> The questions raised concerning the safety of these products are similar to those encountered with DDT in that they result from the persistence of dieldrin (since aldrin residues quickly break down into dieldrin) in the environment and its potential toxicity at low levels. Some studies indicate that dieldrin alone, or in possibly synergistic combination with DDT, has an equivalent potential for adverse effect on non-target predatory wildlife resulting from its low level toxicity intensified by its mobility and concentration up certain food chains. The scientific data also indicate that dieldrin, again like DDT, has an affinity for storage in the fatty tissue of a number of animals, including humans. There are also similar carcinogenic data developed in the laboratory from high dosage rates of dieldrin administered to test animals.
>
> Dieldrin and aldrin apparently have a lower threshold of toxicity to warm-blooded animals than does DDT. In fact, instances of non-lethal human poisoning have occurred in those occupationally exposed to heavy concentrations of dieldrin for protracted periods. Recovery following removal from exposure was slow but apparently complete. These potential hazards deserve a full public airing in the administrative forum provided by the cancellation proceeding.

Denial of Suspension

The Administrator's reasons for denial of suspension, as to aldrin and dieldrin, appear in the following paragraphs of the Statement:

> [B]ecause the vast majority of the present use of these products is restricted to ground insertion, which presents little foreseeable damage from general environmental mobility, because of the pattern of declining gross use, and because the lower historic introduction of these products into the environmental residue burden to be faced by man and the other biota, the delay inherent in the administrative process does not present an imminent hazard. Thus the substan-

tial question of the safety of these registrations is primarily raised by theoretical data, while review of the evidence from the ambient environment indicates that such potential hazards are not imminent in light of the present registrations.

It is significant to note that no residues of either aldrin or dieldrin are now permitted on corn, eggs, milk, poultry, or animal fats shipped in interstate commerce. Because of the use patterns of aldrin and dieldrin, these products constitute the major sources whereby these substances would find their way into human food chains. During the pendency of the administrative process hereby initiated, this Agency will take no action to grant any residue tolerances for these foodstuffs pursuant to the Food, Drug and Cosmetic Act, although initial tolerances have been requested by the manufacturer.

III. THE EDF'S CONTENTIONS OF INVALIDITY OF NON-SUSPENSION DECISIONS

The EDF's petition from the EPA's decision not to suspend aldrin and dieldrin, pending the administrative process, has two prongs: First, it challenges the sufficiency of the analysis of the relevant factual data. Secondly, it contends that the Administrator has failed to provide a consistent statement of reasons for the refusal to suspend.

A. *Contentions As To EPA Conclusions Of Limited Nature Of Immediate Harm*

[5] 1. EDF first disputes the EPA's three factual conclusions, underlying its conclusion of non-imminency of harm, that: "the vast majority of the present use of these products is restricted to ground insertion, which presents little foreseeable damage from general environmental mobility;" that "the pattern of declining gross use, and . . . the lower historic introduction of these products into the environment has left a significantly lower environmental residue burden to be faced by man and the other biota;" and that "the substantial question of the safety of these registrations is primarily raised by theoretical data, while review of the evidence from the ambient environment indicates that such potential hazards are not imminent in light of the present registrations." The EDF characterizes these conclusions as "irrational" in light of the data before the agency—in other words argues that they have no fair support in the record. We do not agree. The evidence supporting the Administrator was far from uncontested. But the function of the suspension decision is to make a preliminary assessment of evidence, and probabilities, not an ultimate resolution of difficult issues. We cannot accept the proposition, implicit in EDF's position, that the Administrator's findings regarding harm were insufficient because controverted by respectable scientific authority. It was enough at this stage that the administrative record contained respectable scientific authority supporting the Administrator.

[6] 2. The EPA's one-sentence discussion of carcinogenicity of aldrin and dieldrin presents a harder question. EDF made a non-trivial showing with respect to carcinogenicity, a matter we have emphasized in the past, EDF v. HEW, 138 U.S.App.D.C. 381, 428 F.2d 1083 (1970). The EPA asks us not to consider the aldrin-dieldrin discussion, standing alone, but to take it as incorporating, by reference, the more detailed carcinogenicity discussion in the Administrator's DDT section. We do not demand sterile formality. In appropriate cases, if the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference.[6]

6. Automotive Parts & Accessories Ass'n v. Boyd, 132 U.S.App.D.C. 200, 407 F.2d 330 (1968); Natural Resources Defense Council, Inc. v. Morton, D.C.Cir., 458 F.2d 827 (January 13, 1972).

On the other hand, candor compels us to say that when the matter involved is as sensitive and fright-laden as cancer, even a court scrupulous to the point of punctilio in deference to administrative latitude is beset with concern when the cross-reference is so abbreviated. All the Statement of Reasons says, after noting that dieldrin, like DDT, has an affinity for storage in the fatty tissue of animals, is this:

> There are also similar carcinogenic data developed in the laboratory from high dosage rates of dieldrin administered to test animals.

All this purports to say is that the test animal laboratory data (indicating carcinogenicity) for dieldrin are similar to the data for DDT. Is this meant to indicate also, that EPA transfers the same lack of scientific consensus, or, for example, that the EPA extrapolates that the conclusions of the MRAK Commission Report as to DDT—that there is suspicion but it is neither a proven danger nor assuredly safe—also applies to aldrin-dieldrin? That is a great deal to find as implicit in the word "similar." Such transfer and extrapolation may well be sound, but it is not necessarily sound, or obvious, at least to a reviewing court, and the matter is important enough to warrant the care of explicitness.

[7] We need not decide this question for, as will appear, the record must go back to EPA for other reasons. Even assuming this problem alone would not have required a remand, we do not think it unduly burdensome to ask EPA to explicate, while it has the subject matter before it for further consideration, the nature and extent of incorporation of its DDT statement on carcinogenicity.

7. In fact, at an earlier point in this sequence of proceedings, the Administrator appeared to be tending toward a somewhat more restrictive, "harm-oriented" definition of "imminent hazard." *See* Wellford v. Ruckelshaus, *supra*, 439 F.2d at 601, n. 12.

B. *Claim Based On Lack Of EPA Identification Of Benefits To Offset Possible Dangers*

The EDF's main argument runs thus, briefly stated: While the Statement of Reasons sets forth, as a matter of EPA policy, that suspension decisions would be made only after the Administrator makes a preliminary assessment of imminency of hazard that includes a balancing of benefit and harm, yet when the EPA discussed aldrin and dieldrin, it inconsistently failed to identify any off-setting benefits, and limited itself to the reference to certain hazards.

The EPA concedes that the "thrust" of the Administrator's analysis related to the absence of any short run major hazards. But it parries that he "did refer to the purposes for which aldrin and dieldrin are used."

> In light of his findings with respect to the absence of any foreseeable hazard, there was little need for the Administrator to go into detail in considering—as he had indicated he would do in suspension decisions. . . . —"the positive benefits."

Propriety of General Approach To Suspension Orders That Considers Benefits Along With Burdens

[8] We are not clear that the FIFRA requires separate analysis of benefits at the suspension stage.[7] We are clear that the statute empowers the Administrator to take account of benefits or their absence as affecting imminency of hazard. The Administrator's general decision to follow that course cannot be assailed as unreasonable. The suspension procedures of this agency, though in the abstract designed for emergency situations, seem to us to resemble more closely the judicial proceedings on a contested motion for a preliminary injunction, to prevail during the pendency of

the litigation on the merits, rather than proceedings on an ex parte application for an emergency temporary restraining order. The suspension decision is not ordinarily one to be made in a matter of moments, or even hours or days. The statute contemplates at least the kind of ventilation of issues commonly had prior to decisions by courts that govern the relationships of parties pendente lite, during trial on the merits.

[9] Judicial doctrine teaches that a court must consider possibility of success on the merits, the nature and extent of the damage to each of the parties from the granting or denial of the injunction, and where the public interest lies.[8] It was not inappropriate for the Administrator to have chosen a general approach to suspension that permits analysis of similar factors. By definition, a substantial question of safety exists when notices of cancellation issue. If there is no offsetting claim of any benefit to the public, then the EPA has the burden of showing that the substantial safety question does not pose an "imminent hazard" to the public.

Lack Of Discussion Of Benefits Of Aldrin-Dieldrin

EDF is on sound ground in noting that while the EPA's general approach contemplates a decision as to suspension based on a balance of benefit and harm, the later discussion of aldrin and dieldrin relates only to harm.

[10, 11] The Administrator's mere mention of these products' major uses, emphasized by the EPA, cannot suffice as a discussion of benefits, even though

> the data before him . . . reflected the view that aldrin-dieldrin pesticides are the only control presently available for some twenty insects which attack corn and for one pest which poses a real danger to citrus orchards . . . .

Brief for EPA, p. 19. The interests at stake here are too important to permit the decision to be sustained on the basis of speculative inference as to what the Administrator's findings and conclusions might have been regarding benefits. Sound principle sustains the practice of vesting choice of policy with the Administrator. Its corollary is that the specific decision must be explained, not merely explainable, in terms of the ingredients announced by the Administrator as comprising the Agency's policies and standards. This is the case even though the variables of the policy approach selected by the Administrator are not necessarily required by the underlying statute.

[12] Our conclusion that a mere recitation of a pesticide's uses does not suffice as an analysis of benefits is fortified where, as here, there was a submission, by EDF, that alternative pest control mechanisms are available for such use. The analysis of benefit requires some consideration of whether such proposed alternatives are available or feasible, or whether such availability is in doubt.[9]

Flexibility of Limited Suspensions For Uses Without Significant Benefits

[13] The importance of an EPA analysis of benefits is underscored by the Administrator's flexibility, in both

8. Delaware & Hudson Ry. Co. v. United Transportation Union, 146 U.S.App.D.C. 142, 450 F.2d 603, cert. denied, 403 U.S. 911, 91 S.Ct. 2209, 29 L.Ed.2d 689 (1971); Virginia Petroleum Jobbers Ass'n v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958).

9. It is worthy of note that the Administrator did undertake some discussion of alternatives in his Statement of Reasons for refusing to suspend DDT registrations. He pointed out that DDT is the only "practical" pesticide against certain insect pests. Precipitous removal of DDT from interstate commerce would force widespread resort to highly toxic alternatives in pest control on certain crops. The widespread poisonings, both fatal and nonfatal, which may reasonably be projected present an intolerable short-term hazard.
Statement, p. 16.

final decisions and suspension orders, to differentiate between uses of the product. Aldrin and dieldrin are apparently not viewed by the EPA as uniform in their benefit characteristics for all their uses. The Administrator had previously stopped certain uses of the pesticides in question in house paints, and in water use. These actions presumably reflected some evaluation of comparative benefits and hazards. The Administrator's reliance on the "pattern of declining gross use" itself indicates that for some purposes aldrin and dieldrin are or will soon become nonessential. Even assuming the essentiality of aldrin and dieldrin, and of the lack of feasible alternative control mechanisms for certain uses, there may be no corresponding benefit for other uses, which may be curtailed during the suspension period.[10]

Flexibility As To Limits

[14] Our concern over EPA's failure to discuss benefits reflects our concern that what is done tacitly or by implication may mean that the agency has not taken into account the possibility of orders falling short of complete suspension. EPA has flexibility not only to confine suspensions to certain uses, but also to order conditional suspensions for uses, available only if certain volumes or limits are not exceeded. EPA apparently assumed certain limits of use would prevail. But if there are dangers, and if the benefits of use may be satisfied within certain limits of use, the EPA should consider whether to exercise its authority to determine that the extent of use permitted pending final determination must be held within announced limits.

Analysis of Limited Short-Run Harm

We do not say there is an absolute need for analysis of benefits. It might have been possible for EPA to say that although there were no significant benefits from aldrin-dieldrin the possibility of harm—though substantial enough to present a long-run danger to the public warranting cancellation proceedings—did not present a serious short-run danger that constituted an imminent hazard. EPA's counsel offers this as a justification for its action.

