FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,	§	
Appellants,	§	CV 97-159G
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Appellees.	§	

JUDGMENT

THIS MATTER CAME BEFORE THE COURT on the Plaintiffs' Petition For Review of The New Mexico Oil Conservation Commission's decision in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A, pursuant to NMSA 1978, §70-2-25 (1995). Having reviewed the record of the proceedings before the New Mexico Oil Conservation Commission and the evidence presented in those proceedings on file herein, the

pleadings and briefs of the parties filed herein, and the arguments of counsel, and having considered the applicable law, the Court has previously entered and filed the Court's Decision setting forth it findings and conclusion. Based on the Court's Decision, this Judgment is entered in favor of the Defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that The New Mexico Oil Conservation Commission's Order No. R-10672-A in Case No. 11510 is, in all respects, affirmed.

Dated this _____ day of December, 1999.

R. W. Gallini

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED AND APPROVED BY:

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MITCHELL\JUDGMENT-FIN

FIFTH JUDICIAL DISTRICT
LEA COUNTY, NEW MEXICO

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DISTRICT COURT CLERK

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., A New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, A Utah general partnership,

Plaintiffs,

vs. **NO. CV-97-159-G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

COURT'S DECISION

THIS MATTER HAVING COME BEFORE THE COURT on Plaintiffs' petition for review of The New Mexico Oil Conservation Commission's decisions in Order No. R-9845 in Case No. 10656, Order No. R-10672 in Case No. 11510 and Order No. R-10672-A. This review was conducted pursuant to NMSA 1978, §70-2-25 (1995 Repl.). This Court entered its Order Establishing Briefing Schedule on September 24, 1997 and all parties complied with the Court's Order. Oral argument was presented to the Court on May 4, 1998 and the Court took its decision

under advisement in order to study the briefs, review the applicable law and oral argument presented by counsel.

The Court having studied all briefs, the applicable law, and considering oral argument of counsel is now prepared to render its decision in this matter. Section 70-2-25 NMSA 1978 refers the Court to §39-3-1.1D NMSA 1978, which provides: "In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:

(1) the agency acted fraudulently, arbitrarily, or capriciously;

(2) the final decision was not supported by substantial evidence; or

(3) the agency did not act in accordance with law.

PLAINTIFFS' CLAIMS:

The main issue in this case is that the Plaintiffs claim they were working interest and/or overriding royalty interest owners in the S/2 SW/4 of Section 28, Township 20 South, Range 30 East, N.M.P.M., Lea County, New Mexico at the time that Defendant, Mitchell Energy Corporation, who was the operator of the Tomahawk "28" Federal Com No. 1 well, located at the 1980 FWL and 1650 FNL of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, filed its application with Defendant Oil Conservation Commission to pool all mineral interests from the top of the Wolf Camp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, T20S, R33E, N.M.P.M., Lea County, New Mexico, to form a standard 320-acre spacing within said vertical extent, which included but was not necessarily limited to the Undesignated Halfway-Atoka Gas Pool and the Undesignated Salt Lake-Morrow Gas Pool, said unit being dedicated to Mitchell's Tomahawk Well to be drilled at an unorthodox gas well location. Plaintiffs claim they were never

given notice of the filing of the case by Mitchell or the Commission as required by law. Plaintiffs claim they did not learn of the existence of the entry of Order No. R-9845 or the existence of Case No. 10656 until sometime in 1995. Plaintiffs further claim that because they were not notified of the proceedings in Case No. 10656 and the entry of the Order No. R-9845, they were unable to make an election as to whether to participate in the Tomahawk Well in the period allowed by law and regulations and under the time frame provided in the Order which had expired by the time they became aware of its existence. The Plaintiffs claim that this failure to be notified and respond subjected them to a 200% risk factor penalty set forth in the Compulsory Pooling Order R-9845. Plaintiffs claim they were denied due process of law. Therefore, the agency did not act in accordance with the law. Therefore, the decisions and orders of the Oil Conservation Commission should be set aside and found to be void, invalid and unenforceable as to Plaintiffs.

DEFENDANTS' CLAIMS:

Defendants claim that Strata Production Company appeared at the hearing in opposition to the granting of Defendant Mitchell's application and claimed that Mitchell had failed to provide notification to Strata's "undisclosed partners" and it was Mitchell's duty to request Strata to disclose the names and addresses and then to provide those parties with an opportunity to join or compulsory pool each party. Defendants further claim that at all times during negotiations and at the time the application was filed and notice was given, Strata was the record title owner of the mineral interests in question and held 100% of both record title and operating rights title, which included the so-called "undisclosed partners" whose interests, if any at the time, did not appear of record. Defendants further claim that on November 7, 1995, some six years after the Strata partners claimed to have acquired an interest in the subject lease, more than 31 months after the entry of the compulsory

pooling order in this case, and after Mitchell had drilled the well, Strata finally signed written instruments conveying interests to its undisclosed partners which were then recorded in Lea County on November 8, 1995. Defendants further claim that notice to Strata was notice to the "undisclosed partners," the Plaintiffs herein, and Strata was obligated to tell them about the application and the hearing. Defendants contend that the Commission in entering its orders and decisions did not act fraudulently, arbitrarily or capriciously; that the final decision of the Commission was supported by substantial evidence and that the Commission acted in accordance with law. Therefore, the Plaintiffs' appeal should be dismissed with prejudice.

STANDARD OF REVIEW:

In reviewing an administrative order, this Court must determine whether, based on the record as a whole, the Commission's order is substantially supported by the evidence and by the applicable law. In reviewing the whole record, the Court must view the evidence in a light most favorable to upholding the agency determination. The Court must uphold the agency decision if the evidence in the record demonstrates the reasonableness of the decision.

DECISION OF THE COURT:

As a matter of Law, this Court finds and concludes as follows:

1. The Commission correctly found that all proper parties to Mitchell's application received proper notice and participated in the hearings conducted by the Oil Conservation Commission.

2. Mitchell did not have actual notice of Plaintiffs' interests such that Plaintiffs can receive the benefit of the New Mexico Supreme Court's decision in ***Uhden v. New Mexico Oil Conservation Commission*** because (a) ***Uhden*** is not applicable to the facts of this case. (b) Defendant Mitchell did not have actual notice of any interest purportedly held by Plaintiffs.

3. Plaintiffs are bound by and took their interests in the lease subject to the interest of Strata Production Company.

4. Plaintiffs are estopped to deny the partnership with Strata, and are bound by the notice given to Strata.

5. Strata Production Company adequately represented the interests now held by the Plaintiffs at the hearings.

6. Plaintiffs cannot use the administrative process in order to seek risk-free benefits after they have determined the subject well reached its payout.

7. At all times material thereto, the Plaintiffs did not have a property interest that entitled them to notice by Mitchell or the Commission of the Application for compulsory pooling.

8. The plaintiffs had no written documentation of a real property interest that would entitle them to notice as required by law and the holding of the Supreme Court of New Mexico in the ***Uhden case***.

9. At all times material thereto, the plaintiffs were, if anything, investors in the Strata enterprise and notice to Strata was notice to them. It was Strata's responsibility to provide its investors with the information they needed to protect their investment.

10. There is no evidence in the record to indicate that the New Mexico Oil Conservation Commission('s):

(A) acted fraudulently, arbitrarily or capriciously in conducting the hearings and rendering its decisions in this case;

(B) final decision was not supported by substantial evidence; or

(C) did not act in accordance with law.

11. There is no evidence in the record to support Plaintiffs' contention that they were denied due process of law.

12. The Commission's Order No. R-10672-A in Case No. 11510 should be affirmed.

Counsel for the defendants shall prepare the judgment in accordance with this decision and present to counsel for plaintiffs for review and approval as to form. Upon entry of the Judgment this matter shall be remanded to the New Mexico Oil Conservation Commission for any further proceedings in connection with this matter.

R. W. Gallini

R. W. Gallini, District Judge

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO

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DISTRICT COURT CLERK

FIFTH JUDICIAL DISTRICT COURT
COUNTY LEA
STATE OF NEW MEXICO

BRANCO, INC., et al.,

Plaintiffs,

vs. **No. CV-97-159-G**

NEW MEXICO OIL CONSERVATION, et al.,

Defendants.

NOTICE OF HEARING

Oral Argument of the above matter will come on for hearing before the Honorable R. W. Gallini on **Monday, May 4, 1998** at 9:00 o'clock a.m. at the Lea County Courthouse, Lovington, New Mexico.

JANIE G. HERNANDEZ,
Clerk of the District Court

By: Rosalee Tisdale
ROSALEE TISDALE, Deputy

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record this 5th day of March, 1998.

Rosalee Tisdale

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FIFTH JUDICIAL DISTRICT COURT
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STATE OF NEW MEXICO

**BRANKO, INC., a New Mexico corporation,
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CHARLES I. WELLBORN, WINN INVESTMENTS, a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,**

Plaintiffs,

v. CV 97-159G

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION,

Defendants.

ANSWER BRIEF OF THE NEW MEXICO OIL CONSERVATION COMMISSION Defendants

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Appeal from the New Mexico Oil Conservation Commission

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NEW MEXICO CASES CITED

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SUMMARY OF PROCEEDINGS

The Plaintiffs' "Factual and Procedural Background" contains a combination of a summary of the proceedings, subjective comments and Plaintiffs' argument. Therefore, the Defendant New Mexico Oil Conservation Commission ("Commission") provides the following summary of proceedings:

1. On December 8, 1992, Mitchell Energy Corporation ("Mitchell") filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location ("1992 Application") with the Oil Conservation Division ("OCD") pursuant to NMSA 1978, § 70-2-17 (Repl.Pamp.1995). The OCD assigned Case No. 10656 to this matter.

2. On January 21, 1993, a hearing was held in Case No. 10656 before an OCD hearing examiner ("1993 Hearing"). Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company ("Strata") appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A. (1993 Hearing Tr. 5)

3. On February 15, 1993, the OCD Director entered Order No. R-9845 in Case No. 10656 which pooled certain mineral interests to form a proration unit to be dedicated to the Tomahawk "28" Federal Com Well No. 1. (R.P. 82-90)

4. By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, § 70-2-13 (Repl.Pamp.1995).

5. By fax on April 28, 1993, Strata withdrew its request for a *de novo* hearing of Case No. 10656. The Commission entered an order on April 29, 1993, dismissing the requested *de novo* hearing of Case No. 10656.

6. Almost three years after the entry of OCD Order R-9845, on January 29, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* ("Motion") in Case No. 10656 was faxed by Harold D. Stratton of Stratton & Cavin, P.A. to OCD on behalf of the Plaintiffs. (R.P. 01-75)

7. On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 ("Reply"). (R.P. 76-90)

8. On May 2, 1996, a hearing on the Motion was held by an OCD hearing examiner who assigned the case as Case No. 11510 ("1996 Hearing").

9. On October 2, 1996, the OCD Director entered Order No. R-10672 in Case No. 11510; the Order reopened Case No. 10656. (R.P. 165-171)

10. On October 30, 1996, Mitchell field a Request for a Hearing *De Novo* before the Commission of Case No. 11510, Order No. R-10672. (R.P. 177-195)

11. On January 16, 1997, the Commission held a *de novo* hearing of Case No. 11510. The parties stipulated to the introduction of the exhibits and transcripts from the 1993 Hearing and the 1996 Hearing. the parties offered no new evidence, but through their counsel, the parties presented argument to the Commission. (1997 Hearing Tr. 4-8).