[15] If this is to be said, it must be said clearly, so that it may be reviewed carefully. Logically, there is room for the concept. But we must caution against any approach to the term "imminent hazard," used in the statute, that restricts it to a concept of crisis. It is enough if there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process. It is not good practice for an agency to defend an order on the hypothesis that it is valid even assuming there are no benefits, when the reality is that some conclusion of benefits was visualized by the agency. This kind of abstraction pushes argument—and judicial review—to the wall of extremes, when realism calls for an awareness of middle ground.

Articulation of Criteria

[16] Our comments according EPA substantial policy choice and discretion are not to be taken as mere lip service to established principle, that is undercut by the need we find for better articulation. We recognize that EPA's functions are difficult and demanding and are impressed by the thoughtfulness and range of EPA's general approach; nor have we any reason to doubt the wisdom and validity of its specific decisions. But the demand of functions so difficult of decision are accompanied by demands, equally difficult to meet, for attentive consideration and careful exposition. Our own responsibility as a court is as a

10. The EPA stated with respect to DDT that effective limitation on use might require more than could be accomplished by EPA administrative measures, and might require legislation to provide a machinery, using pest control consultants, that would provide permission for certification of the property of a particular use at a particular location and time. Statement of Reasons, p. 17.

partner in the overall administrative process—acting with restraint, but providing supervision.[11] We cannot discharge our role adequately unless we hold EPA to a high standard of articulation. Kennecott Copper Corp. v. EPA, D.C.Cir., 462 F.2d 846 (1972). The EPA is charged with profoundly important tasks; reclamation and preservation of our environment is a national priority of the first rank. It is not an agency in the doldrums of the routine or familiar. The importance and difficulty of subject matter entail special responsibilities when the EPA undertakes to explain and defend its actions in court.

Environmental law marks out a domain where knowledge is hard to obtain and appraise, even in the administrative corridors; in the courtrooms, difficulties of understanding are multiplied. But there is a will in the courts to study and understand what the agency puts before us. And there is a will to respect the agency's choices if it has taken a hard look at its hard problems.[12] We emphasize again the judicial toleration of wide flexibility for response to developing situations. The Administrator's premise of relatively low environmental residue burden from aldrin and dieldrin, a consequence of low past and declining present usage, may lead him to consider possible use of interim actions short of complete suspension—continuing registrations selectively, with restrictions on kinds and extent of use, either by orders or, perhaps, through enforceable, voluntary agreements by registrants. The court's concern is for elucidation of basis, not for restriction of EPA's latitude.

IV. PROVISION FOR FURTHER CONSIDERATION

[17] We are not vacating the action before us. At argument we were informed of the deliberations of the aldrin-dieldrin scientific advisory committee, and it is public knowledge that its report has recently been filed. The EPA's Statement of Reasons stated that its suspension decisions would be re-examined on receipt of the committee's report. That course is sound practice, and indeed is an implicit requirement of law, for the administrative process is a continuing one, and calls for continuing re-examination at significant junctures. American Airlines, Inc. v. CAB, 123 U.S.App.D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966). The availability of re-examination in light of the committee report confirms our view that formal findings are not required at the initial decision on suspension.

[18] The EPA proposes to study the committee's analyses and recommendations. We think it in the interest of justice, see 28 U.S.C. § 2106, that the record be remanded to the EPA for consideration at the same time of this opinion. This remand leaves the EPA with latitude, without judicial restrictions, to continue, vacate or modify its order on the question of suspension of aldrin and dieldrin.

So ordered.

11. Greater Boston TV Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

12. WAIT Radio v. FCC, 135 U.S.App. D.C. 317, 418 F.2d 1153 (1969); Greater Boston v. FCC, *supra*, note 10; EDF v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971).

AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

The Slick Corporation, Air Freight Forwarders Association, the Flying Tiger Line, Inc., Intervenors.

TRANS WORLD AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

The Slick Corporation, Air Freight Forwarders Association, the Flying Tiger Line, Inc., Intervenors.

UNITED AIR LINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

The Slick Corporation, Air Freight Forwarders Association, the Flying Tiger Line, Inc., Intervenors.

Nos. 18833, 18834, 18840.

United States Court of Appeals
District of Columbia Circuit.

Argued June 16, 1965.

Decided March 2, 1966.

Petitions for review of determination of Civil Aeronautics Board. The Court of Appeals for the District of Columbia, Leventhal, Circuit Judge, held that procedure by which Civil Aeronautics Board considered and adopted regulation to effect that only all-cargo carriers could provide blocked space service was sufficiently fair without necessity of complete adjudicatory hearing.

Affirmed.

Burger, Danaher and Tamm, Circuit Judges, dissented.

1. Carriers ⇐63

"Blocked space service" is essentially the sale of space on flights at wholesale rates, when "blocked" or reserved by user on an agreement to use as specified in amount of space.

See publication Words and Phrases for other judicial constructions and definitions.

2. Public Service Commissions ⇐7.1

Competitors in a regulated industry should be treated similarly in rate rulings to preserve competition, but reasonable distinctions between groups of competitors are permissible. Federal Aviation Act of 1958, §§ 102(a, f), 103(b), 313(a), 416(a), 49 U.S.C.A. §§ 1302(a, f), 1303(b), 1354(a), 1386(a).

3. Aviation ⇐101

Regulation of Civil Aeronautics Board to effect that only all-cargo carriers could provide blocked space service was sustainable on the merits in making distinction between combination carriers and all-cargo carriers. Federal Aviation Act of 1958, §§ 102(a, f), 103(b), 313(a), 416(a), 49 U.S.C.A. §§ 1302(a, f), 1303 (b), 1354(a), 1386(a).

4. Public Service Commissions ⇐17

The doctrine that rate making tribunal may deny an adjudicatory hearing to applicants whose applications on their face show violations of general rule is not restricted to regulations affecting future applications as distinguished from regulation affecting rights under existing certificates.

5. Administrative Law and Procedure ⇐392

Rule making is a vital part of the administrative process, and is not to be shackled, in absence of clear and specific congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

6. Aviation ⇐101

A regulation to effect that only all-cargo air carriers could provide "blocked space service" was a "rule" within Administrative Procedure Act, resulting in presumptive procedural validity. Administrative Procedure Act, §§ 2(c), 4, 5 U.S.C.A. §§ 1001(c), 1003.

See publication Words and Phrases for other judicial constructions and definitions.

7. Administrative Law and Procedure ⇐311

Relative certitude is necessary for conclusion that adjudicatory procedures are required in administrative process.

8. Aviation ⇐33

Procedure by which Civil Aeronautics Board considered and adopted regulation to effect that only all-cargo carriers could provide blocked space service was sufficiently fair without necessity of complete adjudicatory hearing. Administrative Procedure Act, §§ 4, 8(b), 5 U.S.C.A. §§ 1003, 1007(b); Federal Aviation Act of 1958, § 401(g), 49 U.S.C.A. § 1371(g).

9. Aviation ⇐35

Affirmance of adoption of regulation by Civil Aeronautics Board would be without prejudice to right of objecting parties to reopen question of their exclusion upon showing that board's assumptions could not reasonably continue to be maintained in light of actual experience, and similar considerations.

Mr. Alfred V. J. Prather, Washington, D. C., for petitioner in No. 18833. Mr. Gerry Levenberg, Washington, D. C., also entered an appearance.

Mr. Warren E. Baker, Washington, D. C., with whom Mr. Joseph M. Paul, Jr., Washington, D. C., was on the brief, for petitioner in No. 18834.

Mr. O. D. Ozment, Associate Gen. Counsel, Litigation and Legislation, C. A. B., with whom Asst. Atty. Gen. William H. Orrick, Jr., Messrs. John H. Wanner, Gen. Counsel, Joseph B. Goldman, Deputy Gen. Counsel, C. A. B., and Lionel Kestenbaum, Atty., Dept. of Justice, were on the brief, for respondent.

Mr. Richard P. Taylor, Washington, D. C., with whom Mr. William E. Miller, Washington, D. C., was on the brief, for intervenor Slick Corp.

Messrs. Robert L. Stern, Chicago, Ill., and J. Francis Reilly, Washington, D. C., were on the brief for petitioner in No. 18840.

Mr. Louis P. Haffer, Washington, D. C., was on the brief for intervenor Air Freight Forwarders Ass'n.

Messrs. B. Howell Hill and Frank H. Strickler, Washington, D. C., were on the brief for Braniff Airways as amicus curiae.

Messrs. R. S. Maurer and James W. Callison, Atlanta, Ga., were on the brief for Delta Airlines, Inc., as amicus curiae. Mr. Robert Reed Gray, Washington, D. C., also entered an appearance.

Messrs. Herman F. Scheurer, Jr., and C. Edward Leasure, Washington, D. C., were on the brief for Continental Airlines, Inc., as amicus curiae.

Mr. Lipman Redman, Washington, D. C., was on the brief for Airlift International, Inc., as amicus curiae.

Mr. Edwin Jason Dryer, Washington, D. C., entered an appearance for intervenor, Flying Tiger Line, Inc.

Before BAZELON, Chief Judge, FAHY, WASHINGTON,* DANAHER, BURGER, WRIGHT, McGOWAN, TAMM and LEVENTHAL, Circuit Judges, sitting *en banc*.

LEVENTHAL, Circuit Judge:

[1] On August 7, 1964, the Civil Aeronautics Board,[1] two members dissenting, issued a "policy statement" regulation (PS-24), providing that only all-cargo carriers may provide "blocked space service"—essentially the sale of space on flights at wholesale rates, when "blocked" or reserved by the user on an agreement to use a specified amount of space.[2] Concomitantly, the Board vacat-

* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

1. Hereafter sometimes referred to as the Board, or CAB.

2. Regulation No. PS-24, dated August 7, 1964, "Statements of General Policy Blocked Space Service," constituting Amendment 3 to Part 399 of the Board's regulations, contains statements of policy adopted by the Board for the guidance of the public, with certain exceptions. Amendment 3 added to Subpart C (Policies Relating to Rates and Tariffs) a new § 399.37, now codified as 14 C.F.R. § 399.37, defining blocked space as follows:

"Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only

ed its suspension of a tariff proposing such blocked space service filed by Slick Airways, one of the all-cargo carriers.[3] Defensive tariffs, similar to but not identical with Slick's were filed by American Airlines, Trans-World Airlines and United Airlines,[4] petitioners here, who are combination carriers, i. e. carriers authorized to carry persons as well as property and mail.[5] These tariffs were summarily rejected in Order No. E-21170, August 11, 1964, brought before this court on petitions for review.

The CAB's regulation was the culmination of a rule making proceeding (Docket 14148), held pursuant to notice of January 23, 1964, and supplemental notice of June 22, 1964. All interested parties had opportunity, of which petitioners availed themselves, to present their positions to the Board through oral arguments as well as written data, views, and rebuttals. The procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003. The question before us is whether this regulation effected a modification of petitioners' existing certificates which, under § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), may be accomplished only after a full adjudicatory hearing. We hold that the regulation was validly issued.

The Board's policy statements in Regulation PS-24, essentially legislative findings and conclusions in support of its decision,[6] may be summarized as follows: There is a distinction between combination carriers and all-cargo carriers inherent in their certificates and operating responsibilities thereunder. The reservation of blocked space to all-cargo carriers will further their role as specialists for large volume air freight service in all-cargo aircraft. This can be expected to be followed by a shift of small volume shipments to the combination carriers, whose cargo operations supplement their passenger services and who are better suited for meeting the needs of this category of traffic, at less cost. The blocked space traffic, consisting of traffic produced by frequent, regular and high volume shippers, has particular need for a specialized type of service marked, among other things, by low rates, appropriately convenient schedules and assurance that space will be available when needed. A large market of traffic now moved on surface carriers will become available if air carriers achieve a breakthrough in properly servicing such traf-

when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days.

3. Order No. E-21160, August 7, entered in Docket 15419. Appellant American Airlines sought a stay of Order E-21160. At the suggestion of this court, and to enable this court to rule on that motion, the Board, by Order E-21166, August 7, 1964, stayed the effectiveness of Order E-21160 to August 17, 1964. On August 14, 1964, a division of this court issued an order staying the effectiveness of the Board's order pending hearing on the merits. On October 20, 1964, this court granted a petition for rehearing en banc of the order granting a stay, vacated the court order of August 14, 1964, and denied motion for stay. Since the maximum time for suspension of a tariff would in any event have expired before the hearing of this case, the order is now moot and will not be reviewed by this court.

In Order E-21160 the Board directed that the investigation into the lawfulness of the Slick tariff in Docket 15419 should proceed.

4. The Slick tariff which the Board permitted to go into effect imposed a minimum of 200 pounds for shipments. The defensive tariffs filed by petitioners as to the blocked space arrangement contained no such limitation.

5. This authority exists by virtue of certificates issued under the statutory "grandfather" provision. Civil Aeronautics Act of 1938, § 401(e), 52 Stat. 988.

6. We use the term "legislative findings and conclusions" to avoid confusion with the "findings and conclusions" required by § 8(b) of the Administrative Procedure Act for adjudications and rules required to be made on the record after opportunity for agency hearing.

fic—a breakthrough dependent on development of marketing and performance techniques adapted to serving the peculiar needs of these shippers, and dependent on attraction of high volume of traffic through rate reduction, in turn made possible by improved planning and efficiency.

The Board considered that its statutory responsibility to promote air transportation required it to pursue earliest possible achievement of the breakthrough, and that this depended on assigning the exclusive role of perfecting blocked space service to the specialized all-cargo carriers.

Of particular interest and significance were the following findings and conclusions:

> However, the needed improvement in equipment utilization and load factors cannot be obtained if the traffic from blocked space arrangements is spread too thinly among carriers. Thus, if the blocked space concept is to be given a true test, we must make sure that excessive blocked space capacity is not offered. For this reason in particular, our policy contemplates that only the all-cargo carriers will be permitted to offer blocked space service at this time.
>
> Assigning the all-cargo carriers the exclusive role of performing blocked-space service will, we believe, provide them with a needed source of financial strengthening. We recognize, of course, that some traffic now moving on the cargo services of the combination carriers may be diverted to the blocked space services of the all-cargo carriers, but we do not believe that such diversion would be significant. Moreover, these carriers can be expected to acquire an increasing share of small package shipments. Some traffic now moving on the all-cargo carriers at regular rates will be diverted to their lower blocked space rates. However, there is no reason to believe that attractive blocked space rates and the benefits of specialization will not ultimately bring about an increase in traffic more than offsetting any such diversion.

[2] 1. Petitioners say that the Board has no power by summary action, without hearing, to prevent a carrier or group of carriers from competing fully with other carriers. Their reliance on a "fundamental principle" that carriers should be able to compete with each other, though couched here in procedural terms, has overtones of an argument on the merits. At the outset we reject the sweeping argument, if that argument is being made or implied, that such agency action would be invalid even if taken after the most elaborate of procedures. That competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition is not denied. But that is not to say that reasonable distinctions between groups of competitors are impermissible, and that different services and rates may not then be authorized for the different groups or classes. Congress made a broad delegation of power to the Board, in § 416(a) of the Act (49 U.S.C. § 1386(a)), to "establish such just and reasonable classifications or groups of air carriers * * * as the nature of the services performed by such air carriers shall require."

[3] Petitioners have made no presentation that the Board's distinction between combination carriers and all-cargo carriers is meaningless or without rational foundation. Congress has given the Board not only a wide regulatory authority, but a specific promotional function to initiate proposals for the purpose of expanding efficient civil aviation transport;[7] the power to classify carriers and service; and the power to issue implementing rules and regulations.[8] This combination of powers, together with the underlying findings and conclusions, suffices to sustain the regulation on the merits, assuming no proce-

7. 49 U.S.C. §§ 1302(a) and (f), and 1303 (b).

8. 49 U.S.C. § 1354(a).

dural bar. See generally United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

2. Petitioners claim that § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), assures them an "adjudicatory hearing" because the Board action amounts to a modification or suspension of existing rights under their certificates of public convenience and necessity.

In essence, petitioners' argument is the same as the thesis this court accepted ten years ago in the *Storer* case,[9] only to be reversed by the Supreme Court.[10] This court held the multiple ownership rule of the Federal Communications Commission invalid because of the inadequacy of the rule making procedure followed in its adoption, an adjudicatory hearing being expressly guaranteed by statute to applicants for licenses. The Supreme Court, however, held that notwithstanding the statutory hearing requirement the Commission retained the power to promulgate rules of general application consistent with the Act, and to deny an adjudicatory hearing to applicants whose applications on their face showed violations of the rule. *Storer's* vitality is attested by its recent application in FPC v. Texaco, 377 U.S. 33, 39, 84 S.Ct. 1105, 1109, 12 L.Ed.2d 112 (1964),[11] where the Supreme Court stated:

> [T]he statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

[4] Petitioners argue that the *Storer* doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB regulation affected rights under existing certificates. That such a restrictive reading of the *Storer* doctrine is unwarranted, is shown by such decisions as National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943);[12] Air Line Pilots Ass'n Intern. v. Quesada, 276 F.2d 892 (2d Cir. 1960);[13] and Capitol Airways,

9. Storer Broadcasting Co. v. United States, 95 U.S.App.D.C. 97, 220 F.2d 204 (1955).

10. United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L. Ed. 1081 (1956).

11. The Federal Power Commission had validly adopted a rule prohibiting certain pricing provisions in the rate schedules of independent producers of natural gas, and had summarily rejected applications for certificates of public convenience and necessity which contained rate schedules with provisions running afoul of the Commission's rule. The Court of Appeals for the Tenth Circuit held that the rule could not be applied to deprive a certificate applicant of the adjudicatory hearing guaranteed him by § 7 of the Natural Gas Act. 276 F.2d at 896. The Supreme Court reversed. See generally Davis, 2 *Administrative Law* § 15.03 (1958).

12. *National Broadcasting Co.* upheld the validity of regulations applicable to radio stations engaged in chain broadcasting. The regulations were issued in 1941 after an investigation and legislative hearings appropriate for rule making (see 319 U.S. at 194–195, 63 S.Ct. 997), but not the adjudicatory-type hearing prerequisite under the Communications Act, even prior to the Administrative Procedure Act, for denial of a license application or modification or non-renewal of license, see Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 332, 66 S.Ct. 148, 90 L.Ed. 108 (1945). The regulation required radio station licensees engaged in chain broadcasting to alter long-standing business practices—e. g. precluded network affiliation contracts for a term longer than two years—to avoid revocation or at the very least non-renewal of licenses. But the court found (319 U.S. p. 225, 63 S.Ct. p. 1013) that there was "no basis for any claim that the Commission failed to observe procedural safeguards required by law."

13. The court upheld the promulgation, without adjudicatory hearings, of a Federal Aviation Agency regulation barring individuals sixty years old from serving as pilots, even though that regulation modified rights under all outstanding licenses and effected a termination without hearing of some outstanding licenses. Re

Inc. v. CAB, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961).[14] See also Transcontinental Television Corp. v. FCC, 113 U.S. App.D.C. 384, 308 F.2d 339 (1962).

[5] The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

3. The need for and importance of policy rule making made on the basis of a procedure appropriate thereto is clearly identified in the Administrative Procedure Act (APA), 5 U.S.C. § 1001 et seq. In general, the APA establishes a dichotomy between rule-making and adjudication. For adjudication a formal system is provided.[15]

Rule making, however, is governed by § 4, which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules. These more limited requirements are geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. Compare the Attorney General's Manual on the Administrative Procedure Act (1947), pp. 14–15:

> The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.
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> * * * * * *
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> Not only were the draftsmen and proponents of the bill aware of this

jecting a challenge by pilots relying on the statutory provision, 49 U.S.C. § 1371(g), that an adjudicatory hearing must be provided before an airman's license may be revoked or amended, the court stated (276 F.2d at 896):

> The Administrator's action does not lose the character of rule-making because it modifies the plaintiff pilots' claimed property rights in their licenses and their contractual rights under collective bargaining agreements * * *. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation.

14. *Capitol Airways* upheld a CAB order amending its rules so as to require "supplemental" air carriers serving military installations to apply for individual exemptions from restrictions on their pre-existent operating authority, rather than enjoying a blanket exemption previously in effect under the Board's rules. The court held that this action could be effected without a hearing, although the Board "has redrawn the rules of the game" in such a way that some competitors will survive while others will not. 110 U.S.App.D.C. at 265, 292 F.2d at 758.

15. Section 5 of the APA in substance provides that the officers who receive the evidence shall make an initial decision, or at least a recommended decision, and prohibits any officer engaged in investigating or prosecuting functions from participating in the decision. It protects the right of cross-examination and the right of presenting oral testimony.

realistic distinction between rule making and adjudication, but they shaped the entire Act around it.

Rule making has a unique value and importance as an administrative technique for evolution of general policy, notwithstanding, or perhaps indeed because of, the freedom from the procedures carefully prescribed to assure fairness in individual adjudication. SEC v. Chenery Corp., 332 U.S. 194, 202, 203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).[16]

[6] The regulation under discussion, being an "agency statement of general * * * applicability and future effect designed to implement * * * or prescribe law or policy," plainly satisfies the definition of "rule" in § 2(c) of the APA,[17] as well as general understanding. There is therefore a presumptive procedural validity for the rule making procedure prescribed in § 4 of the APA, unless countermanded by a different Congressional mandate.

4. Serious questions have been raised concerning the adjudicatory-type hearings required and held on initial licensing involving specific carriers and routes. It has been suggested that air line certificates are an instance where "functions that are more truly planning than adjudicatory have been forced too rigidly into the latter mould," and that officials engaged in planning functions should be "free to use flexible procedures in the search for ideas and policies" rather than be "bound either as a matter of routine or law to pursue procedures ill-adapted for the performance of such a function." [18]

[7] The difficulties currently experienced in the administrative process, sometimes referred to as its "malaise," obviously do not warrant departure from procedures mandated by Congress. But they suggest the need for relative certitude before a court concludes that adjudicatory procedures are required. The need for certitude is underscored if the adjudicatory procedure is to be required on the ground that the proceeding involves an amendment of licensing, for under the Administrative Procedure Act that conclusion results in even more rig-

16. *Chenery* recognizes that an agency may have the discretion to determine how to proceed. The objective of pursuit of the "rule of law" in the administrative process, through development of relatively clear and informative public standards, can be achieved either through rule making or the case-by-case adjudicatory system.

For some statements reviewing the relative advantages and disadvantages of rule making procedures as opposed to adjudication for the development of agency policy, and concluding that increased use of rule making is in the public interest, see e. g., Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921 (1965); Baker, *Policy By Rule or Ad Hoc Approach—Which Should it Be?* 22 Law & Contemp.Prob. 658 (1957).

Judge Friendly in effect suggests (p. 105) that the case-by-case technique as utilized by the CAB has muddied the waters and operated to avoid an overall policy statement of approach to the route structure.

17. 5 U.S.C. § 1001(c) defines "rule" as meaning "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Professor Davis points out that the words "or particular" were inserted after Senate passage in order, said the House Committee, to "assure coverage of rule making addressed to named persons," that the words were not intended to change into rule making what was previously considered adjudication but "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." 7 Davis, *supra* note 11, § 5.02.