12. On March 19, 1997, the Commission entered its order in Case No. 11510. The Commission's Order, Order No. R-10672-A, denied the Plaintiffs' Motion to Reopen Case No. 10656. (R.P. 251-259).

13. On April 7, 1997, the Plaintiffs filed an Application for Rehearing pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995). The application was deemed denied on April 17, 1997, pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995) as the Commission took no action on the

application. (R.P. 260-263).

14. On April 25, 1997, the Plaintiffs filed its Petition for Review of the Commission's Order with this Court pursuant to Rule 1-074 NMRA 1997 and NMSA 1978, § 70-2-25 (Repl.Pamp.1995).

SUMMARY OF FACTS

On December 8, 1992, Mitchell filed the 1992 Application for Compulsory Pooling and Unorthodox Gas Well Location with the OCD. On January 21, 1993, a hearing on the 1992 Application was held by an OCD hearing examiner. The 1992 Application was opposed by Strata Production Company ("Strata"). Strata appeared and presented evidence at the 1993 Hearing.

At the 1993 Hearing, Mark Murphy, the president of Strata, testified that Strata was the record title holder of the U. S. Oil and Gas Leases, at issue, on the date of the title opinion. (1993 Hearing Tr. 141) Murphy also testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease. (1993 Hearing Tr. 141) Mitchell's landman, Stephen J. Smith, also testified that the title opinion dated December 29, 1992 for Mitchell prepared by William B. Burford of the Hinkle, Cox Eaton, Coffield & Hensley law firm also indicated that ownership of the property interest in question was held by Strata. (1993 Hearing Tr. 27, 28)

Almost three years later on November 7, 1995, Murphy as president of Strata attempted to transfer a 1.5% overriding royalty interest in one of the leases, U. S. Oil and Gas Lease NM 82927, to three of the Plaintiffs. (Branko's Exhibit 17 from the 1996 Hearing, Exhibit B attached thereto) Also, on November 7, 1995, Murphy as president of Strata attempted to transfer 81.5% of the operating rights to U.S. Oil and Gas Lease NM 82927 to thirteen of the Plaintiffs.

(Branko's Exhibit 17 from the 1996 Hearing, Exhibit C attached thereto) In an affidavit executed on January 17, 1996, Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease [U.S. Oil and Gas Lease NM 82927] as indicated hereinabove at Paragraph 5, Strata retained all of the record title interest subject to the beneficial interest of the parties as described at Exhibit A hereto." (1996 Hearing, Branko's Exhibit 17) Exhibit B to this Affidavit on its first page contains the following statements by Murphy on behalf of Strata: "*Strata owns 100% of the record title interest and 100% of the leasehold operating rights." "Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed."

Strata received notice of the 1992 Application and the 1993 Hearing. Strata appeared and presented evidence and argument at the 1993 Hearing.

The Commission's order, on appeal to this Court, is valid as to Plaintiffs as proper notice of the 1992 Application and 1993 Hearing was given to Strata, owner of the legal interest of the leases in 1992 and 1993.

ARGUMENT

POINT I
The Plaintiffs Did Not Have a Property Interest That Entitled Them to Notice

The Plaintiffs' Brief employs several red herrings, such as the issue of recordation, in its attempt to have the Court focus on anything other than the issue of this appeal, *i.e.* did the Plaintiffs have a property interest in 1992 or 1993 in certain federal oil and gas leases that entitled them to notice of the 1992 Application or the 1993 Hearing? No, they did not.

To dispense with a couple of the nonissues that comprise a majority of the Plaintiffs'

Brief, the Commission agrees with the Plaintiffs that a property interest need not in every case be recorded to be entitled to notice; the Commission also agrees that an interest in a federal oil and gas lease constitutes an interest in real property. The Commission also agrees that Mrs. Uhden, as lessor of a mineral lease to Amoco, certainly owned a property interest. *See Uhden v. New Mexico Oil Conservation Comm'n,* 112 N.M. 528, 817 P.2d 721 (1991).

A. The Plaintiffs Had No Written Documentation of a Real Property Interest

The Plaintiffs themselves claim only that their interests were merely "beneficial" or "equitable" interests and that the vendor of their interests, Strata, was the "trustee" of such interests. *See* Plaintiffs' Brief, p 8. These are dispositive admissions from the Plaintiffs and make their other arguments of no consequence.

The Plaintiffs each claim to have had a property interest in certain federal oil and gas leases at the time of the 1992 Application and the 1993 Hearing before the OCD hearing examiner. The Plaintiffs claim that these property interests entitled them to notice of the 1992 Application and the 1993 Hearing.

What property interest did the Plaintiffs have at the time of the 1992 Application and the 1993 Hearing? It is not enough to claim over and over again to have a property interest entitled to notice and to make it so just by repetition. Such statements are not magic incantations that create cognizable property rights. The Plaintiffs had the burden of proving they had a property interest entitled to notice to the Commission and now to this Court. They have failed to present evidence that proves such an interest.

The evidence presented to the Commission by affidavits from the individual plaintiffs was that each plaintiff paid an amount of money to Strata for a certain percentage interest in federal

oil and gas leases; there was no evidence that any written documentation was made of the payment until the attempted transfers in 1995. The leases in question are United States Oil and Gas Lease NM 57683 and United States Oil and Gas Lease NM 82927. The affidavits state the date and the amount paid to Strata for an interest in leasehold operating rights in the federal leases. Each plaintiff claims to have acquired his interest in the leases in either 1989 or 1990. (1996 Hearing, Branko Exhibits Nos. 1 through 16) However, there is no written documentation of a transfer or conveyance of any kind of the interest from Strata to the individual plaintiffs in the record before this Court except for the attempted transfer by Strata on November 7, 1995, three years after the 1992 Application was filed.[1] (1996 Hearing, Branko Exhibit 17, exhibits B and C attached thereto) Apparently, the Plaintiffs paid Strata in 1989 and 1990 and received no written documentation regarding their interests in the leases until 1995.

No evidence was introduced by the Plaintiffs of any conveyance of an interest in the federal oil and gas leases from Strata to the individual Plaintiffs until the attempted transfer in 1995, three years after the 1992 Application and two years after the 1993 Hearing. All that the Plaintiffs had in the interim was a right of action against Strata.

As earlier agreed, leasehold operating rights and overriding royalty interests are interests in real property. *Johnson v. Gray*, 75 N.M. 726, 410 P.2d 948 (1966). NMSA 1978, § 38-1-3 (Repl. Pamp.1987) incorporates the English Statute of Frauds and makes it in force in New Mexico. *Coseboom v. Margaret S. Marshall's Trust*, 64 N.M. 170, 326 P.2d 368 (1958), rev'd

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[1] In *Strata v. Mercury*, 121 N.M. 622, 916 P.2d 822 (1996), a similar situation existed in that Strata had investors in a farmout agreement, but there was no evidence in the record that Strata had assigned any of its interest in the agreement to its investors. Rather, Strata and its investors executed a separate contract that governed the rights and obligations between Strata and its investors.

on other grounds, 67 N.M. 405, 356 P.2d 117 (1960). The Statute of Frauds (29 Charles II, c 3) provides:

> No action shall be brought on any contract or sale of tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person therewith by him lawfully authorized.

The Statute of Frauds would not have necessarily prevented the Plaintiffs from enforcing an oral agreement they had with Strata concerning these leases, because of the equitable remedy of constructive trusts. *See Aragon v. Rio Costilla Coop. Livestock Ass'n*, 112 N.M. 152, 812 P.2d 1300 (1991) (the failure of an oral trust in land by virtue of the effect of the statute of frauds may result in the imposition of a constructive trust under certain circumstances, *see Restatement (Second) of Trusts 404 (1957)*

NMSA 1978, § 70-1-1 (Repl.Pamp.1995) states:

> That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, **shall be recorded** in the office of the county clerk of the county where the lands are situated.

(Emphasis added.)

The only documentary evidence the Plaintiffs presented as to their interests having been recorded with the county clerk is in Branko's Exhibit 17 from the 1996 Hearing. Exhibit 17 is the January 17, 1996 affidavit of Mark B. Murphy, president of Strata. Attached to the Affidavit are Exhibits A, B and C. Exhibit B to the Affidavit is the attempted transfer of a 1.5% overriding royalty interest in United States Oil and Gas Lease NM 82927 to three of the Plaintiffs. Exhibit B was

signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Exhibit C to the Affidavit is the attempted transfer of 81.5% of the operating rights to United States Oil and Gas Lease NM 82927 to thirteen of the Plaintiffs.[2] Exhibit C was also signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Three years had elapsed between the filing of the 1992 Application and the filings of the attempted transfers in 1995.

In ¶ 6 of the Affidavit Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove at Paragraph 5, Strata retained all of the record title interest subject to the beneficial interest of the parties as described at Exhibit A hereto." (1996 Hearing, Branko's Exhibit 17) Murphy admits in this statement that Strata alone had legal title to the United States Oil and Gas Lease NM 82927 after the Plaintiffs bought into the Strata enterprise. Murphy characterized the Plaintiffs' interests at that time as merely a "beneficial interest." Additionally, Exhibit B to the Affidavit on its first page contains the following statements by Strata: "*Strata owns 100% of the record title interest and leasehold operating rights." "Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed." These statements appear on a document executed by Murphy as president of Strata on November 7, 1995. Plaintiffs' beneficial interest did not entitle them to notice any more than a beneficiary of a trust is entitled to notice of actions affecting property owned by the trust. *See Back Acres Pure Trust v. Fahnlander*, 443 N.W. 2d 604 (1989) (as a general rule, the trustee is the proper person

[2] One of the Plaintiffs, Scott Exploration Inc., claimed both an overriding royalty interest and an operating interest in the lease. Two of the entities listed as transferees on Exhibit C, Arrowhead Oil Corporation and Warren, Inc., did not join the Plaintiffs as parties to this case.

to sue or be sued on behalf of the trust); *In re Estate of Viola*, 482 N.E.2d 29 (1985) (title in real property cannot remain in abeyance; it must be vested in someone, since public policy favors certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownerships which may engender needless litigation)

Plaintiffs rely on two cases to support their claims: *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979) and *Mesich v. Board of County Commissioners of McKinley County*, 46 N.M. 412, 129 P.2d 974 (1942). However, the Plaintiffs fail to note that in both of these cases the plaintiffs had entered into real estate contract with the sellers of the land purchased. There is no evidence in the record that the Plaintiffs and Strata entered any written agreement.