18. Landis, *Report on the Regulatory Agencies to the President-Elect*, p. 18 (1960).

A leading practitioner before the CAB has even suggested that the breakdown of the administrative process in protracted cases should be overcome by the adoption of a conference-hearing procedure, with virtual elimination of oral testimony, including cross-examination, and hearings confined in substance to conference discussions between lawyers and expert witnesses. Westwood, *Administrative Proceedings: Techniques of Presiding*, 38 A.B.A.J. 659 (1964).

orous procedural requirements than apply to initial licensing. Thus, the examiner would not even be free to consult with agency technicians, as he is on initial licenses. And the presentation to the agency heads would have to await an examiner's report and proceed on the basis of exceptions thereto, whereas in initial licensing the agency may omit the examiner's report and proceed on the premise that exceptions can be more clearly focused in the light of proposals and views of the senior staff officials. In short, the rigors of the adjudicatory procedure could not even be softened by the exceptions deliberately provided by Congress in the APA in cases of initial licensing (and rule making on the record) in order to provide the flexibility requisite for proceedings principally involving policy determinations.[19]

5. We are not here concerned with a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding before us is rule making both in form and effect. There is no individual action here masquerading as a general rule. We have no basis for supposing that the Board's regulation was based on a sham rather than a genuine classification. The classes of carriers were analyzed both functionally and in terms of capacity for furthering the promotional purposes of the Act. The class of combination carriers is not accorded the same rights as the class of all-cargo carriers, but the difference is in no sense a punishment for sins of commission or omission. They are not, in Judge Washington's phrase, "goats" being separated from favored sheep.[20]

6. Petitioners' contention is not advanced by CAB v. Delta Airlines, 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961). Once the Supreme Court made clear that the original certificate order had become final, it was undisputed that the second order, addressed to the one carrier (Delta) and prescribing for it a less favorable route than the original order, was an amendment of a certificate for which an adjudicatory hearing is requisite under § 401(g) of the Federal Aviation Act. The "security of route" principle thus gives protection to an individual carrier that has made an investment in order to carry on the certificated service, assuring it that the CAB will not worsen its position by action addressed against it individually, by prescribing inferior routes. Since the Supreme Court gave no indication in *Delta* that it intended to depart from the *Storer* doctrine, we see no basis for reading *Delta* as implying that the mere fact that licenses will be affected renders general rule making an impermissible means of agency action governing all carriers, or an appropriate general class of carriers.

Where the agency is considering an order against a particular carrier or carriers there is protection through the requirement of the adjudicatory procedure appropriate for such individual actions and amendments, a requirement which *Delta* warns will be strictly enforced. Where the agency is considering a general regulation, applicable to all carriers, or to all carriers within an appropriate class, then each carrier is protected by the fact that it cannot be disadvantaged except as the Board takes action against an entire class. For any such class regulation there is also protection outside the field of procedure in that the general regulation must be reasonable both as to the classification employed, and as to the nature and extent of the restriction in relation to the evil remedied or other general public purpose furthered.

7. There may be wisdom in providing for oral testimony, at least in legislative-type hearings, in advance of the adoption of controversial regulations governing competitive practices, even though the

19. See Attorney General's Manual on the Administrative Procedure Act, p. 15 (1947).

20. Capitol Airways, Inc. v. CAB, 110 U.S. App.D.C. 262, 265, 292 F.2d 755, 758 (1961). What Judge Washington had in mind was the use of rules as a guise for imposition of sanctions on some parties for violations of the Act, not the kind of distinctions made by the Board here.

need for development of overall requirements precluded Congressional requirement of such hearings for rule making generally.[21]

This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress. Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); Pollack v. Simonson, 121 U.S.App.D.C. 362, 350 F.2d 740 (1965).[22]

[8] However in the present case the CAB did not limit itself to minimum procedures, but rather gave the parties a significantly greater opportunity to persuade and enlighten the Board. It provided not merely for written comment, but in addition for oral argument.[23] The CAB, presumably with the aid of its policy staff, sifted out the dross and delineated key questions on which argument could most helpfully be focused, including the question material to the case at bar.

If additional procedural safeguards are to be imposed as a requirement it would be more salutary to incorporate them into a rule making procedure than to adopt a blanket requirement of an adjudicatory procedure. A rule making setting would better permit confinement of oral hearings to the kind of factual issues which can best be determined in the light of oral hearings, without undue elongation of the proceeding or sacrifice of the expedition and flexibility available in rule making. It would also permit the hearing examiner to confer with experts and the Board concerning "legislative facts" and policy questions.

However, there is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently

21. Compare pp. 107–08 of the Final Report of the Attorney General's Committee on Administrative Procedure (S.Doc. 8, 77th Cong., 1st Sess.) (1941):

> [Hearings] are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.
>
> The Committee believes that the practice of holding public hearings in the formulation of rules of the character mentioned above should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of a regulation. * * * Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith—good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated.

22. Compare S.Rep.No. 752, 79th Cong., 1st Sess. p. 18 (1945); Administrative Procedure Act, Legislative History, p. 204 (S.Doc. No. 248). The Senate Judiciary Committee, while according to initial licensing certain exceptions from procedural requirements generally applicable to adjudicatory determination "upon the theory that in most licensing cases the original application may be very much like rule making," observed that some cases "tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions in such cases, because they are not to be interpreted as precluding fair procedure where it is required."

23. Opportunity for oral argument to the board is not necessarily requisite even in adjudicatory proceedings, NLRB v. Clausen, 188 F.2d 439 (3rd Cir.), cert. denied, 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 653 (1951). Whether it is required by due process depends upon the circumstances. FCC v. WJR, The Goodwill Station, 337 U.S. 265, 276, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949).

if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. Nor was there any specific proffer as to particular lines of cross-examination which required exploration at an oral hearing.[24]

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts.[25] It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience. Although the CAB's regulation is not temporary in the sense of being expressly limited in duration, the Board's findings plainly reflect its assumption that the regulation was intended to be subject to re-examination.[26] The Board's regulations provide that "any policy may be amended from time to time as experience or changing conditions may require." 14 C.F.R. § 399.4. In any event, it is the obligation of an agency to make re-examinations and adjustments in the light of experience.[27]

[9] To avoid any possible misapprehension, our affirmance of the Board's action is without prejudice to the right of the combination carriers to reopen the question of their exclusion upon a showing that the Board's assumptions could not reasonably continue to be maintained in the light of actual experience, that their overall cargo business was significantly impaired, or that the air freight market had sufficiently expanded so that the promotion of the air cargo industry through blocked space reduced rates would not be imperiled by their participation.

Since our records show that this Court took action more than a year ago to permit the regulation to become effective (see note 3 *supra*), it should perhaps be mentioned that at the argument respond-

24. A request for cross-examination is generally of less value when not coupled with a proffer of direct proof, see Westwood, *supra* note 18.

Petitioner United stated in its comments that "if the Board accepts the conclusions of its staff predicated as they are on inaccurate and untested cost estimates, the combination carriers will be penalized and their right to operate all-cargo aircraft somehow impaired." Disputes as to costs frequently involve judgment as to cost allocations, and in such matters, as Justice Brandeis noted long ago, "experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate." Groesbeck v. Duluth, S.S. & A. R. Co., 250 U.S. 607, 614–615, 40 S.Ct. 38, 41, 63 L.Ed. 1167 (1919).

25. See 1 Davis, *Administrative Law* § 7.02, p. 413 (1958):

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

26. Thus the Board noted its conclusion that expansion to combination carriers was not feasible "at this time." In the accompanying order permitting Slick's tariff to go into effect, the Board stated: "We believe that Slick is proposing a worthwhile experiment which should be tested in the market place. * * * Permitting Slick's tariff to go into effect now will also provide the Board with experience data upon which we may better gauge the effect of the blocked space service during the course of the ensuing investigation." Order No. E–21160, August 7, 1964.

27. See National Broadcasting Co. v. United States, 319 U.S. 190, 225, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192, 205, 76 S.Ct. 763, 100 L.Ed. 1081 (1956).

ents stated that thus far there had been little blocked space traffic and no significant diversion from petitioners. Petitioners replied that this period has not been a fair test, since the all-cargo carriers may have been awaiting the outcome of the litigation before aggressively exploiting their newly won privileges. It suffices to say that if and when petitioners have a showing to make based in significant measure on actual relevant experience, they will have a remedy available to vindicate their asserted rights, both before the Board and on judicial review in case of dissatisfaction with the Board's action or inaction.

Meanwhile they have been accorded a hearing conforming to and surpassing the minimum required for rule making. They have not been subject to a denial of procedural rights that undermines the validity of the regulation.

Affirmed.

WASHINGTON, Senior Circuit Judge, did not participate in this decision.

BURGER, Circuit Judge, with whom DANAHER and TAMM, Circuit Judges, join (dissenting):

Petitioners, three airlines authorized to carry both passengers and cargo on a regular basis, hold certificates for cargo carriage legally identical with the certificate held by Intervenor, Slick Corporation, an all-cargo carrier. Without holding the adjudicatory hearing required by statute before an outstanding certificate may be amended,[1] the Civil Aeronautics Board laid down what it described as a "regulation" allowing all-cargo carriers —but no others—to offer reduced rates for "blocked-space" shipments; it expressly excluded combination airlines such as Petitioners from the benefits of offering the same reduced-rate service.

Acting under this "regulation" the Board issued the order under review, specifically denying applications of Petitioners to offer the same service Slick had been authorized to offer. These actions were taken in response to Slick's request, over the opposition of its fellow all-cargo carrier, Flying Tiger Line, that the Board "delineate the roles" of combination and all-cargo carriers[2] in such a way as to make the all-cargo carriers the "wholesalers" and the combination carriers the "retailers" of air cargo space. I have trouble seeing how a "regulation" which turns identical certificates into ones which place the licensees in entirely distinct carrier roles, carrying different

1. Federal Aviation Act of 1958, § 401(g), 72 Stat. 756, 49 U.S.C. § 1371(g) (1964); see C. A. B. v. Delta Air Lines, 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961).
2. The Board purported to find authority for this delineation in section 416(a) of the Act, 72 Stat. 771, 49 U.S.C. § 1386(a) (1964), which provides:

> The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

The Board's "Policy Statements," described in the majority's footnote 2, asserted the following justification for its action:

> A logical means of further delineating the role of the all-cargo carriers is *to foster their development* as specialists for large volume air freight service in all-cargo aircraft. The reservation of blocked space arrangements exclusively to the all-cargo carriers is consistent with this objective. The increased concentration of the all-cargo carriers on large volume traffic can be expected to be followed by a shift of small volume shipments to the combination carriers, *whose cargo operations supplement their passenger services* and who are better suited for meeting the needs of this category of traffic and at less cost.

(Emphasis added.) In light of this statement, it should be remembered that the all-cargo airlines carry about 15 per cent of the nation's scheduled domestic air-freight, while the combination carriers carry 85 per cent. Of such freight transported in all-cargo airplanes, the all-cargo lines carry 36 per cent, and the combination lines 64 per cent.

types of cargo for different types of shippers, can be said to be anything less than an amendment of outstanding certificates. This much is clear, for it is undisputed that after the "regulation" Petitioners could not lawfully engage in the same carriage as their all-cargo competitors. Indeed the Board concedes that its action has excluded Petitioners from performing the kind of carriage which they were originally certificated to perform and in which they have made large investments of capital. I therefore dissent from the majority's conclusion that an adjudicatory hearing was not required. As I see it this is nothing more than a transparent device to favor some carriers at the expense of others.

The certificates of the all-cargo carriers and those of the combination carriers bestow identical rights and impose identical obligations with respect to the carriage of property. It follows that the two types of carriers must be free to file identical tariffs for the carriage of cargo. By permitting the all-cargo carriers to file blocked-space tariffs the Board acknowledges their present authority to file such tariffs under their existing certificates, which, except as to passenger carriage, are the same as those of the combination carriers. By denying the combination carriers the opportunity to file such tariffs the Board in effect amends outstanding certificate authority. Cf. FCC v. National Broadcasting Co. (KOA), 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943).

The majority opinion cites a number of cases in an effort to sustain its holding that the Board has authority to amend Petitioners' certificates by rulemaking rather than an adjudicatory procedure. Those cases are not in point. First, most of them dealt with agencies other than the CAB. The Supreme Court said recently in another context, "[f]ederal agencies are not fungibles * * *—Congress has treated the matter with attention to the particular statutory scheme and agency." International Union, United Auto. Aerospace & Agriculture Implement Workers, etc. v. Scofield, 382 U.S. 205, 210, 86 S.Ct. 373, 377, 15 L.Ed.2d 272 (1965).[3] We are dealing here with a statute motivated in large part by concern for "security of certificate." CAB v. Delta Air Lines, 367 U.S. 316, 322 n. 6, 324–325, 81 S.Ct. 1611 (1961). This concern is reflected in the section 401(g) requirement of an evidentiary hearing before a certificate may even be amended. Second, none of the cases relied on by the majority deals with a situation like that before us, where an agency attempts by rulemaking to amend some—but not all—of the outstanding certificates authorizing a particular kind of service so as to deprive the licensees of a significant part of their license authority.

United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956), upon which the majority chiefly relies, as well as FPC v. Texaco, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964),[4] and National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943),[5] are cases dealing with rulemaking applying *across the board* to all *applicants* for licenses or certificates. Petitioners there were not being deprived of any authority they had formerly exercised; in those cases rulemaking was used to formulate reasonable, nondiscriminatory criteria to be met as conditions of receiving certificates in the first place. By contrast, the present appeal involves a use of rulemaking to abridge existing certificates to give favored carriers a monopoly on certain classes of carriage for the express pur-

3. This distinction is particularly applicable to Transcontinent Television Corp. v. FCC, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962), cited by the majority, which dealt with the very different legislative situation of broadcast station license renewals under the Communications Act of 1934, which gives the FCC broad powers to make frequencies unavailable by rule amendment.

4. See generally 39 N.Y.U.L.Rev. 347 (1964).

5. It is relevant to note that the opinion in *National Broadcasting Co.* does not mention the issue before us.

pose of "foster[ing] their development" at the expense of others not so favored. These differences are not "fortuitous circumstances" recognition of which leads to "revising" or "reshaping" the *Storer* doctrine, as the majority suggests. They are basic not only to the statute but also to the question of the appropriateness of rulemaking procedures, as I will show.

Air Line Pilots Ass'n, Intern. v. Quesada, 276 F.2d 892 (2d Cir. 1960), is even less apposite. That case involved the narrow issue of validity of a rule based on flight safety considerations against pilots flying scheduled aircraft after reaching age 60; there was no amendment of certificate authority in the sense here involved. The licenses originally issued to the pilots specifically provided that their duration was as set out in current regulations. And the Act itself imposes an express duty on the Administrator of the FAA to prescribe reasonable regulations relating to pilot standards. It was thus in a very narrow and limited context that the court held that an adjudicatory hearing was not required for each individual pilot; the rule laid down there was made applicable to all pilots, not to certain ones selected by the Board.

Finally, the majority relies on Capitol Airways, Inc. v. CAB, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961), which expressly distinguishes cases like the one before us and includes dictum directly on point here, while distinguishing CAB v. American Air Transport, Inc., 91 U.S.App.D.C. 318, 201 F.2d 189 (1952):

> *American Air Transport* * * * involved an effort by the Board to separate the sheep from the goats * * *. This court remanded the case to the District Court to determine whether the Board had in fact changed the terms of existing licenses. The inference to be drawn is that if the Board proposed to discriminate between carriers in the same group, characterizing some as law abiders and some as law breakers, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause.
>
> In contrast, in the present case the impact of the Board's decision is on an entire class, rather than on particular members of the class who are singled out as law violators or labeled for some reason as unfit or unworthy. Here, the Board has left all competitors in the field, but has redrawn the rules of the game. Some will be easily able to survive under these new rules: some will not. But there is no attempt to adjudicate the merits of individual firms * * *.

110 U.S.App.D.C. at 265, 292 F.2d at 758. (Footnote omitted.) The majority seeks to distinguish the import of this language and the *American Air Transport* case on the ground that here the Board does not accuse petitioners of violating the law. I confess great difficulty in understanding why licensees not accused of violating the law are not as much entitled to an adjudicatory hearing as licensees who are so accused, when the two are subjected to equivalent Board action. The majority's proposed distinction seems to me to pose substantial problems of equal protection of the laws under the fifth and fourteenth amendments.

Although it is not necessary to discuss the relative desirability of rulemaking and adjudicatory procedures in a situation where Congress has spoken as clearly as it has here, I note that my conclusion as to congressional meaning is reinforced by a consideration of the types of issues involved here. Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class. As pointed out above, however, the CAB's result here is reached by a rule which has different impacts upon members of the same basic category. When the Board makes such a differentiation, the proceedings inescapably become highly adversary in character, especially where the final determination purports to rest upon asserted differences in capabilities and potentialities as

between individual carriers. The rulemaking procedure's lack of direct testimony of witnesses, cross-examination, and other features of adjudicatory hearings is totally inadequate for the testing of such competing considerations, both factual and inferential.

While the question whether reduced-rate "blocked-space" service may be offered by *any* carrier might well be appropriate for rulemaking, the selection of particular carriers to provide such service is clearly the sort of question which can be resolved properly and fairly only in an adjudicatory proceeding. Once the Board had decided that it should not allow every freight carrier to offer such service, it was faced with the problem of picking and choosing among competing, mutually exclusive applications. *Cf.* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945). Furthermore, these were not applicants competing for a *new* right which neither had previously held; they were competing to retain a right which their certificates already authorized. The Board's action made some carriers "more equal" than others.

The majority seems to be trying to suggest, by repeated references to the combination carriers as a "class", that any multiple of one automatically makes a class for these purposes; two seems sufficient to make a "class" of the only domestic all-cargo carriers now certificated. The "formal" procedural safeguards which seem to distress the majority, see pp. 10–14, *supra*, were written into law by Congress precisely because Congress believed that they were necessary in making this crucial kind of determination. A general dissatisfaction with the "rigors" of procedural safeguards should not lead to dispensing with them in a case where they are most appropriate, nor to amending the statute judicially.

While it is not essential to my view of this case, it seems to me of no little significance that the history of all transportation, air, water or land, is that the carriage of bulk freight becomes the dominant and most lucrative business. I see no reason why this is not likely to be true in air carriage.[6] Although passenger carriage is clearly a major and profitable market now, it does not follow that it has the bright prospects for expansion that are open to air freight carriage. History indicates that the future will see a steadily increasing ratio of freight tonnage to passenger tonnage. The Board action here arbitrarily permits one group of favored carriers to preempt much of this lucrative and expanding market by depriving equally certificated carriers of part of their duly granted authority. The Board's "Policy Statements" confirm the accuracy of this forecast by declaring that the opportunity to offer reduced blocked-space rates would give the all-cargo carriers "a needed source of financial strengthening," while implying that the combination carriers "can be expected" to suffer no reduction in the amount of air freight they presently carry. Even if the Board has the power to realign so drastically the competitive positions of carriers holding equal certificates, the Act as I read it requires that the Board first hold an evidentiary hearing, before it may make such a certificate amendment.

6. As the majority itself recognizes, the fact that experience since the order became effective shows "no significant diversion" of cargo from petitioners is a makeweight argument lacking in probative value. Moreover, such off-the-record argument is not properly before us.

statement could not have been effectively utilized by the defense. We are not to speculate that the same result would have been reached by the trier of the facts had the prosecution's only witness been subject to cross-examination after defense counsel had had an opportunity to peruse and use, if so advised, the Jencks statement the witness had given after the arrest.

If, however, the trial judge decides that the statement was not producible, the court shall make findings of fact leading to that decision, and enter a new final judgment of convictions if the court concludes to reaffirm its former rulings. This will enable appellant, if so advised, to seek further appellate review on the record as it then appears. Williams v. United States, *supra*.

In view of the above disposition of the cases other contentions pressed upon us need not be decided.

It is so ordered.

NIAGARA MOHAWK POWER CORPORATION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

No. 19887.

United States Court of Appeals
District of Columbia Circuit.

Argued Oct. 18, 1966.

Decided May 18, 1967.

Petition for Rehearing Denied June 12, 1967.

On petition to review an order of the Federal Power Commission. The Court of Appeals, Leventhal, Circuit Judge, held that Commission had statutory authority to assign an effective date for licenses issued to power company earlier than date of issuance of the license when project involved was one constructed or maintained without a license in violation of applicable law.

Affirmed.

1. Navigable Waters ⇐2

Federal Power Commission had statutory authority to assign an effective date for licenses issued to power company earlier than date of issuance of the license when project involved was one constructed or maintained without a license in violation of applicable law. Federal Power Act, § 10(d, e), 16 U.S.C.A. § 803(d, e).

2. Administrative Law and Procedure ⇐305
Electricity ⇐1

Federal Power Act is not to be given a tight reading wherein every action of Federal Power Commission is justified only if referable to express statutory authorization; on the contrary, the Act is one that entrusts a broad subject matter to administration by the Commission, subject to congressional oversight, in the light of new and evolving problems and doctrines. Federal Power Act, § 309, 16 U.S.C.A. § 825h.

3. Navigable Waters ⇐2

Authority of Federal Power Commission to establish effective dates of licenses earlier than the date of issuance, while not expressly set forth in Federal Power Act, is fairly implied, assuming a reasonable exercise of the authority. Federal Power Act, § 10(d, e), 16 U.S.C.A. § 803(d, e).

4. Administrative Law and Procedure ⇐386
Statutes ⇐199

While "necessary or appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, they are not restricted to procedural minutiae; they authorize an agency to use means of regulation not spelled out in detail, provided that agency's action conforms with purposes and policies of Congress and does not contravene any terms of the statute.

5. Navigable Waters ⇐2

Congress intended, by section of Federal Power Act relating to conditions in the discretion of Federal Power Commission, to give the Commission wide latitude and discretion in performance of its licensing and regulatory functions. Federal Power Act, § 10(g), 16 U.S.C.A. § 803(g).

6. Administrative Law and Procedure ⇐324

Breadth of an agency's discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of congressional objectives.

7. Equity ⇐57

Equity regards as being done that which should have been done.

8. Navigable Waters ⇐2

Reversal was not required of Federal Power Commission decision because of agency's alleged arrogation to itself of the powers of a court of equity, since Commission did not suppose that it had a broad equitable charter but at most referred to this principle as showing that its course was reasonable.

9. Administrative Law and Procedure ⇐301

Principles of equity are not to be isolated as a special province of the courts; they are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law.

Mr. Lauman Martin, Syracuse, N. Y., for petitioner.

Mr. George F. Bruder, Atty., F. P. C. with whom Messrs. Richard A. Solomon, Gen. Counsel, Howard E. Wahrenbrock, Sol. at the time the brief was filed, Peter H. Schiff, Deputy Sol., and Joseph B. Hobbs, Atty., F. P. C., were on the brief, for respondent.

Before FAHY,* DANAHER and LEVENTHAL, Circuit Judges.

LEVENTHAL, Circuit Judge:

Petitioner, Niagara Mohawk Power Corporation, is an electric utility that operates and maintains four hydroelectric projects on navigable waters within the State of New York. It seeks review of orders of the Federal Power Commission, issued in 1963 and 1964,[1] which granted licenses for these projects, insofar as they specified 1941 and 1949 effective dates for the licenses granted.