B. Plaintiffs Were Investors in the Strata Enterprise

Mark Murphy, the president of Strata, testified at the 1993 Hearing that Strata, not the Plaintiffs, was the record title holder on the date of the title opinion (1993 Hearing Tr. 141). Mitchell's landman, Stephen J. Smith, also testified that the title opinion dated December 29, 1992 for Mitchell prepared by William B. Burford of the Hinkle, Cox, Eaton, Coffield & Hensley law firm also indicated that ownership of the property interest in question was held by Strata. (1993 Hearing Tr. 27, 28)

Murphy testified that he told Mitchell's landman Smith on October 26, 1992, that Strata had other partners. (1993 Hearing Tr. 122). On direct examination, Murphy was asked: "Who are these parties, as a general rule?" Murphy responded: "As a general rule, they're long-term investors of Strata." (1993 Hearing Tr. 127) Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17 from the 1993 Hearing, were long-term partners of Strata. (1993 Hearing Tr. 129) Murphy also stated, "As a matter of fact, many times in

leasehold situations like this, you don't immediately make assignments to all the parties until a well is drilled or some action taken. So if you do sell it, you only have to handle one assignment from Strata to whoever the purchaser is. If we [Strata] assign this out to all these parties, they would have to gather up -- we'd have to gather up 15 assignments into Mitchell or to whomever." (1993 Hearing Tr. 130) Murphy also testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease." (1993 Hearing Tr. 141)

The practice described by Murphy provided benefits to both Strata and its investors, *i.e.*, the Plaintiffs. The Plaintiffs enjoyed the benefits of not being the title holders, *e.g.*, not having to record the individual assignments, not having to be available for negotiations, not having to make elections to participate; but at the same time, they claim as well the benefits of record title holders such as the right to notice. They cannot have both; they are either interest owners entitled to notice or not. In this case, the evidence is that they were not property interest owners entitled to notice of the 1992 Application filing or the 1993 Hearing. Rather, the Plaintiffs' interests are more like those of a shareholder in a corporation. The corporation is the legal entity entitled to notice of actions affecting property owned by the corporation, not the individual shareholders, *i.e.*, investors. *See* NMSA 1978, § 53-11-14.

On page 7 of the Plaintiffs' Brief is the statement: "Although Plaintiffs had not yet recorded their interest, they held a valid property interest in a federal oil and gas lease." Of course the Plaintiffs had not recorded their interest; they had nothing tangible to record.

The Commission notes the recordation statute not as a basis for denying the Plaintiffs notice as is argued in the Plaintiffs' Brief. The Commission notes the recordation statute, because the statute is premised on there being something tangible to record, *e.g.* a lease, a deed,

an assignment. From a review of all the evidence presented to the Commission, it is apparent that there was no tangible document that the individual Plaintiffs could have recorded in 1992 or 1993. At the earliest, the Plaintiffs could have recorded the attempted conveyance by Strata in 1995, two years after the hearing.

Why did the Plaintiffs wait for over three years from the date the 1992 Application was filed and the 1993 Hearing was held to bring their claims? Why did Stratton on behalf of Strata withdraw the request for a *de novo* review of the OCD order in 1993? Would the claims have been brought now if the well had not produced? The Plaintiffs want the penalty imposed on Strata for electing not to participate in a successful well removed so that their interests as investors in Strata are more rewarding. (1993 Hearing Tr. 32) The case is an attempt to avoid the penalty imposed on Strata for choosing not to pay its share of the costs of the well.

The Plaintiffs' argument attempts to convince this Court that the Plaintiffs are in the position of the plaintiff in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). This is not the case. Mrs. Uhden was the owner in fee of an oil and gas lease who leased it to Amoco but retained a royalty interest. There was no dispute that Mrs. Uhden had a real property interest; the dispute was whether the Commission was engaged in rulemaking proceedings or in adjudicating property rights. The Plaintiffs in the case before this Court simply had no cognizable real property interest at the time of the 1992 Application or the 1993 Hearing, and therefore the Plaintiffs were not entitled to notice of the 1992 Application or 1993 Hearing.

POINT II
The Plaintiffs Were Not Transferees of the Federal Leases in 1992 or 1993

The leases in questions are federal oil and gas leases. Any attempt to transfer ownership interests in the leases must be approved by the Bureau of Land Management of the United States Department of Interior pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 187a (1994). This act states, in part: "[A]ny oil and gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary." Not only were the attempted transfers to the Plaintiffs never approved by the BLM or accepted as required by the transferees so far as the evidence provided by the Plaintiffs indicates, they were not even executed by Strata until November 7, 1995. (1996 Hearing, Branko Exhibit 17, Exhibits B and C attached thereto)

A recent federal district court case from Utah emphasized that BLM's approval of the transfer of interest in a federal oil and gas lease is necessary for the transfer to have any effect, not only as between the federal government and the transferor and transferee but also as between private entities. *River Gas Corp. v. Pullman*, 960 F. Supp. 264 (D. Utah 1997). In this case the plaintiffs sought to quiet title to certain interests in a federal oil and gas lease. The plaintiffs had been assigned 100% of the record title to the federal lease by PG&E Company (PG&E), and the assignment was approved by the BLM on July 1, 1994. However, the defendants in the quiet title action had purportedly been assigned 100% of the record title to the same federal lease by PG&E's corporate predecessor much earlier on August 9, 1990. This attempted assignment was never approved by the BLM. The court granted the plaintiffs' request and entered a quiet title decree in their favor stating, regarding the earlier attempted assignment, "[i]t is well established that a party must receive the approval of the Secretary of the Interior in order for an assignment of a government lease to be valid." The court continued "... an assignment does not actually

occur until approval is granted." The court also stated, "Because the interests in the lease remain with the assignor until BLM approval is obtained, Pullman **never had an interest** in the government lease." *Id.* at 266 (emphasis added).

The defendants in *River Gas Corp.* cited *Norbeck v. Crawford*, 836 P.2d 1231 (1992 Mont.) as a case in which assignees of a federal lease were allowed to resubmit the assignment for BLM approval some fifty-six years after the attempted assignment. However, the *River Gas Corp.* court was quick to point out that even though the BLM did approve the assignment fifty-six years after the attempted assignment, the assignee was not entitled to any past profits from the lease "...because there was never a valid assignment and therefore no change of title." *River Gas Corp.*, 960 F. Supp. at 266, FN[2].

The Plaintiffs cite cases and other authorities to support their position that BLM approval is not necessary for state law recognition of interests in federal oil and gas leases. However, the Plaintiffs do not come within the cases and authority cited, because the Plaintiffs in this case presented no evidence whatsoever of having any conveyance to the interests in the leases until the attempted transfer by Murphy in 1995, over two years after the 1992 Application and the 1993 Hearing.

The Plaintiffs in the case before this Court are, at best, in the position of the defendants in the *River Gas Corp.* if indeed the assignments were ever approved by the BLM. The Plaintiffs' cognizable property interest arose, if ever, at the time of such approval by the BLM, *i.e.*, sometime after November 1995. However, at the time of the 1992 Application and the 1993 Hearing, the Plaintiffs had no interest in the federal oil and gas leases that entitled them to notice of the application and hearing.

CONCLUSION

The Commission requests that the Court enter its order affirming the Commission's Order No. R-10672-A in Case No. 11510.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the New Mexico Oil Conservation Commission's Answer Brief was mailed to all counsel of record on the 19th day of November, 1997.

Marilyn S. Hebert

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' BRIEF-IN-CHIEF

Plaintiffs hereby submit their Brief-in-Chief in support of their appeal from the Oil Conservation Commission ("Commission") as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 8, 1992, in connection with its proposal to drill the Mitchell Tomahawk "28" Federal Com No. 1 Well ("Tomahawk Well"), Defendant Mitchell Energy Corporation ("Mitchell") filed its application with the Oil Conservation Division ("Division") requesting an order pooling all mineral interests from the top of the Wolfcamp Formation to the base of the Pennsylvanian Formation underlying the W/2 of Section 28, Township 20 South, Range 33 East, N.M.P.M. ("Application"). Prior to filing the Application, Mitchell entered into negotiations with Strata Production Company ("Strata"), a working interest owner in the S/2 SW/4 of Section 28.

(R. at Tr. of 1993 hearing at 28 - 46, 50 - 53, 118 - 128).[1] During the course of these negotiations, Strata's president, Mark B. Murphy, continually informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved in the subject property. (R. at Tr. of 1993 hearing at 29, 34 - 35, 39, 42, 46, 51, 53, 58, 122, 128). These negotiations were eventually unsuccessful. (R. at Mitchell Exhibit No. 16 of 1993 hearing). On January 13, 1993, prior to the hearing, Strata's Mr. Murphy, sent, via facsimile, a list of all working interest owners and their interests in the subject property to Mr. Steve Smith of Mitchell. (R. at Branko Exhibit No. 24 of 1996 hearing). Of the working interest owners, only Strata was notified of the hearing of Mitchell's Application (R. at 238), despite Mitchell's actual knowledge of Plaintiffs' interest in the subject property as well as their whereabouts. (R. at Branko Exhibit No. 24, 1996 hearing). A hearing was then held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. (R. at Mitchell Exhibit No. 1 from 1996 hearing). Mitchell did not spud the Tomahawk Well until May 18, 1993.

On January 29, 1996, Plaintiffs filed a motion with the Division to reopen Case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. (R. at 275). Plaintiffs' motion to reopen the case was granted on October 2, 1996 by order of the Division. (R. at 237 - 243). On October 30, 1996, Mitchell requested a *de novo* hearing, (R. at 178) which was granted by the Commission. A hearing *de novo* was held on January 16, 1997 before the Commission. This hearing resulted in

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[1] Only certain portions of the record on appeal have been numbered by the court clerk. As a result, record references have been made to pages of transcripts from the administrative hearings and exhibits filed therewith.

Order No. R-10672-A. (R. at 251 - 259). Pursuant to such order, the Commission concluded that at the time that Mitchell filed its Application in 1992, the Plaintiffs in this case were not interest owners entitled to notice pursuant to NMSA 1978, §70-2-17 and OCD Rule 1207. (R. at 259). On April 7, 1997, Plaintiffs filed an application for rehearing with the Commission. (R. at 260 - 263). Plaintiffs' application for rehearing was denied by the Commission pursuant to NMSA 1978, §70-2-25(A) on April 17, 1997. Pursuant to NMSA 1978, §70-2-25, Plaintiffs' filed their petition for review of the Commission's decision on April 25, 1997.

II. STANDARD OF REVIEW OF ADMINISTRATIVE AGENCY DECISION

The scope of judicial review of administrative agency orders has been established by the New Mexico Supreme Court. In reviewing the actions taken by an administrative agency, it is the court's duty to determine whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the order was supported by substantial evidence and generally whether the action of the administrative body was within the scope of its authority or whether the agency action was in accordance with law. SCRA 1986, 1-074(Q); *Elliott v. New Mexico Real Estate Comm'n.*, 103 N.M. 273, 275, 705 P.2d 679, 681 (1985).

II. ARGUMENT AND AUTHORITIES

At the time of the Application and hearing, Plaintiffs' owned working interest and/or overriding royalty interests in a part of the property which was the subject of the pooling Application of Mitchell. Mitchell was aware of all of the Plaintiffs' interests prior to the 1993 hearing and was aware there were other working interests in the subject property even before it filed its application. Plaintiffs' property interests are interests in real property and as such, are protected property rights for purposes of the d ·d States and New

Mexico Constitutions. The Division's granting of Mitchell's pooling request is a state action which affects the Plaintiffs' property interests. Plaintiffs have, by reason of such action, been deprived of their legal rights as working interest and overriding royalty interest owners to participate in the production of the Tomahawk Well pursuant to their respective interests.[2] Before the Division could take any valid action affecting the property interests of Plaintiffs, Plaintiffs must have been provided with constitutionally sufficient notice and a fair opportunity to be heard. No such notice was given and, therefore, any action taken by the Division without such notice that affects the Plaintiffs' property interest is void as to Plaintiffs.

A. Plaintiffs, as Working Interest and/or Overriding Royalty Interest Owners Under a Federal Oil and Gas Lease, Have Protected Property Interests Under the Due Process Clause of the New Mexico and United States' Constitutions.