Each of the licenses issued by the Commission to petitioner contains the usual provisions requiring that the licensee pay annual charges under Section 10(e) of the Federal Power Act for the purpose of reimbursing the United States for costs of administration, and requiring that it establish amortization reserves under Section 10(d) from excess profits earned after the project has been in operation for twenty years.[2]

* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

1. The orders may be found at 29 FPC 1290; 31 FPC 1549; 32 FPC 125, 1404. The petition for review is under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l* (1964).

2. Section 10 of the Act is codified at 16 U.S.C. § 803 (1964). Section 10(d) provides:

> "That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license."

Section 10(e) provides in pertinent part:

> "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the

Petitioner's complaint is that those provisions should not have been made effective retroactively, as of a date prior to the issuance of the order. The significance of the provision for amortization reserves appears from the provisions of Section 10(d) and Sections 14 and 16: The Commission may in its discretion apply these amortization reserves to reduce the net investment in the project; the net investment, not to exceed the fair value, plus severance damages, is the amount for which the project upon expiration of its license may be taken over by the United States or transferred to a new licensee.

I

The pertinent statutory and administrative background begins with the Federal Water Power Act of 1920[3]—which reflected "a major change of national policy" and the Congressional intention to go beyond a mere prohibition of obstructions to navigation and achieve instead "a comprehensive development of national resources."[4] The basic provisions of Sections 10, 14 and 15 were in the 1920 act. But the 1920 act reflected deficiencies in administration and implementation. In 1930 the Federal Power Commission, previously a committee of cabinet officers, was reorganized as an independent commission.[5] In the Public Utility Act of 1935[6] Congress amended the 1920 law and made it Part I of the Federal Power Act. Section 23(b), as amended in 1935 (16 U.S.C. § 817), expressly makes it unlawful not only to construct but also to operate or maintain any project works in any navigable water of the United States without a license issued under the Act or a valid permit issued prior to adoption of the 1920 act. The law also makes clear that after 1935 no project could lawfully be constructed in non-navigable waters over which Congress has jurisdiction without the filing of a declaration of intention with the Commission and its determination that such construction would not affect the interests of interstate or foreign commerce. The courts have made clear that since the use of the flow of a navigable stream reflects a revocable license not tantamount to a "vested right," the license provisions of the Act governing electric power projects are a regulation of commerce that must be accepted by one maintaining a project in a stream now held navigable even though the project was constructed at a time when the river was not considered a navigable waterway.[7]

Notwithstanding the statutory requirements, many hydro-electric projects have been operated, and many constructed, without the requisite authorization. Petitioner did not file applications for licenses for these projects until 1962. Yet the first three projects, built before 1935, were in reaches of the Sacandaga River (Project 2318) and Raquette River (Projects 2320 and 2330) that the Commission had in 1949 determined to be navigable waters.[8] And in 1941 it constructed Project 2424 on the Erie Canal, which is part of the New York State Barge Canal System, without any declaration or application for authorization

> Commission for the purpose of reimbursing the United States for the costs of the administration * * * and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require * * *."

3. Act of June 10, 1920, 41 Stat. 1063.

4. First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 180–181, 66 S.Ct. 906, 919, 90 L.Ed. 1143 (1946).

5. Act of June 23, 1930, 46 Stat. 797.

6. Act of August 26, 1935, 49 Stat. 838.

7. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 424–429, 61 S.Ct. 291, 85 L.Ed. 243 (1940); Pennsylvania Water & Power Co. v. FPC, 74 App.D.C. 351, 357–359, 123 F.2d 155, 161–163 (1941), cert. denied, 315 U.S. 806, 62 S. Ct. 640, 86 L.Ed. 1205 (1942).

8. New York Power and Light Corp., 8 FPC 231; Central New York Power Corp., 8 FPC 390.

although it was in 1903 that the Supreme Court had found the Erie Canal to be a navigable water of the United States.[9]

The Commission's orders assigned 1949 effective dates and a 1993 termination date for the licenses governing the first three projects. The 1964 order granting a license for Project 2424 assigned an effective date of July 1, 1941 and a termination date of June 30, 1991. The Commission granted the rehearing sought by petitioner and adhered to these dates.[10]

Petitioner does not complain to us of the termination dates of the licenses,[11] but contends that the Commission had no authority whatever to set effective dates prior to issuance dates of the licenses. It does not argue in the alternative that if the Commission had this power it acted unreasonably or abused its discretion. Even so we think it helpful to retrace the path of the Commission's exercise of the power it considered within the ambit of its authority.

The various licensing orders set forth that the effective dates had been established in accordance with the Commission's so-called *Androscoggin*[12] decision, and we begin by reviewing at some length the principles there laid down. That case involved a project constructed before 1935, although the dam was rebuilt in 1958. The Company applied for a license in 1960 after the Commission, in another proceeding, found that the Androscoggin River was a navigable water of the United States on the basis of its use for transportation of logs. In the *Androscoggin* opinion, discussing a compliance problem that had "perplexed the Commission for many years," the Commission identified three principal factors to be taken into account.

(1) The licensee should not reap a windfall from the delay in filing. "To the extent feasible, it is the burden of a sound licensing policy to minimize such inequities." (27 FPC at 833).

(2) The Commission's past failure, for want of funds or manpower, to enforce general compliance and the large number of projects that had operated without a license since 1935 indicated the need for a discriminating approach in order to cope with the compliance problem.

(3) In regard to termination date the Commission took realistic account of the significance of certain 1943 decisions[13] holding navigable a stream usable for log transport, and thus giving notice of the perils of further unlicensed operation to the owner of a project in such a stream. And so the Commission fixed December 3, 1993—fifty years after that 1943 notice—as the termination date of the Androscoggin license.

As to effective date, the Commission rejected use of date of issuance since this would encourage delay in filing the license applications which the law requires. But the Commission decided not to use as an effective date the earliest

9. The Robert W. Parsons, 191 U.S. 17, 28, 24 S.Ct. 8, 48 L.Ed. 73.

10. After petitioner accepted the licenses for the three earlier projects—it has not yet accepted the license tendered for Project 2424—the Commission issued statements of annual charges, totaling $174,259 for administrative costs for these projects from the 1949 effective dates through 1963. After granting petitioner's application for rehearing of these statements and the order issuing the license for Project 2424, the Commission held that the annual charges had properly been assessed from the effective dates stated in the licenses, and that the amortization reserve provisions had likewise been properly related back to the stated effective dates.

11. It may be noted that Section 6 of the Act provides that licenses are to be issued for not more than fifty years. 16 U.S.C. § 799 (1964).

12. Public Serv. Co. of New Hampshire, 27 FPC 830 (1962).

13. City of Spooner, Wisconsin, 3 FPC 986; Wisconsin Michigan Power Co., 3 FPC 449; Wisconsin Pub.Serv. Corp., 3 FCP 495.

date it felt it could justify.[14] It did not even select the 1943 date of the decisions on navigability—used as a reference point for setting the termination date—though this treatment "would be a legitimate exercise of our discretion." Instead the Commission announced a general policy for future cases of tendering licenses effective April 1, 1962, the month of the *Androscoggin* decision, for cases that do not involve a prior finding of navigability on the particular river, an unauthorized construction after 1935, or other unusual circumstances (*e. g.*, expenses due to applicant's recalcitrance). However, it believed a stricter policy was required for the Androscoggin case because there was a flagrant breach of statutory duty in 1958 when applicant failed to apply for a license even after the Commission's determination of jurisdiction over the *Androscoggin* River. It stated that it had avoided a date prior to 1958, lest this deter potential applicants from coming forward to comply with the statute, but might reconsider if experience shows that voluntary cooperation is not forthcoming in any event.

In selecting effective dates for petitioner's four projects, the Commission used a 1949 date for the pre-1935 projects which were constructed at a time when it might have been reasonably assumed that no license was required for construction on rivers like the Sacandaga and Raquette. Although the 1943 decisions on the logging criterion were notice of an obligation to file for a license, the Commission used the 1949 date of the decisions on the navigability of the particular rivers.

Project 2424 was governed by the stricter standard that *Androscoggin* warned was applicable to post-1935 construction begun without filing either a license application or declaration of intention, notwithstanding the express requirements of Section 23(b) of the Act. The Commission used the 1941 date on which Project 2424 was constructed, since the Erie Canal had long ago been determined to be a navigable water.

II

[1] We conclude that the Commission does have statutory authority to assign an effective date earlier than the date of the issuance of the license when the project involved was one constructed or maintained without a license in violation of applicable law. We are in accord with the results of the decisions of the First Circuit. Central Maine Power Co. v. FPC, 345 F.2d 875 (1st Cir. 1965); Bangor Hydro-Electric Co. v. FPC, 355 F.2d 13 (1st Cir. 1966).

Petitioner relies on three contentions: that in the absence of clear expressions to the contrary, legislation must be construed to avoid retrospective application;[15] that the retroactive ascertainment of administrative charges is a penalty not specifically authorized by statute, and the legislature was careful to specify the particular instances in which a penalty might be collected for a default;[16] and that the Commission ex-

14. See 27 FPC at 833, stating that the license could have been made effective as of 1935 (or even earlier). "We are persuaded, however, to allow for the fact that the concept of navigability has evolved only gradually and did not attain its present dimensions until 1943."

15. Union Pac. R. R. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S.Ct. 101, 58 L.Ed. 179 (1913); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164, 65 S.Ct. 172, 89 L.Ed. 139 (1944); Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U.S. 370, 389, 52 S. Ct. 183, 76 L.Ed. 348 (1932).

16. See Section 13, 16 U.S.C. § 806 (1964), for failure to complete project construction; Section 17(b), 16 U.S.C. § 810 (1964), for delinquency in payment of annual charges; Sections 18, 16 U.S.C. § 811 (1964), and 316(b), 16 U.S.C. § 825o (1964), for willful violation of rules and regulations of Secretary of the Army; Section 307(c), 16 U.S.C. 825f (1964), for willful failure to testify or produce documents; Section 314(a), 16 U.S.C. § 825m (1964), for willful violation of the Act, rules, regulations, or orders; Section 315(a), 16 U.S.C. § 825n (1964), for willful failure to comply with orders,

ceeded its authority in arrogating to itself the power of an equity court, here deciding the matter on the equity principle of regarding as done that which should have been done, rather than adhering to its legislative character.

[2, 3] The case presents no question of Congressional power, but only a question of construction of the scope of administrative discretion entrusted to respondent Commission under the Act. The Commission's authority to establish effective dates of licenses earlier than the date of issuance, while not expressly set forth in the Act, is fairly implied, assuming reasonable exercise of the authority. The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.

[4] In support of this conclusion we note first the familiar provision, contained in this Act as Section 309, authorizing the Commission "to perform any and all acts, and to prescribe * * * such orders * * * as it may find necessary or appropriate to carry out the provisions of [the Act]."[17] While such "necessary or appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.[18]

Second we stress the undeniable significance, in showing latitude accorded to the Commission, of the statutory provisions authorizing the Commission to issue licenses on conditions. Section 6 of the Act makes licenses subject not only to the conditions written into the Act by Congress, but also such additional conditions as may be required by the Commission. Section 10(g) specifically authorizes the Commission to attach such "conditions not inconsistent with the provisions of this Act as the commission may require."

[5] The statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest. We are mindful of the liberal interpretation the Supreme Court has given similar provisions in other statutes as reflecting a broad authority, and in appropriate cases a correlative duty, to effectuate the public interest.[19]

rules, or regulations, or to respond to a subpoena or make an appearance, or to submit information or documents in the course of investigations; and Section 316 (b), 16 U.S.C. § 825o (1964), for willful violations of rules, regulations, restrictions, conditions, or orders of the Commission.

17. 16 U.S.C. § 825h (1964).