Property, within constitutional protection, denotes a group of rights inhering a citizen's relation to a physical thing, a right to possess, use and dispose of it. *Cereghino v. State By and Through State Highway Commission*, 370 P.2d 694, 697 (Or. 1962), *citing United States v. General Motors*, 323 U.S. 373, 377 - 378 (1945). Property interests subject to protection under the Fourteenth Amendment are not limited to a few rigid, technical forms, but rather, refer to a broad range of interests. *Chavez v. City of Santa Fe Housing Authority*, 606 F.2d 282, 294 (10th

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[2] Plaintiffs' property interests have been affected as follows:

1) Their property interests have been subjected to a comprehensive Joint Operating Agreement approved by the Division;

2) Their share of oil and gas production has been subjected to a 200% penalty; and

3) The 200% penalty is measured by the total costs to drill, test, evaluate and complete the Tomahawk Well, even through Plaintiffs' rights in the Tomahawk Well are limited to production from the Pennsylvanian Formation.

(R. at Mitchell Exhibit No. 1, 1996 hearing) (OCD Order resulting from 1993 hearing).

CORDANT
in·har·mo·ni·ous \-'mō-nē-əs\ *adj* **1** : not harmonious : DISCORDANT **2** : not fitting or congenial : CONFLICTING — **in·har·mo·ni·ous·ly** *adv* — **in·har·mo·ni·ous·ness** *n*
in·har·mo·ny \(')in-'här-mə-nē\ *n* : DISCORD
in·haul \'in-ˌhȯl\ *n* : a rope used to draw in a ship's sail
in·here \in-'hi(ə)r\ *vi* [L *inhaerēre*, fr. *in-* + *haerēre* to adhere — more at HESITATE] : to be inherent : BELONG
in·her·ence \in-'hir-ən(t)s, -'her-\ *n* : the quality, state, or fact of inhering or of being inherent
in·her·ent \-ənt\ *adj* [L *inhaerent-*, *inhaerens*, prp. of *inhaerēre*] : involved in the constitution or essential character of something : INTRINSIC — **in·her·ent·ly** *adv*
in·her·it \in-'her-ət\ *vb* [ME *enheriten* to make heir, inherit, fr. MF *enheriter* to make heir, fr. LL *inhereditare*, fr. L *in-* + LL *hereditare* to inherit — more at HERITAGE] *vt* **1** : to come into possession

Cir. 1979). Whether an interest constitutes a protected property interest is determined by reference to state law. *Casias v. City of Raton,* 738 F.2d 392, 394 (10th Cir. 1984). Under New Mexico law, Plaintiffs have a clearly established property interest in a federal oil and gas lease which is entitled to due process protection.

1. Plaintiffs Have Protected Interests in the Federal Oil and Gas Lease Regardless of Whether Such Interests are Recorded.

Each of the Plaintiffs has an interest in a federal oil and gas lease which covers various lands including the S/2SW/4 of Section 28. (R. at Branko Exhibits 1 - 17, 1996 hearing). Plaintiffs acquired their interests well before the Application was filed in this case by Mitchell and well before the hearing of 1993. In fact, all of the Plaintiffs acquired their respective interests prior to April 1, 1990. *Id.* Plaintiffs acquired their interests from Strata by paying to Strata a purchase price and in return received their interests in the subject federal oil and gas lease. (R. at Branko Exhibits 1 - 17, 1996 hearing.) Further, Plaintiffs have each paid their percentage portion of the rentals due under the oil and gas lease. *Id.* It is well established in New Mexico that Plaintiff's interest constituted valid property interests requiring the accordance of due process. The nature of Plaintiffs' property interest was addressed by the New Mexico Supreme Court in *Uhden v. New Mexico Oil Conservation Commission, et al.*, 112 N.M. 528, 817 P.2d 721 (1995) when it stated that:

> [i]n this State a grant or reservation of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this State, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property.

Id. at 530, 817 P.2d at 723, *citing Duvall v. Stone*, 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citations omitted). The plaintiffs in this case owned working interests[3] and/or overriding royalty interests[4] in a federal oil and gas lease. In New Mexico, these interests clearly constitute an interest in real property. *See Bolack v. Underwood*, 540 F.2d 816, 820 (10th Cir. 1965), *citing Rock Island Oil and Refining Co., et al. v. Simmons, et ux.*, 73 N.M. 142, 386 P.2d 239 (1963). Therefore, the Plaintiffs' interests at issue in this case constitute constitutionally protected property rights. *See Uhden, supra.*

Despite the well established law above, the New Mexico Oil Conservation Commission in its order of March 19, 1997 found that Plaintiffs did not have a protected property interest as they were not "record owners" at the time of the 1993 hearing. (R. at 259). The fact that Plaintiffs' interests were not recorded is irrelevant to the issue of whether Plaintiffs had a protected property interest. As previously discussed, an interest in a federal oil and gas lease constitutes an interest in real property in New Mexico. *See Bolack v. Underwood, supra.* The

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[3] A working interest is an operating interest under an oil and gas lease. *H. Williams and C. Meyers,* Manual of Oil and Gas Terms, 1225 (9th Ed. 1994). The working interest under a Federal Oil and Gas Lease is generally referred to as the operating rights. 43 C.F.R. §3100.0-5(d) (1988) defines operating rights as follows:

> (d) Operating rights (working interest) means the interest created out of a lease authorizing the holder of that right to enter upon the leased lands to conduct drilling and related operations, including production of oil or gas from such lands in accordance with the terms of the lease.

[4] In *Meeker v. Ambassador Oil Co.*, 308 F.2d 875, 882 (10th Cir. 1962), rev'd 375 U.S. 160 (1963), the 10th Circuit Court of Appeals provided the following definition of overriding royalty:

> An overriding royalty is a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other costs incident to the reduction and sale of oil and gas produced from the lease. It is an interest carved out of the lessee's share of the oil and gas, ordinarily called the working interest, as distinguished from the owner's reserved royalty interest. It is generally held that an overriding royalty is an interest in real property.

Oil Conservation Commission refers to NMSA 1978, § 70-1-2 (1995 Repl.) for the proposition that in order for Plaintiffs to have a protected property interest, their interest must be "of record." The statute in question states:

> . . . such record shall be noticed to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record and no assignment or other interest of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right to such royalties of any purchaser or transferee in good faith, *without knowledge of the existence of such unrecorded instrument.*

NMSA 1978, § 70-1-2 (emphasis added). This statute has no affect upon the validity of Plaintiffs' interest in the oil and gas lease at issue. *See Ames v. Robert*, 17 N.M. 609, 615 (1913). (A deed of land though not recorded, is good as between grantor and grantee). The Commission's Order ignores the fact that this statute is designed to protect those third parties who receive assignments of oil and gas leases and who do not have knowledge of unrecorded instruments affecting title to property. New Mexico has previously addressed both the effect and purpose of recording statutes such as § 70-1-2. These statutes are designed for the purpose of giving constructive notice to third-party purchasers of interests in real estate, who do not have knowledge of an unrecorded deed. *See Angle v. Slayton,* 102 N.M. 521, 523, 697 P.2d 940, 942 (1985); *Cano v. Lovato,* 105 N.M. 522, 529, 734 P.2d 762, 769 (Ct. App. 1986) (emphasis added), *cert. denied* 104 N.M. 246, 719 P.2d 1267, *cert. quashed* 105 N.M. 438, 733 P.2d 1321 (1986). However, the recording of a deed or other such document is not needed to transfer title to property. *Id.* In fact, when an individual receives an instrument which is to be recorded, there is no requirement that the instrument be recorded within any particular period of time. *Angle,* 102 N.M. at 523, 697 P.2d at 942. Although Plaintiffs had not yet recorded their interests, they held a valid property interest in a federal oil and gas lease. As Defendants had actual knowledge

of Plaintiffs interest, they may not seek protection under § 70-1-2, as this statute only offers protection to those individuals without knowledge of such a transfer. *See* NMSA 1978, § 70-1-2. At the 1996 hearing, Mr. Smith, representing Mitchell, admitted that individuals who do not record their ownership interests still have ownership rights in the subject property. (R. at Tr. of 1996 hearing at 62). This indicates that Mitchell made a conscious decision not to give notice to known individuals with property interests in the federal oil and gas lease.

2. Plaintiffs Were Beneficial Owners of Property Rights Under the Federal Oil and Gas Lease at the Time of the 1993 Hearing.

While Defendants' base their argument that Plaintiffs did not have a protected property interest on the fact that Plaintiffs did not have record title, Defendants fail to recognize that there is more than one type of property ownership which is to be accorded due process protection. Although Strata remained "record owner" of the property at issue, Plaintiffs had a protected property interest by virtue of their equitable ownership in the oil and gas lease. Plaintiffs in this case acquired their interests in the oil and gas lease prior to April 1, 1990 (R. at Branko Exhibits 1 - 17, 1996 hearing). As soon as Strata and Plaintiffs entered into an agreement by which Plaintiffs would purchase their interests in the federal oil and gas lease, Plaintiffs acquired beneficial ownership and thus could not have their property interests affected without being accorded due process:

> In New Mexico the rule is that a *vendee*, under an executory contract for the sale of realty, acquires an equitable interest in the property. By application of the doctrine of equitable conversion, the *vendee* is treated as the owner of the land and holds an interest in real estate. On the other hand, the *vendor* holds the bare legal title as the trustee for the *vendee*.

Marks v. City of Tucumcari, 93 N.M. 4, 5, 595 P.2d 1199, 1200 (1979) (emphasis in original); *see also Mesich v. Board of County Commissions of McKinley County,* 46 N.M. 412, 416 - 417, 129 P.2d 974, 976 (1942) (contract for the sale of real estate results in the vendee being looked upon and treated as the owner of land and entitles him to convey it, encumber it, devise it by will, while legal title is vested in the vendor as a naked trust). Mitchell has stipulated to evidence that indicates that Plaintiffs as working interest owners each paid their respective share of the lease bonus and annual rentals. (R. at Branko Exhibits 1 - 17, 1996 hearing). Through such actions Plaintiffs acquired their ownership interests. Defendants improperly assume that record title is the only type of ownership which is entitled to protection under the due process provisions of the New Mexico and United States' Constitutions. Defendants attempt to equate "record title" with "protected property interest." As discussed, such an attempt must fail under New Mexico law.

3. Bureau of Land Management Approval is not Needed for Plaintiffs to Have a Protected Property Interest in a Federal Oil and Gas Lease.

In a final attempt to argue that Plaintiffs do not have a protected property interest, the Commission argues that because the oil and gas lease at issue is a federal oil and gas lease, Bureau of Land Management ("BLM") approval is necessary for the transfer from Strata to Plaintiffs to be valid. *See generally* Oil Conservation Commission's Statement of Appellate Issues. What Defendants have failed to recognize, however, is that state law determines ownership of federal oil and gas leases not the BLM. *See O'Kane v. Walker*, 561 F.2d 207, 211 (10th Cir. 1977); *see also Wallace v. Pan American Petroleum Corp., et al.*, 384 U.S. 63, 70 (1966). Thus, it is New Mexico law which must be used to determine ownership of the federal

oil and gas lease. Further, in arguing that BLM approval is needed, the Commission has ignored federal statutes and the BLM's own regulations.

Federal statutory law expressly recognizes that an interest in any oil and gas lease may be assigned or subleased without approval by the Secretary of Interior. *See* 30 U.S.C. § 187a. This statute states that:

> Notwithstanding anything to the contrary in Section 187 of this title, any oil or gas lease issued under the authority of this chapter may be assigned or subleased, as to all part of the acreage included therein, *subject to final approval* of the secretary and as to either a divided or undivided interest therein. . . .

Id. (emphasis added). As may be seen, the fact that Plaintiffs had not received final approval from the BLM did not mean that they did not have a protected property interest, it simply meant that final approval had yet to be received by the Secretary of Interior.

Further, the history of this federal statute demonstrates that it has been amended for the express purpose of allowing private parties to make transfers of interest in federal oil and gas leases prior to receiving final approval by the Secretary of Interior. *See Lawrence P. Terrell*, Law of Federal Oil and Gas Leases, § 10.03[5], p. 29 (1997 ed.). "While there is some case law to the contrary, the weight of authority that an assignment may be effective and complete between the assignor and assignee immediately upon execution of the assignment instrument even though it may not yet have been filed with or approved by the BLM." *Id.* (citations deleted). Accordingly, the absence of BLM approval of an assignment should in no way be an obstacle to an assignee enforcing its claim against other private claimants. *Id.* The amendment made to 30 U.S.C. § 187a was made to address the precise situation which the court is presented with in this case. "Where § 30 [30 U.S.C. § 187] had been negatively worded so as to prohibit assignments except with the Secretary's consent - a provision that had been interpreted to require prior

approval for assignments - the new section affirmatively conferred on lessees the express right to assign or sublet, subject only to final, or ultimate, approval by the Secretary." *Lawrence P. Terrell*, Law of Federal Oil and Gas Leases, § 10.03[3], p. 17 (1997 ed.). The purpose of the amendment was to allow assignees to exercise rights of ownership over the lease prior to approval of the assignment to eliminate much of the delay incident to assignments as had occurred under the prior version of the statute. *Id.* at 18, n. 30. Thus, as may be seen, federal law offers no support for Defendants argument that Plaintiffs were required to have their interests approved by BLM prior to having protected property interests.

Federal regulations implementing this statute are in accordance. BLM regulations provide in part that:

> the rights of the transferee to a lease or an interest therein shall not be recognized ***by the department*** until the transfer has been approved by the authorized officer . . . . If the transfer is filed after the 90th day, the authorized officer may require verification ***that the transfer is still in force and effect.***

43 C.F.R. § 3106.1(b). As seen by this plain language, BLM's own regulations recognize the fact that transfers are valid even though they have not been approved. BLM's approval is only needed for purposes of government recognition of the transfer. This has been recognized in New Mexico in the case of *Rock Island Oil & Refining Co. v. Simmons*, 73 N.M. 142, 148, 386 P.2d 239, 242 - 243 (1963), which stated:

> . . . . The rules of the Bureau of Land Management under which the governmental department denied approval of the first assignments tendered ***were for the protection and benefit of the [Federal] government only, and thus are not available to an individual.***

Id; See also Aronow v. Bishop, 86 P.2d 644, 648 (Mont. 1939) (assignment of federal oil and gas lease valid between private parties despite lack of approval.) The Commission in this case may

not take advantage of BLM's regulations to defeat the assignments from Strata to Plaintiff. *Id.*, *see also Bolack v. Underwood*, 340 F.2d 816, 820 (10th Cir. 1965) ("There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in such instance, where no right of the federal government is involved, state law governs").

Defendants rely on *River Gas Corp. v. Pullman,* 960 F. Supp. 264 (D. Utah 1997) in support of their argument that BLM approval was required by Plaintiffs. This case, however, is easily distinguished. In *River Gas Corp.* the attempted transfer of rights under a federal oil and gas lease were expressly rejected by BLM. *Id.* at 265 - 266. Further, the court in *River Gas Corp.* stated expressly what issue it was presented with:

> The issue before the court is whether disapproval of an assignment by the BLM and subsequent approval of the same assignment to a different party will control in an action to quiet title between private parties.

River Gas Corp., 960 F. Supp. at 265. In this case the BLM has approved assignments to Plaintiff working interest owners. Unlike *River Gas Corp.*, there is no dispute by the BLM, Strata or Plaintiffs as to who owns the federal lease at issue. Thus the factual issues presented are not analogous to the case at hand. It has never been suggested that the BLM has rejected Strata's transfer of interest to Plaintiffs.

A closer reading of *River Gas Corp.* results in the finding that the case actually supports Plaintiffs' claims. The court in *River Gas Corp.* cited with approval the Ninth Circuit case of *Isaacs v. De Hon, et al.*, 11 F.2d 943 (9th Cir. 1926). This case dealt with the appellant's claim that the appellee was not entitled to hold an oil claim or prospecting claim under a federal lease because he was not a citizen of the United States and, therefore, would not qualify under the

regulations of the general land office. *River Gas Corp.*, 960 F. Supp. at 266 - 267. The court cited with approval the following portion of the *Isaacs* case:

> Appellant is in no position to take advantage of this regulation. It may be that plaintiffs will lose the fruits of this litigation by the refusal of the secretary to approve the assignment of interest in the permit. But appellant is nevertheless held in a court of equity to the obligations he assumed in his grub state contract.

River Gas Corp., 960 F. Supp. at 267, *citing Isaacs v. De Hon, et al.*, 11 F.2d at 944. Such language clearly indicates that the appellee in the *Isaacs* case had a valid property interest at the time of the litigation. The fact that he had yet to receive approval of the assignment was irrelevant to the interest that he held at the time of the litigation. Similarly, in this case, although Plaintiffs did not have BLM approval at the time of the 1993 hearing, such approval was unneeded for Plaintiffs to have a protected property interest. While it is true that Plaintiffs' interests were subject to subsequent approval by the BLM, Defendants have never, and it is uncontested that, the BLM never disapproved the transfer from Strata to Plaintiffs. Thus, as may be seen, Defendants claim that BLM approval was needed at the time of the 1993 hearing for Plaintiffs to have a protected property interest finds no support in the law. New Mexico law is to be applied in determining the ownership interests in federal oil and gas liens and, as previously discussed, New Mexico law expressly recognizes Plaintiffs' rights as valid and protected property interests in this state.

B. Lack of Notice of the Hearing in This Case Deprived Plaintiffs of Their Property Without Due Process of Law in Contravention of N. M. Const. art. 2, § 18 and U.S. Const. amend. XIV.

The Court need look only to the recently decided case of *Uhden v. New Mexico Oil Conservation Commission, et al.*, 112 N.M. 528, 817 P.2d 721 (1995), to determine the merits

of Plaintiffs' appeal. In *Uhden*, the appellant, Ms. Uhden, was the owner in fee of an oil and gas estate in San Juan County. In 1978, Uhden executed an oil and gas lease in favor of Amoco Production Company ("Amoco"). The lease contained a pooling clause. Pursuant to its rights under the lease, Amoco drilled the Cahn Well which was originally spaced on 160-acres. Based on the size of the initial spacing unit, Uhden initially received a royalty interest equal to 6.25% of the production from the Cahn Well. In 1983, Amoco filed an application with the Division seeking an increase in well spacing from 160-acres to 320-acres. The Cahn Well and Uhden's royalty interest thereunder were both effected by the application. Even though Amoco had actual notice of Uhden's mailing address, Amoco provided notice of the application by publication only. In January 1984, the Oil Conservation Commission granted temporary approval of Amoco's application and in February 1986, the Commission granted final and permanent approval, both without notice to Uhden. The net effect to Uhden was a reduced royalty interest equal to 3.125% of production from the Cahn Well.

Uhden unsuccessfully sought relief through the Commission, and then appealed to the district court which affirmed the orders of the Commission. Uhden then appealed to the New Mexico Supreme Court. The New Mexico Supreme Court ruled that Uhden clearly had a property right in the oil and gas lease which was protected by due process of law. Further, in regard to the notice to which Uhden was entitled, the court held that:

> if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States' Constitutions requires the party who filed the spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.

Id., 112 N.M. at 531, 817 P.2d at 724. Because Uhden was not provided with proper notice, the Division's orders were void as to her. *Id.*

In this case, as explained above, Plaintiffs had a protected property interest as a result of their interests in the federal oil and gas lease. Mitchell was aware of the names, addresses and even the nature and extent of each of the Plaintiffs' interests prior to the 1993 hearing (R. at Branko Exhibit No. 24, 1996 hearing). Despite such knowledge, Mitchell provided notice only by publication. Mitchell did not attempt to serve Plaintiffs personally as required by the New Mexico and United States' Constitutions. *See Uhden*, 112 N.M. at 531, 817 P.2d at 724. The 1993 hearing resulted in an order by the Division that affected the Plaintiffs' interests by depriving them of the opportunity to participate in the Tomahawk Well. The order entered by the Division as a result of the 1993 hearing is therefore void as to Plaintiffs.

Aside from not following the holding of *Uhden*, the Commission has failed to follow relevant New Mexico statutes as well as their own rules and regulations. The Commission, in its order of March 19, 1997, found that Branko was not an interest owner entitled to notice pursuant to NMSA 1978, § 70-2-17 and OCD Rule 1207 (R. at 259). Again, the Commission bases their finding on the fact that Plaintiffs were not "record owners." However, § 70-2-17 and OCD Rule 1207 indicate that Plaintiffs were entitled to notice regardless of the type of ownership interest they hold, and that by failing to give notice to Plaintiffs, Defendants violated Plaintiffs due process rights. The plain language of NMSA 1978, § 70-2-17 indicates that Plaintiffs in this case were entitled to notice. This statute states in part that

> *all orders affecting such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to* ***the owner or owners*** *of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas,*

> *or both*. . . . Such pooling order of the Division shall make definite provision as to ***any owner, or owners,*** who elects not to pay his proportionate share in advance for the pro rata reimbursement solely out of production to the parties advancing the costs of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, but which shall include a reasonable charge for supervision and may include a charge for the risk involved in the drilling of such well, which charge for risk shall not exceed 200% of the non-consenting working interest owner, or owners, pro rata share of the cost of drilling and completing the well.

NMSA 1978, § 70-2-17(C) (emphasis added). As seen in the plain language of this statute, ***any owner*** is entitled to notice when a pooling order is entered, not just record owners. Although the Commission has stated that Plaintiffs were not entitled to notice under the statute, the plain language of this statute does not support such an argument.

Further indicating that Plaintiffs were entitled to notice in this case is the OCD's rules and regulations. Division Rule 1207.A.1 states that:

> . . . . in cases of applications filed for compulsory pooling under § 70-2-17 NMSA 1978, as amended, . . . ***actual notice shall be given to each known individual owning*** an uncommitted leasehold interest, an unleased and uncommitted mineral interest, or royalty interest not subject to a pooling or unitization clause in the lands affected by such application which interest must be committed and has not been voluntarily committed to the area proposed to be pooled or unitized. Such individual notice in compulsory pooling or statutory unitization cases shall be by certified mail (return receipt requested).

As seen by the Division's own rule, actual notice was to be given to *each known individual owner*. This language is unambiguous and clearly establishes the need for notice in this case. As discussed below, Mitchell had, at all relevant times, actual knowledge of the existence of Plaintiffs. As a result of this knowledge, Mitchell was required to give personal notice to each Plaintiff.

C. Mitchell Was Aware of Plaintiffs' Interest and Should Have Given Notice of the Proceedings as Required by Due Process of Law.