18. *See, e. g.*, Public Serv. Comm'n of State of New York v. FPC, 117 U.S.App.D.C. 195, 198–199, 327 F.2d 893, 896–897 (1964). *See generally*, United States v. Storer Broadcasting Co., 351 U.S. 192, 203, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); American Airlines, Inc. v. CAB, 123 U.S. App.D.C. 310, 313–314, 359 F.2d 624, 627–628 (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966).

In sharp contrast are limited statutory provisions like those considered in Blair v. Freeman, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966).

19. *See, e. g.*, Atlantic Ref. Co. v. Public Serv. Comm'n of New York ("CATCO case"), 360 U.S. 378, 391–392, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959).

Compare United States v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S.Ct.

As for the Act here involved, we agree with the observation of the Third Circuit, that Congress intended by Section 10(g) "to give to the Commission wide latitude and discretion in the performance of its licensing and regulatory functions." Metropolitan Edison Co. v. FPC, 169 F.2d 719, 723 (3d Cir. 1948).

[6] Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.[20] This source of discretion is available not only where an agency has the explicit power to impose penalties (see cases cited note 20), but also where the agency's order, though having aspects of determination of individual fault, is a denial to a wrongdoer of participation in a Government program generally extended to businessmen, for the purpose of maintaining the fairness, equity and efficiency of the program.[21] Here the case is stronger, for petitioner seeks a license or privilege. While that license may not be unreasonably or unlawfully withheld, it certainly need not be extended to an applicant not ready to redress his default by discharging the duty he should by rights have assumed without nudging.

By these standards the actions under review, being reasonable, are within respondent's authority. The effective date used by the Commission to measure the extent of petitioner's obligation under its license reflects an effective date of default that gives petitioner the benefit of any doubt. We have already discussed the Commission's policies in selecting effective dates earlier than the license issuance date. The Commission has made a reasonable effort to use a discriminating approach in order to avoid invidious discrimination. That is, the Commission's selection of effective dates takes account of narrow differences in situations in order to avoid a gross approach that would favor wrongdoers. While perfection in this effort may be unattainable, as petitioner suggests, nothing presented to us bears a taint of unreasonableness.

This reasonable exercise of administrative authority is not to be gainsaid by maxims that are good enough as generalities but do not undercut the kind of actions under review. Thus, an agency's authority to impose penalties may not be lightly inferred, but the term "penalty" is hardly appropriate for a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law, and is not made collectible in any

291, 85 L.Ed. 243 (1940); Michigan Consol. Gas Co. v. FPC, 108 U.S.App.D.C. 409, 283 F.2d 204, cert. denied *sub nom.*, Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227 (1960); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied *sub nom.*, Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966).

20. Consolo v. FMC, 383 U.S. 607, 620–621, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215–217, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); FCC v. WOKO, Inc., 329 U.S. 223, 227–228, 67 S.Ct. 213, 91 L.Ed. 204 (1946); Philadelphia Television Broadcasting Co. v. FCC, 123 U.S. App.D.C. 298, 359 F.2d 282 (1966).

21. L. P. Steuart & Bro., Inc. v. Bowles, 322 U.S. 398, 406, 64 S.Ct. 1097, 88 L.Ed. 1350 (1944); Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 186–187, 334 F.2d 570, 576–577 (1964).

event but only as an obligation to accompany the privilege of continuing to utilize a river subject to the jurisdiction of Congress. In general retrospective applications of law are not lightly inferred, but here the agency's actions were a reasonable exercise of its implied authority.

[7–9] Certainly we reject petitioner's argument that reversal is required because the agency arrogated to itself the powers of a court in equity. It is indeed a "familiar principle of equity * * * to regard as being done that which should have been done." [22] But the Commission did not suppose it had a broad equity charter. At most it referred to this principle as showing that its course was reasonable. The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice.[23] Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.[24]

The Commission's actions were rooted in a reasonable effort to combine a sense of justice with practical common sense. Courts are loath to say that good sense is not good law.

Affirmed.

22. Central Maine Power Co. v. FPC, 345 F.2d 875, 876 (1st Cir. 1965).

23. United States v. Morgan, 307 U.S. 183, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211 (1939): "Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice." *See also* Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 16–18 (1936).

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION AND LOCAL UNION NO. 245, ABC, AFL–CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Guy's Foods, Inc., Intervenor.

GUY'S FOODS, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Nos. 20189, 20347.

United States Court of Appeals
District of Columbia Circuit.

Argued Feb. 27, 1967.

Decided May 18, 1967.

On petitions to review and on cross petition to enforce an order of the National Labor Relations Board. The Court of Appeals, Fahy, Circuit Judge, held that National Labor Relations Board order requiring company to withdraw and withhold recognition from labor association as representative of its employees unless and until certified by board was not an abuse of discretion where company had assisted association as to representative election with rival union.

Petitions denied and order enforced.

1. Labor Relations ⇐567

Findings that company, in face of organizing efforts of labor union, committed unfair labor practices were supported by substantial evidence, including evidence of company efforts to aid a rival

24. *See* note 23, *supra;* Braniff Airways, Inc., v. CAB, —— U.S.App.D.C. ——, 379 F.2d 453 (No. 20160, Apr. 12, 1967); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION vii (1965) (central thesis that "courts and agencies are in a *partnership* of lawmaking and law applying"); NLRB v. Warren Co., 350 U.S. 107, 112, 76 S.Ct. 185, 100 L.Ed. 96 (1955).

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June 8, 1982

Ms. Angela Albarez, C.S.R.
Albuquerque Deposition Service
122 Broadway Boulevard, S.E.
Albuquerque, New Mexico 87102

Re: Consolidated Cause No. 81-176, in the District Court of Taos County, New Mexico, Robert Casados, et al., Plaintiffs, v. Oil Conservation Commission, et al., Defendants, and Alex J. Armijo, Commissioner of Public Lands, Intervenor.

Dear Ms. Albarez:

On May 17, 1982, Mr. Ernest L. Carroll wrote you concerning preparation of the transcript in the above-referenced case excluding certain argument commencing on Page 4 and continuing to Page 70 of the transcript. On this date, the defendants and the intervenor, through their respective counsel, have mailed to the Court a Designation of Additional Parts of Record Proper which includes the entire transcript of proceedings of the December 7, 1981 hearing.

Enclosed please find the copy of Appellee's Request for Preparation of Transcript of Proceedings and a check made payable to you from Campbell, Byrd & Black. Please complete this check in the amount of your cost of preparing the transcript. A bill marked "Paid" by Defendants-Appellees should be submitted with the transcript to the Court. Also enclosed is the certificate for your signature certifying that satisfactory arrangements have been made for payment of the cost of this transcript. Please execute the certificate and return it to me for filing with the Court.

If you have any questions, please advise.

Very truly yours,

William F. Carr

WFC:kb
enclosures
cc: Ernest L. Carroll
W. Perry Pearce
W. Thomas Kellahin
J. Scott Hall

STATE OF NEW MEXICO COUNTY OF TAOS

IN THE DISTRICT COURT

ROBERT E. CASADOS, et al.,

Plaintiff,

v.

Consolidated Cause No. 81-176.

OIL CONSERVATION COMMISSION, et al.,

Defendants,

ALEX J. ARMIJO, Commissioner of Public Lands,

Intervenor.

DESIGNATION OF ADDITIONAL PARTS OF RECORD PROPER

To: Delores G. Gonzales,
Clerk of the District Court:

Appellants designate the following to be included in the record proper:

1. The transcript on appeal filed by the Oil Conservation Commission on July 28, 1981, together with the instruments referred to therein including the following:

a. Certified copy of Affidavits of Publication for Oil Conservation Commission Case No. 6967;

b. Exhibits 1 through 11, introduced by Amoco Production Company at July 21, 1980 hearing;

c. Exhibits marked "B" and "C" introduced by Protestants at July 21, 1980 hearing;

d. Certified copy of Affidavits of Publication for Rehearing of Oil Conservation Commission Case No. 6967;

e. Exhibits Nos. RH-1 through RH-9 and Exhibit 11A, introduced by Amoco Production Company at October 8, 1980 hearing;

f. Exhibits Nos. 1 through 3, introduced by Cities Service Company at October 9, 1980 hearing.

2. This Designation of Additional Parts of Record Proper.

3. The Transcript of Proceedings ordered by Appellees.

W. Perry Pearce, Esquire
New Mexico Oil Conservation Division
P. O. Box 2088
Santa Fe, New Mexico 87501

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ATTORNEY FOR ALEX J. ARMIJO,
COMMISSIONER OF PUBLIC LANDS

ATTORNEYS FOR DEFENDANTS-APPELLEES.

Certificate of Service

I hereby certify that true and correct copies of the foregoing pleading were mailed to Ernest L. Carroll, Post Office Box 511, Midland, Texas 79702, attorney for Plaintiffs-Appellants this 8th day of June, 1982.

William F. Carr

William F. Carr

JUN 09 1982

STATE OF NEW MEXICO COUNTY OF TAOS

IN THE DISTRICT COURT

ROBERT E. CASADOS, et al.,

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OIL CONSERVATION COMMISSION,
et al.,

Defendants,

ALEX J. ARMIJO, Commissioner
of Public Lands,

Intervenor.

APPELLEE'S REQUEST FOR PREPARATION
OF TRANSCRIPT OF PROCEEDINGS

To: Angela M. Albarez,
CSR, Court Reporter

Please prepare a transcript of proceedings for the appeal of this case consisting of the entire transcript of proceedings before the court.

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William F. Carr

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October 15, 1982

Rosemarie Alderete, Clerk
New Mexico Supreme Court
Post Office Box 848
Supreme Court Building
Santa Fe, New Mexico 87501

Re: Robert Casados, et al. v. Oil Conservation Commission, et al.; Supreme Court of New Mexico Cause No. 14,539

Dear Ms. Alderete:

Enclosed herewith for filing is an original and three copies of Defendant Amoco Production Company's Motion to Strike Issues on Appeal and supporting Memorandum Brief.

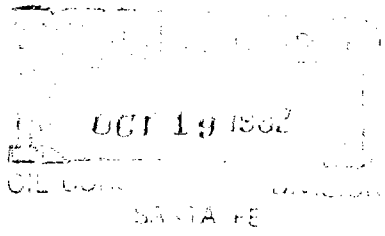
Very truly yours,

William F. Carr

WFC:rr
Enclosures

IN THE SUPREME COURT

STATE OF NEW MEXICO



ROBERT CASADOS, et al.,

Plaintiffs-Appellants,

vs.

OIL CONSERVATION COMMISSION, et al.,

Defendants-Appellees,

Cause No. 14, 359

and

ALEX J. ARMIJO, COMMISSION OF PUBLIC LANDS,

Intervenor-Appellee.

MOTION TO STRIKE ISSUES ON APPEAL

Defendant-Appellee, Amoco Production Company, moves the Court for an Order striking certain issues raised by Plaintiffs-Appellants, in their Brief in Chief, and in support of this Motion states:

1. This case involves an appeal of a decision of the New Mexico Oil Conservation Commission.

2. The procedures to be followed in taking this appeal are strictly defined by New Mexico Statute.

3. Section 72-2-25B N.M.S.A. (1978 Comp.) provides that the issues on appeal of an Oil Conservation Commission decision are limited to questions presented to the Commission in an application for rehearing.

4. The only issues presented to the Commission by Plaintiffs in an application for rehearing are:

a. whether there was substantial evidence to support the Commission's findings on waste and correlative rights,

b. whether the findings of the Commission are adequate to disclose the reasoning of the Commission on the issues of waste prevention and protection of correlative rights, and

c. whether, without additional data, the decision of the Commission is arbitrary and capricious.

5. Plaintiffs-Appellants have raised certain additional issues for the first time in their Brief in Chief, which issues were not presented to the Oil Conservation Commission in an application for rehearing.

6. Plaintiffs-Appellants failed to exhaust their administrative remedies as to the new issues raised in their Brief in Chief.