It is undisputed that Mitchell had actual knowledge of the Plaintiffs' interests in the property at the time of the 1993 hearing (R. at Branko Exhibit No. 24, 1996 hearing.) Mitchell received, via facsimile and certified mail, a complete list of Plaintiffs, their addresses and a description of their interests in the affected lease. *Id.* This information was provided to Mitchell on January 13, 1993 before the hearing on January 21, 1993. *Id.* Mitchell was also made aware of Plaintiffs' interest at the 1993 hearing. (R. at Tr. of 1993 hearing at 9-16). Further, such information was available at all times to Mitchell, in that, Mitchell could simply have asked for such information at any time prior to the hearing in January 1993. Mitchell, however, failed to exercise due diligence, or any diligence, in ascertaining the identities of Plaintiffs even though Mitchell had actual knowledge of their existence. By its own admission, Mitchell had knowledge that there were other interest owners prior to January of 1993. (R. at Tr. of 1996 hearing at 19 - 20, 61 - 62). In fact, Mitchell had knowledge of the existence of Plaintiffs' interest as early as October of 1992 (R. at Tr. of 1996 hearing at 61 - 62, 66) and had a duty at that time under *Uhden* to use due diligence to ascertain the identity and whereabouts of Plaintiffs. It was at this time that Mr. Murphy of Strata Production Company informed Steve Smith of the existence of Plaintiffs. (R. at Tr. of 1996 hearing at 19 - 20, 61 - 62, 66). A few days following this, Mr. Smith was again informed that Strata had other partners who had interests under the federal oil and gas lease. (R. at Tr. of 1996 hearing at 19). Mr. Smith admits that he was informed prior to the 1993 hearing that there were undisclosed partners who had an interest in the federal oil and gas lease in question. (R. at Tr. of 1996 hearing at 61 - 63). Indeed, it is also Mr. Smith's

position that he understands that individuals who have not recorded their ownership interests still have ownership rights in the subject property. *Id.* at 62. Even after the 1993 hearing, but prior to the time in which the well was actually drilled, Mitchell was again reminded on two separate occasions of Plaintiffs' interests. (R. at 31, 35). When questioned as to why he did not attempt to discover the identities of Plaintiffs, Mr. Smith responded that he did not make any attempts "because." (R. at 66 of Tr. of 1996 hearing). Mitchell had merely to inquire of Strata as to the interests owned by, identity and whereabouts of Plaintiffs. When this inquiry was eventually made in January of 1993, Mitchell was immediately given all information regarding the Plaintiffs from Mr. Murphy of Strata prior to the 1993 hearing (R. at Branko Exhibit No. 24, 1996 hearing).

At the 1996 hearing, Mitchell stipulated to the fact that Plaintiffs had paid for their respective interests in the federal lease at issue (R. at Branko Exhibits 1 - 17, 1996). Such actions are consistent with the actions of an owner. The fact that Mitchell stipulated to the fact that Plaintiffs paid for their respective interests in the federal oil and gas lease, but still refuses to recognize them as owners is illogical. Defendants have offered no explanation as to why Mitchell chose not to provide notice to the Plaintiffs, or at least, make some effort to ascertain whether the Plaintiffs actually owned an interest in the affected property. Mitchell, therefore, purposely kept itself ignorant as to the identity of the Plaintiffs. Such a tactic, however, does not comport with due process and as a result, Plaintiffs' rights have been violated. This is especially true in light of the fact that Mitchell could have simply asked whether Plaintiffs had any ownership interests in the oil and gas lease at issue. Mitchell, therefore, failed to exercise due diligence as required by *Uhden*. The consequences of failing to exercise due diligence is seen

in *First National Bank of Belen v. Luce*, 87 N.M. 94, 529 P.2d 760 (1974). Here the court stated that:

> . . . the proposition that a person who purchased real estate in possession of another is, in equity, bound to inquire of such possessor what right he has in the real estate. ***If he fails to make such inquiry, which ordinary faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose.***

87 N.M. at 95, 529 P.2d at 761 (emphasis added). Thus, since Mitchell was under a duty to inquire about Plaintiffs' interests, but chose not to, Mitchell is charged with all knowledge which such inquiry would have rendered. If necessary, the 1993 hearing could have been continued to allow for notice to be given to Plaintiffs without any inconvenience to Mitchell. The Tomahawk Well was not spudded until May 18, 1993. There was clearly plenty of time to provide notice and an opportunity to be heard to Plaintiffs, however, there was also clearly no desire on the part of Mitchell to provide such notice and deal with Plaintiffs. While the Tomahawk Well was spudded on May 18, 1993, there are apparently no compelling reasons why the well was spudded at this early date. Indeed, it appears that Mitchell could have waited until October 31, 1993 to spud the well without losing any of the affected leases as provided by the lease involved. (R. at Mitchell Exhibit 7, 1993 hearing).

As Mitchell had actual knowledge of the existence of Plaintiffs, Mitchell was under a duty to provide formal notice to Plaintiffs of the 1993 hearing. In New Mexico, notice in a case before the Division or the Commission must be by personal service as determined in *Uhden, supra*, if the parties whereabouts can be ascertained through due diligence.[5] New Mexico Statute

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[5] It should be noted that even in light of the direction given the Division by the New Mexico Supreme Court in *Uhden* regarding the form of notice required, the Division still has not amended its notice regulations to provide for personal service. *See* OCD Rule 1204 and 1207. Further, despite the explicit language of *Uhden* requiring personal service, the OCD counsel present at the 1997 hearing stated that "I don't know →

I still don't.

and Division rules recognize this concept by placing the burden of notice directly upon the applicant, Mitchell in this case. *See* NMSA 1978, § 70-2-18(A) and Division Rule 1207(A)(1).

In arguing that there was no duty to give notice to Plaintiff, it would appear that Mitchell is relying upon the same argument as the Commission with regard to the rights of Plaintiffs in this case. Mitchell has argued in this case that Plaintiffs were not entitled to notice as they were not record owners at the time of the 1993 hearing. In light of *Uhden*, such an argument is unpersuasive. *Uhden* specifically held that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the United States and New Mexico Constitutions requires the party who filed the spacing application, in this case Mitchell, to provide notice of the pending proceedings by personal service to such parties whose property rights may be affected. *Uhden*, 112 N.M. at 531, 817 P.2d at 724. Thus, Mitchell was under a duty to exercise due diligence to ascertain the identify of Plaintiffs. As previously discussed, Mitchell exercised no diligence at all in attempting to ascertain the identities of Plaintiffs. Even when Mitchell was given actual knowledge of Plaintiffs identity, the nature of their interest owned and their whereabouts, Mitchell still did not act upon such knowledge. Indeed, for administrative convenience it appears that Mitchell made a conscious decision to not provide notice.

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the constitutionality of providing notice just by certified mail, as we currently do, versus personal service." (R. at Tr. of 1993 hearing at 43).

D. The Division Never Obtained Jurisdiction Over Plaintiffs and Therefore, Any Order Issued by the Division in Regard to the Rights of Plaintiffs is Void.

It is fundamental that a board, commission or court does not obtain jurisdiction over a party until that party is served with notice and is given an opportunity to be heard. Any action taken by the Division that affects the Plaintiffs' rights is void as to Plaintiffs unless they have been provided with notice and a fair opportunity to be heard. As it is uncontested that Plaintiffs were never notified of the Application filed in 1992, the 1993 hearing or the entry of the order as a result of the 1993 hearing, the Division never acquired the requisite jurisdiction over Plaintiffs.

It is submitted that had the administrative proceedings taken place in a New Mexico court and Plaintiffs were not served with notice of the proceeding, there would be no serious argument about the court's ability to adjudicate Plaintiffs' rights. For a district court to have jurisdiction over a party and comply with due process requirements, a summons and complaint must be served on the party pursuant to SCRA 1986, 1-004 in a manner reasonably calculated to bring the proceeding to the defendants attention. *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988). It is this same standard of due process and justice that is required in administrative proceedings:

> Administrative proceedings must conform to fundamental principals of justice and the requirements of due process of law. The litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty. [citations omitted]

Uhden, 112 N.M. at 530 - 531, 817 P.2d 723 - 724. The standards of justice and procedural due process are identical whether a judicial or administrative setting. As discussed, the case of *Uhden*

v. New Mexico Oil Conservation Commission, et al., supra, is dispositive as to the issues of this case. In *Uhden*, the New Mexico Supreme Court found that since Uhden was not served personally with notice of the Oil Conservation Commission's hearing, that the order entered by the Commission effecting Uhden's rights was void. The *Uhden* case does not stand alone for this proposition in New Mexico. In *AA Oilfield Service v. New Mexico State Corp. Comm'n.*, 118 N.M. 273, 278, 881 P.2d 18, 23 (1994), the New Mexico Supreme Court held that "if the Corporation Commission enters an order without providing notice and hearing as required, such orders are void and subject to collateral attack." This decision was based on a previous New Mexico case, *Groendyke Transportation, Inc. v. New Mexico State Corp. Comm'n.*, 79 N.M. 60, 62, 439 P.2d 709, 711 (1968) which reached the same result.

In Oklahoma, a sister oil and gas state, the Oklahoma Supreme Court held that when parties did not receive the requisite notice of an increased well density application, a jurisdictional defect was apparent from the face of the record and thus the Oklahoma Corporation Commission did not have jurisdiction to adjudicate the rights of the parties and the commission's order was void. *Anson Corp. v. Hill*, 841 P.2d 583, 586 (Okla. 1992). In *Union Texas Petroleum vs. Corp. Comm'n.*, 651 P.2d 652 (Okla. 1981), the Oklahoma Supreme Court similarly held that:

> The record contains no notice of a mailing to this entity and thus the record demonstrates the commission attempted to proceed against Union's interest in the absence of jurisdiction over the person of that entity. Accordingly, the order's attempt to adjudicate the rights of Union Oil of California is ineffective, and a nullity insofar as it purports to affect its interest.

651 P.2d at 659; *see also Capital Federal Savings Bank v. Bewley*, 795 P.2d 1051, 1053 (Okla. 1990). Plaintiffs had a right to be notified of the Division's proceeding by personal service. *See Uhden, supra.* Plaintiffs were not notified of either the application or the hearing which

purportedly resulted in the pooling of Plaintiffs' interests in the subject property. Due to the lack of notice and personal service on Plaintiffs, the Division never obtained jurisdiction over them. The action taken by the Division in the proceeding and the resultant order is, therefore, void as to Plaintiffs and their interests in the subject property.

III. CONCLUSION

It is well established by New Mexico law that Plaintiffs had a protected property interest in the federal oil and gas lease at issue. As a result, Plaintiffs must have been accorded due process prior to any deprivation of their property interests. The record on appeal clearly demonstrates that Mitchell had actual knowledge of Plaintiffs' existence, identity, whereabouts and nature of each interest owned prior to the 1993 hearing. Despite this actual knowledge, Mitchell failed to give notice to Plaintiffs. As a result of this lack of notice, the Oil Conservation Division failed to acquire jurisdiction over Plaintiffs thereby rendering its order of 1993 void as to Plaintiffs. The Oil Conservation Commission erred in upholding the Division's order and in finding that Plaintiffs were not entitled to notice as they were not "record owners" at the time of the 1993 hearing. As seen, record ownership is only one type of ownership and Plaintiffs had a protected property interest and thus had a right to notice in this action. Therefore, this Court should enter an order vacating Order Nos. R-9845 and R-10672-A and hold that Order No. R-9845 is void, invalid and unenforceable as to Plaintiffs.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: Brian J. Pezzillo
Harold D. Stratton, Jr.
Brian J. Pezzillo
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I hereby certify that a true and correct copy of the foregoing pleading was served via first class mail on opposing counsel of record at the following addresses:

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Harold L. Hensley, Jr.
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this 23rd day of October, 1997.

STRATTON & CAVIN, P.A.

By: Brian J. Pezzillo
Brian J. Pezzillo

FIFTH JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF LEA

DOCKETING ORDER

The Civil Docket for January, February, March and April 1998, will be called in Lea County at the Lea County Courthouse in Lovington beginning at **9:00 A.M. on Friday, November 07, 1997.** All Civil cases at issue (all answers filed) thru October 15, 1997 will be called before **Judge R.W. Gallini** at 9:00 A.M. followed by **Judge Gary L. Clingman at 10:00.** (Cases will be set for trial during the months of January thru April 1998. Entry of appearance does not constitute an answer.

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

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

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

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

R. W. Gallini

JUDGE R. W. GALLINI

JUDGE GARY L. CLINGMAN

CASE HISTORY

D-0506-CV-0000097159 BRANKO INC ETAL VS THE NEW MEX

TYPE: CONTRACT/DEBT & MONEY DUE CURRENT STATUS: PN PENDING 04-25-1997
DATE FILED: 04-25-1997

--- JUDGES ---
INITIAL ASSIGNMENT 04-25-1997 RALPH W GALLINI

				--------ATTORNEYS--------
P	001	ACTIVE	BRANKO INC ETAL	HAROLD D. STRATTON JR.
P	002	ACTIVE	BROWN DUANE	HAROLD D. STRATTON JR.
P	003	ACTIVE	CAVIN S H	HAROLD D. STRATTON JR.
P	004	ACTIVE	EATON ROBERT W	HAROLD D. STRATTON JR.
P	005	ACTIVE	KRAMER TERRY	HAROLD D. STRATTON JR.
P	006	ACTIVE	KRAMER BARB	HAROLD D. STRATTON JR.
P	007	ACTIVE	LANDWEST	HAROLD D. STRATTON JR.
	008	ACTIVE	MCCLELLAND CANDACE	HAROLD D. STRATTON JR.
P	009	ACTIVE	MITCHELL STEPHEN T	HAROLD D. STRATTON JR.
P	010	ACTIVE	PERMIAN HUNTER CORPORATION	HAROLD D. STRATTON JR.
P	011	ACTIVE	SCOTT III GEORGE L	HAROLD D. STRATTON JR.
P	012	ACTIVE	SCOTT EXPLORATION INC	HAROLD D. STRATTON JR.
P	013	ACTIVE	WELLBORN CHARLES I	HAROLD D. STRATTON JR.
P	014	ACTIVE	WINN INVESTMENTS INC	HAROLD D. STRATTON JR.
P	015	ACTIVE	WORRALL LORI SCOTT	HAROLD D. STRATTON JR.
P	016	ACTIVE	XION INVESTMENTS	HAROLD D. STRATTON JR.
			VS.	
D	001		NM OIL CONSERVAT.	MARILYN S. HEBERT
D	002	ACTIVE	MITCHELL ENERGY CORPORATION	HAROLD L. HENSLEY JR. W. THOMAS KELLAHIN JAMES M. HUDSON

CAUSE OF ACTION

04-25-1997 1 1 CONTRACT MISCELLANEOUS

FIFTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF LEA

BRANCO, INC., et al.,

Plaintiff,

vs. No. CV-97-159-G

NEW MEXICO OIL CONSERVATION, et al.,

Defendants..

ORDER ESTABLISHING BRIEFING SCHEDULE

THIS MATTER having come before the Court upon the request of the parties to establish a briefing schedule for submission of briefs upon the issues involved in this proceeding, and the Court being advised in the premises, **NOW THEREFORE**

IT IS HEREBY ORDERED that the parties will submit to the Court their briefs in accordance with the following schedule:

1. Plaintiff shall file his Brief-in-Chief on or before October 24, 1997;

2. Defendants shall file their Answer Briefs on or before November 24, 1997;

3. Plaintiff shall file his Reply Brief, if any, on or before December 15, 1997.

After all briefs have been submitted, the Court shall notify the parties regarding oral argument.

R. W. Gallini

R. W. GALLINI, District Judge

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. CV 97-159G

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

ORDER

THIS MATTER, having come before the Court by telephone conference in the above referenced cause on the Plaintiffs' Motion for Filing of Appellate Briefs and for Oral Argument in the above entitled action and the Plaintiffs being represented by their attorney of record Harold D. Stratton, Jr., the Defendant, New Mexico Oil Conservation Commission, being represented by its attorney of record Lyn Hebert and the Defendant, Mitchell Energy Corporation, being represented by its attorney of record James M. Hudson and the Court after hearing arguments of counsel being fully advised on the premises,

IT IS THEREFORE ORDERED, that the parties shall be allowed to file briefs in this cause pursuant to a schedule and terms to be issued by the Court.

IT IS FURTHER ORDERED that the Court shall notify the parties regarding oral argument after the Court has had an opportunity to review the briefs of the parties in the cause.

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED BY:

By: _____
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Stratton & Cavin, P.A.
Attorneys for Plaintiff
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APPROVED AS TO FORM:

By: Telephonic Approval 9/19/97
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FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S.H. CAVIN, ROBERT W. EATON,
TERRY KRAMER, and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE McCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE S. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs - Appellants,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION,

Defendants - Appellees.

NEW MEXICO OIL CONSERVATION COMMISSION'S STATEMENT OF APPELLATE ISSUES

COMES NOW the New Mexico Oil Conservation Commission ("Commission") and pursuant to Rule 1-074 (L) NMRA 1997 responds as follows to the Plaintiffs' Statement of Appellate Issues:

STATEMENT OF ISSUES

The Plaintiffs have failed to comply with Rule 1-074(K)(3) NMRA 1997 that states, in part, that the appellant's statement of appellate issues shall contain, *inter alia*:

> an argument, which shall contain the contentions of the appellant **with respect to each issue presented in the statement of appellate issues**, with citations to the authorities, statutes and parts of the record on appeal relied upon.

(Emphasis added.)

The Plaintiffs list twelve separate issues in their "Statement of Issues," but the Plaintiffs present argument as to only four of the twelve issues. In so doing, the Plaintiffs have made numerous statements of fact in its "Statement of Issues" that are not supported in the "Argument" section by citations to the authorities, statutes and parts of the record on which the Plaintiffs rely.

Additionally, the Plaintiffs have made assertions concerning findings of fact from Commission Order No. R-10672-A ("Order") in its "Statement of Issues" that are not findings contained in the Order. Plaintiffs' Issue 7 asks: "Whether the Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants...." First, the Commission simply made no such finding. (R.P. 251-259) Second, it is not clear to whom Plaintiffs are referring by the term "applicants." Is this the reference to Defendant-Appellee Mitchell Energy Corporation ("Mitchell") that was the applicant for the forced pooling order before the Commission? Why would Mitchell be "given" notice as Mitchell was the applicant? Or, is this a reference to the Plaintiffs, *i.e.*, the party complaining about lack of notice?

Issue 12 asks: "Whether the Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable." Again, a review of the Commission's Order reveals that the Commission made no such finding. (R.P. 251-259)

The Commission requests that the eight issues that are not argued by the Plaintiffs, Issue Numbers 1, 2, 4, 5, 7, 10, 11 and 12, be stricken and that the issues that are misstatements of the

Commission's Order, Issue Numbers 7 and 12, be stricken.

SUMMARY OF THE PROCEEDINGS[1]

The Plaintiffs' summary of the proceedings combines the procedural history of this case with subjective comments. The Plaintiffs apparently attempt to circumvent the page limitation for their argument imposed by Rule 1-074 NMRA 1997 by putting much of their argument in this summary. Therefore, the Commission provides the following summary:

1. On December 8, 1992, Mitchell filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location ("1992 Application") with the Oil Conservation Division ("OCD") pursuant to NMSA 1978, § 70-2-17 (Repl.Pamp.1995). The OCD assigned Case No. 10656 to this matter.

2. On January 21, 1993, a hearing was held in Case No. 10656 before an OCD hearing examiner ("1993 Hearing"). Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company ("Strata") appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A. (1993 Hearing Tr. 5)

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[1] The Plaintiffs refer to the application filed in 1992 by Mitchell as having been "omitted" from the record on appeal filed with the Court. This is inaccurate. The application is not a part of the record on appeal of the case before this Court. While it is true that the exhibits and transcriptions from an earlier case, Case No. 10656, were introduced and received into evidence in Case No. 11510, the pleadings and papers from Case No. 10656 were not introduced and did not become a part of the record for Case No. 11510. (1997 Hearing Tr. 4-8)

The Commission did not oppose the Plaintiffs' motion to supplement the record on appeal of Case No. 11510 by adding the application, but the Plaintiffs just make matters more confusing by referring to the application as "omitted," implying that it was, indeed, a part of the record of Case No. 11510, when in fact it was not.

3. On February 15, 1993, the OCD Director entered Order No. R-9845 in Case No. 10656 which pooled certain mineral interests to form a proration unit to be dedicated to the Tomahawk "28" Federal Com Well No. 1. (R.P. 82-90)

4. By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, § 70-2-13 (Repl.Pamp.1995).

5. By fax on April 28, 1993, Strata withdrew its request for a *de novo* hearing of Case No. 10656. The Commission entered an order on April 29, 1993, dismissing the requested *de novo* hearing of Case No. 10656.

6. Almost three years after the entry of OCD Order R-9845, on January 29, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* ("Motion") in Case No. 10656 was faxed by Harold D. Stratton of Stratton & Cavin, P.A. to OCD on behalf of the Plaintiffs. (R.P. 01-75)

7. On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 ("Reply"). (R.P. 76-90)

8. On May 2, 1996, a hearing on the Motion was held by an OCD hearing examiner who assigned the case as Case No. 11510 ("1996 Hearing").

9. On October 2, 1996, the OCD Director entered Order No. R-10672 in Case No. 11510; the order reopened Case No. 10656. (R.P. 165-171)

10. On October 30, 1996, Mitchell filed a Request for a Hearing *De Novo* before the Commission of Case No. 11510, Order No. R-10672. (R.P. 177-195)

11. On January 16, 1997, the Commission held a *de novo* hearing of Case No. 11510. The parties stipulated to the introduction of the exhibits and transcripts from the 1993 Hearing

and the 1996 Hearing. The parties offered no new evidence, but through their counsel, the parties presented argument to the Commission. (1997 Hearing Tr. 4-8)

12. On March 19, 1997, the Commission entered its order in Case No. 11510. The Commission's Order, Order No. R-10672-A, denied the Plaintiffs' Motion to Reopen Case No. 10656. (R.P. 251-259)

13. On April 7, 1997, the Plaintiffs filed an Application for Rehearing pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995). The application was deemed denied on April 17, 1997 pursuant to NMSA 1978, § 70-2-25 (Repl.Pamp.1995) as the Commission took no action on the application. (R.P. 260-263)

14. On April 25, 1997, the Plaintiffs filed its Petition for Review of the Commission's Order with this Court pursuant to Rule 1-074 NMRA 1997 and NMSA 1978, § 70-2-25 (Repl.Pamp.1995).

ARGUMENT

A. The Plaintiffs Did Not Have a Property Interest That Entitled Them to Notice

The Plaintiffs each claim to have had a property interest in certain federal oil and gas leases at the time of the 1992 Application and the 1993 Hearing before the OCD hearing examiner. The Plaintiffs claim that these property interests entitled them to notice of the 1992 Application and the 1993 Hearing.