7. The Court lacks jurisdiction to decide the new issues presented in Plaintiff-Appellants' Brief in Chief.

8. These issues should be stricken from the appeal.

9. This motion substantially affects the disposition of this case.

Respectfully submitted;

CAMPBELL, BYRD & BLACK, P.A.

By: William F. Carr

William F. Carr
Post Office Box 2208
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421

ATTORNEYS FOR DEFENDANT-APPELLEE, AMOCO PRODUCTION COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 1982, I caused a true copy of the foregoing pleading to be mailed to Ernest L. Carroll and William Monroe Kerr, Kerr, Fitz-Gerald & Kerr, P.O. Drawer 511, Midland, Texas 79702, attorneys of record for Plaintiffs-Appellants.

William F. Carr

IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, et al.,

Plaintiffs-Appellants

vs.

OIL CONSERVATION COMMISSION, et al.,

Defendants-Appellees, No. 14,359

and

ALEX J. ARMIJO, COMMISSIONER OF PUBLIC LANDS,

Intervenor-Appellee.

BRIEF IN SUPPORT OF DEFENDANT-APPELLEE'S MOTION TO STRIKE ISSUES ON APPEAL

Defendant-Appellee, Amoco Production Company (hereinafter referred to as Amoco) moves the Court for an order striking certain issues raised by Plaintiffs-Appellants (hereinafter referred to as Plaintiffs) in their Brief in Chief on the grounds that Plaintiffs failed to properly raise these issues before the New Mexico Oil Conservation Commission and thereby failed to exhaust their administrative remedies. This failure to exhaust administrative remedies leaves the Supreme Court without jurisdiction to decide the questions being asserted by

Plaintiffs for the first time before the New Mexico Supreme Court. Pubco Petroleum Corporation vs. Oil Conservation Commission, 75 N.M. 36, 399 P.2d 932, 933 (1965).

Amoco made application for approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement to the New Mexico Oil Conservation Commission (hereinafter referred to as Commission) on May 28, 1980. A public hearing was held on this application on July 21, 1980 and on August 14, 1980 the Commission entered Order No. R-6446 approving the Unit Agreement (TR.8-15). On September 2, 1980, pursuant to Section 70-2-25A N.M.S.A. (1978 Comp.), Plaintiffs filed an Application for Rehearing (TR.16-31) and on January 23, 1981, after rehearing, the Commission entered Order No. R-6446-B which again approved the Unit Agreement (TR.34-45). Plaintiffs then filed Petitions to Appeal from Orders No. R-6446 and No. R-6446-B in the District Courts of Harding, Quay and Union Counties, New Mexico (TR.1). These petitions were consolidated for hearing before the District Court of Taos County (TR.166-173) and on May 6, 1982 the District Court affirmed the Oil Conservation Commission orders approving the Bravo Dome Carbon Dioxide Gas Unit Agreement.

The legislature has strictly limited the scope of review of an Oil Conservation Commission decision. Section 70-2-25A N.M.S.A. (1978 Comp.) sets out the procedures required for filing an application for rehearing. It reads:

A. Within twenty days after entry of any order or decision of the Commission, any party of record adversely affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The Commission shall grant or refuse any such application in whole or in part within ten days after the same is filed, and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the Commission may enter such new order or decision after rehearing as may be required under the circumstances. (emphasis added)

Section 70-2-25B provides that a party may appeal a decision on rehearing, or the Commission's refusal to rehear a case, to the district court of the county wherein any property affected by the action is located. This section provides in part:

B. Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision by filing a petition for review of the action of the Commission within twenty days after the entry of the order following rehearing or after the refusal or [of] rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the Commission and shall set forth the order or decision of the Commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the Commission by the application for rehearing. (emphasis added)

Section 70-2-25B further provides for a second appeal:

> Appeals may be taken from a judgment or decision of the District Court to the Supreme Court in the same manner as provided for appeals from any other final judgment entered by District Court in this state. The trial of such application for relief

> from action of the Commission in the hearing of any appeal to the Supreme Court from the action of the District Court shall be expedited to the fullest possible extent.

The New Mexico Supreme Court in Pubco Petroleum Corporation vs. Oil Conservation Commission, construed Section 65-3-22, N.M.S.A. (1953 Comp.), which is the predecessor to Section 70-2-25 N.M.S.A. (1978 Comp.) and in all relevant respects is identical to it. In Pubco, Consolidated Oil & Gas, Inc. had filed an application with the Commission seeking changes in an existing proration formula. Following denial of this application, Consolidated timely applied for and was granted a rehearing on their application. On rehearing, the Commission entered its order amending the proration formula. Pubco had not filed for a rehearing following entry of the order entered after rehearing but instead filed a petition in the District Court of San Juan County for review of the Commission's order entered on rehearing, asserting the invalidity of that order "for various and sundry reasons". 399 P.2d at 933.

Pubco's petition for review was opposed by the Commission and by Consolidated on the grounds that Pubco had failed to exhaust its administrative remedies by not applying for a rehearing of the second Commission Order. The petition for review was dismissed by the District Court and Pubco appealed this decision to the Supreme Court. In upholding the District Court's dismissal of the petition for review, the Supreme Court stated: "Subsection (a) specifically required the filing of an application for rehearing setting forth the claimed invalidity of the order

entered by the Commission. Its purpose is to afford the Commission an opportunity to reconsider and correct an erroneous decision." (emphasis added) 399 P.2d at 933. Because Pubco failed to apply for rehearing before the Commission, the Supreme Court reached "the conclusion that appellant [Pubco] has failed to exhaust its statutory administrative remedies." 399 P.2d at 933. It therefore concluded that as a result of this failure to exhaust administrative remedies, the trial court was without jurisdiction to review the order. The decision in Pubco stands for the principle that a party to a Commission proceeding must give the Commission an opportunity to reconsider and correct any error it may have made by filing an application for rehearing which sets forth the respect in which any order or decision of the Commission is believed to be erroneous. Until an alleged error is so presented to the Commission through an application for rehearing, administrative remedies have not been exhausted and the question cannot be reviewed by the courts.

The case before the Court is different from Pubco for here the Plaintiffs applied to the Commission for rehearing after entry of Commission Order No. R-6446. The issues raised in that application were reviewed by the Commission, and the Commission thereby had the opportunity to reconsider and correct the alleged errors in Order No. R-6446.

Following the rehearing the Commission entered Order R-6446-B which contained new and more elaborate findings which had been requested by Plaintiffs in their Application for

Rehearing (TR.16-31). Plaintiffs did not file a new application for rehearing challenging any new matter arising from Order No. R-6446-B but, instead, appealed the Commission's action to the District Courts. Plaintiffs pursued this course of action instead of following Section 70-2-25A which provides for the filing of an application for rehearing after entry of any Commission order. Plaintiffs therefore failed to provide the Commission with the opportunity to correct an allegedly erroneous decision and, as noted in Pubco, thereby failed to exhaust their administrative remedies as to any issue other than those raised in the application for rehearing filed following entry of Order R-6446.

The questions (issues) presented to the Commission in Plaintiffs' application for rehearing are, therefore, the only ones that may be reviewed on appeal for this court lacks jurisdiction to decide any other matters. The application for rehearing attacked Order No. R-6446 on the following grounds: (1) the "scant evidence" did not substantiate the findings and conclusions sought and the Commission failed to make factual findings "sufficiently extensive to show the basis for the Commission's August 14, 1979 Order"; (2) additional findings concerning prevention of waste must be made; (3) additional findings concerning protection of correlative rights are necessary; (4) the record presented no evidence that the correlative rights of the owners of interests in production were

protected under the proposed agreement; (5) the data is insufficient to draw any affirmative conclusions or predict that the "proposed unit and its plan will in any ways serve the cause of conservation, the public interest, the prevention of waste or the protection of correlative rights"; (6) a prediction of a useful anticipated economic life of the field or fields is impossible; (7) more facts are necessary; (8) the application for approval of this unit is premature; and (9) unless more facts are developed, the Oil Conservation Commission's decision that the unit will prevent waste and will protect correlative rights is arbitrary and capricious (TR.16-31). Simply stated, Plaintiffs only challenged the Commission's order on the grounds that there was not substantial evidence to support its findings on waste and correlative rights; that the findings were inadequate to disclose the Commission's reasoning and that without additional data the decision of the Commission was arbitrary and capricious.

These are the only issues which were presented to the Commission in the application for rehearing, and under Section 70-2-25B and Pubco Petroleum Corp. vs. Oil Conservation Commission, these are the only issues on appeal to the District Court and Supreme Court. In fact, in their Petition to Appeal from Order No. R-6446 and Order R-6446-B of the Oil Conservation Commission to the District Court the Plaintiffs properly limited the issues on appeal to correlative rights and waste--issues the Plaintiffs raised in their Application for Rehearing. Paragraphs 6 and 7 of the Petition to Appeal state the Plaintiffs' contentions on appeal to the District Court as follows:

6. Commission Order No. R-6446 and Order No. R-6446-B are both invalid and should be set aside by the Court because the record as made before the Commission is devoid of substanital evidence to support findings and conclusions that:

A. Unitization at this time or in the foreseeable future under the Unit Agreement will prevent waste cognizable by the Commission;

B. Unitization under the Unit Agreement will protect the correlative rights of either the Plaintiffs or others who own fee interests in oil, gas and other minerals which may have become committed to the unit.

7. Commission Order No. R-6446 and Order No. R-6446-B are both invalid and should be set aside by the Court because the Commission did not difine or establish or set forth the extent that waste, as prohibited in the Oil and Gas Act, gas [sic] occured, is occurring presently, or is likely to occur in the future. With respect to correlative rights, no attempt has been made to define correlative rights beyond stating all persons interested will be treated the same, a concept which is not contained within the definition of correlative rights contained in Section 70-2-33 (h) N.M.S.A. 1978. (TR.4-5)

In their appeal to this Court, Plaintiff's summarized argument is:

> The Commission's Order should be set aside on several grounds. Neither the State of New Mexico nor the Commission has the power and ability the Commission claims for itself to compel drilling and producing in re-writing the contract. Since the basic premise of the Commission's Order is that it does have such power, the Order itself should be set aside. Neither is a preliminary agreement nor a preliminary contract tantamount to approval. There is a defect in notice to interested parties. Further the Commission lacks tools with which to properly exercise the powers it has reserved unto itself. (Brief-in-Chief, p. 12-13)

These issues were not raised in an application for rehearing.

Conclusion

Amoco submits that Plaintiffs, having failed to file an application for rehearing after entry of Order No. R-6446-B, failed to exhaust their administrative remedies as to any issue arising from that order. The only issues properly before the Court for determination, therefore, are those presented to the Commission by the application for rehearing filed by Plaintiffs following entry of Commission Order No. R-6446. All other issues should be stricken from this appeal.

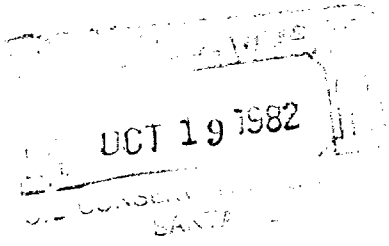
Respectfully submitted,

CAMPBELL, BYRD & BLACK, P.A.

By _____
William F. Carr

P. O. Box 2208
Santa Fe, New Mexico 87501
Phone: (505) 988-4421

ATTORNEYS FOR DEFENDANT-APPELLEE,
AMOCO PRODUCTION COMPANY



CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of october, 1982, I caused a true copy of the foregoing pleading to be mailed to Ernest L. Carroll and William Monroe Kerr, Fitz-Gerald and Kerr, P. O. Drawer 511, Midland, Texas 79702, attorneys of record for Plaintiffs-appellents.

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William F. Carr

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To: Angela M. Alvarez,
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