What property interest did the Plaintiffs have at the time of the 1992 Application and the 1993 Hearing? The evidence presented to the Commission by affidavits from the individual plaintiffs was that each plaintiff paid an amount of money to Strata for a certain percentage

interest in federal oil and gas leases. The leases in question are United States Oil and Gas Lease NM 57683 and United States Oil and Gas Lease NM 82927. These affidavits state the date and the amount paid to Strata for an interest in leasehold operating rights in the federal leases. Each plaintiff claims to have acquired his interest in the leases in either 1989 or 1990. (1996 Hearing, Branko Exhibits Nos. 1 through 16) However, there is no written documentation of a transfer of the interest from Strata to the individual plaintiff in the record before this Court except for the attempted transfer by Strata on November 7, 1995, three years after the 1992 Application was filed.[2] (1996 Hearing, Branko Exhibit 17, exhibits B and C attached thereto) Apparently, the Plaintiffs paid Strata in 1989 and 1990 and received no written documentation regarding their interests in the leases until 1995.

The Plaintiffs in their Statement of Appellate Issues correctly state that leasehold operating rights and overriding royalty interests are interests in real property. *Johnson v. Gray*, 75 N.M. 726, 410 P.2d 948 (1966). NMSA 1978, § 38-1-3 (Repl. Pamp.1987) incorporates the English Statute of Frauds and makes it in force in New Mexico. *Coseboom v. Margaret S. Marshall's Trust,* 64 N.M. 170, 326 P.2d 368 (1958), rev'd on other grounds, 67 N.M. 405, 356 P.2d 117 (1960). The Statute of Frauds (29 Charles II, c 3) provides:

> No action shall be brought on any contract or sale of tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the

[2] In *Strata v. Mercury*, 121 N.M. 622, 916 P.2d 822 (1996), a similar situation existed in that Strata had investors in a farmout agreement, but there was no evidence in the record that Strata had assigned any of its interest in the agreement to its investors. Rather, Strata and its investors executed a separate contract that governed the rights and obligations between Strata and its investors.

> party to be charged therewith, or by some person therewith by him lawfully authorized.

The Statute of Frauds would have prevented the Plaintiffs from enforcing in the courts any oral agreement they had with Strata concerning these leases.

NMSA 1978, § 70-1-1 (Repl.Pamp.1995) states:

> That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, **shall be recorded** in the office of the county clerk of the county where the lands are situated.

(Emphasis added.)

The only documentary evidence the Plaintiffs presented as to their interests having been recorded with the county clerk is in Branko's Exhibit 17 from the 1996 Hearing. Exhibit 17 is the January 17, 1996 affidavit of Mark B. Murphy, president of Strata. Attached to the Affidavit are Exhibits A, B and C. Exhibit B to the Affidavit is the attempted transfer of a 1.5% overriding royalty interest in United States Oil and Gas Lease NM 82927 to three of the Plaintiffs. Exhibit B was signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Exhibit C to the Affidavit is the attempted transfer of 81.5% of the operating rights to United States Oil and Gas Lease NM 82927 to thirteen of the Plaintiffs.[3] Exhibit C was also signed by Murphy for Strata on November 7, 1995 and recorded in Lea County on November 8, 1995. Three years had elapsed between the filing of the 1992 Application and the

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[3] One of the Plaintiffs, Scott Exploration Inc., claimed both an overriding royalty interest and an operating interest in the lease. Two of the entities listed as transferees on Exhibit C, Arrowhead Oil Corporation and Warren, Inc., did not join the Plaintiffs as parties to this case.

filings of the attempted transfers in 1995.

In ¶ 6 of the Affidavit Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove at Paragraph 5, Strata retained all of the record title interest subject to the beneficial interest of the parties as described at Exhibit A hereto." (1996 Hearing, Branko's Exhibit 17) Murphy admits in this statement that Strata alone had legal title to the United States Oil and Gas Lease NM 82927 after the Plaintiffs bought into the Strata enterprise. Murphy characterized the Plaintiffs' interests at that time as merely a "beneficial interest." Additionally, Exhibit B to the Affidavit on its first page contains the following statements by Strata: "*Strata owns 100% of the record title interest and leasehold operating rights." "Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed." These statements appear on a document executed by Murphy as president of Strata on November 7, 1995. Plaintiffs' beneficial interest did not entitle them to notice any more than a beneficiary of a trust is entitled to notice of actions affecting property owned by the trust.

Mark Murphy, the president of Strata, testified at the 1993 Hearing that Strata, not the Plaintiffs, was the record title holder on the date of the title opinion (1993 Hearing Tr. 141). Mitchell's landman, Stephen J. Smith, also testified that the title opinion dated December 29, 1992 for Mitchell prepared by William B. Burford of the Hinkle, Cox, Eaton, Coffield & Hensley law firm also indicated that ownership of the property interest in question was held by Strata. (1993 Hearing Tr. 27, 28)

Murphy testified that he told Mitchell's landman Smith on October 26, 1992, that Strata had other partners. (1993 Hearing Tr. 122). On direct examination, Murphy was asked: "Who

are these parties, as a general rule?" Murphy responded: "As a general rule, they're long-term investors of Strata." (1993 Hearing Tr. 127) Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17 from the 1993 Hearing, were long-term partners of Strata. (1993 Hearing Tr. 129) Murphy also stated, "As a matter of fact, many times in leasehold situations like this, you don't immediately make assignments to all the parties until a well is drilled or some action taken. So if you do sell it, you only have to handle one assignment from Strata to whoever the purchaser is. If we [Strata] assign this out to all these parties, they would have to gather up -- we'd have to gather up 15 assignments into Mitchell or to whomever." (1993 Hearing Tr. 130) Murphy also testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease." (1993 Hearing Tr. 141)

The practice described by Murphy provided benefits to both Strata and its investors, *i.e.*, the Plaintiffs. The Plaintiffs enjoyed the benefits of not being the title holders, *e.g.*, not having to record the individual assignments, not having to be available for negotiations, not having to make elections to participate; but at the same time, they claim as well the benefits of record title holders such as the right to notice. They cannot have both; they are either interest owners entitled to notice or not. In this case, the evidence is that they were not property interest owners entitled to notice of the 1992 Application filing or the 1993 Hearing. Rather, the Plaintiffs' interests are more like those of a shareholder in a corporation. The corporation is the legal entity entitled to notice of actions affecting property owned by the corporation, not the individual shareholders, *i.e.*, investors.

Why did the Plaintiffs wait for over three years from the date the 1992 Application was

filed and the 1993 Hearing was held to bring their claims? Why did Stratton on behalf of Strata withdraw the request for a *de novo* review of the OCD order in 1993? Would the claims have been brought now if the well had not produced? The Plaintiffs want the penalty imposed on Strata for electing not to participate in a successful well removed so that their interests as investors in Strata are more rewarding. (1993 Hearing Tr. 32) The case is an attempt to avoid the penalty imposed on Strata for choosing not to pay its share of the costs of the well.

The Plaintiffs' argument attempts to convince this Court that the Plaintiffs are in the position of the plaintiff in *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). Mrs. Uhden was the owner in fee of an oil and gas lease who leased it to Amoco but retained a royalty interest. There was no dispute in *Uhden* that the plaintiff had a real property interest; the dispute was whether the property interest she had was entitled to notice. The Plaintiffs in the case before this Court simply had no cognizable real property interest at the time of the 1992 Application or the 1993 Hearing, and therefore the Plaintiffs were not entitled to notice of the 1992 Application or 1993 Hearing.

B. The Plaintiffs Were Not Transferees of the Federal Leases in 1992 or 1993

The leases in questions are federal oil and gas leases. Any attempt to transfer ownership interests in the leases must be approved by the Bureau of Land Management of the United States Department of Interior pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 187a (1994). This act states, in part: "[A]ny oil and gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary." Not only were the attempted transfers to the Plaintiffs never approved by the

BLM or accepted as required by the transferees so far as the evidence provided by the Plaintiffs indicates, they were not even executed by Strata until November 7, 1995. (1996 Hearing, Branko Exhibit 17, Exhibits B and C attached thereto)

A recent federal district court case from Utah emphasized that BLM's approval of the transfer of interest in a federal oil and gas lease is necessary for the transfer to have any effect, not only as between the federal government and the transferor and transferee but also as between private entities. *River Gas Corp. v. Pullman*, 960 F. Supp. 264 (D. Utah 1997). In this case the plaintiffs sought to quiet title to certain interests in a federal oil and gas lease. The plaintiffs had been assigned 100% of the record title to the federal lease by PG&E Company (PG&E), and the assignment was approved by the BLM on July 1, 1994. However, the defendants in the quiet title action had purportedly been assigned 100% of the record title to the same federal lease by PG&E's corporate predecessor much earlier on August 9, 1990. This attempted assignment was never approved by the BLM. The court granted the plaintiffs' request and entered a quiet title decree in their favor stating, regarding the earlier attempted assignment, "[i]t is well established that a party must receive the approval of the Secretary of the Interior in order for an assignment of a government lease to be valid." The court continued "... an assignment does not actually occur until approval is granted." The court also stated, "Because the interests in the lease remain with the assignor until BLM approval is obtained, Pullman **never had an interest** in the government lease." *Id.* at 266 (emphasis added).

The defendants in *River Gas Corp.* cited *Norbeck v. Crawford*, 836 P.2d 1231 (1992 Mont.) as a case in which assignees of a federal lease were allowed to resubmit the assignment for BLM approval some fifty-six years after the attempted assignment. However, the *River Gas*

Corp. court was quick to point out that even though the BLM did approve the assignment fifty-six years after the attempted assignment, the assignee was not entitled to any past profits from the lease "...because there was never a valid assignment and therefore no change of title." *River Gas Corp.*, 960 F. Supp. at 266, FN[2].

The Plaintiffs in the case before this Court are, at best, in the position of the defendants in the *River Gas Corp.* if indeed the assignments were ever approved by the BLM. The Plaintiffs' cognizable property interest arose, if ever, at the time of such approval by the BLM, *i.e.*, sometime after November 1995. However, at the time of the 1992 Application and the 1993 Hearing, the Plaintiffs had no interest in the federal oil and gas leases that entitled them to notice of the application and hearing.

STATEMENT OF RELIEF SOUGHT

The Commission requests that the Court enter its order affirming the Commission's Order No. R-10672-A in Case No. 11510.

Respectfully submitted,

Marilyn S. Hebert
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Certificate of Service

I hereby certify that a copy of the New Mexico Oil Conservation Commission's Statement of Appellate Issues was mailed to all counsel of record on the 16th day of September, 1997.

Marilyn S. Hebert

FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,	§	
Appellants,	§	CV 97-159G
v.	§	
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	§	
Appellees.	§	

MITCHELL ENERGY CORPORATION'S RESPONSE TO APPELLANTS' STATEMENT OF APPELLATE ISSUES

COMES NOW the Appellee, Mitchell Energy Corporation ("Mitchell"), and pursuant to Rule 1-074 N.M.R.A. 1997 ("Rule 1-074"), submits its response to Appellants' Statement Of Appellate issues:

I. STATEMENT OF THE ISSUES

Mitchell objects to the Appellants' (collectively referred to as "Branko") Statement Of Appellate Issues on two grounds. First, Branko ignores the appropriate standard of review. As

discussed further below, it is Branko's burden to show that the New Mexico Oil Conservation Commission's ("Commission") findings, based on the record as a whole, are not supported by substantial evidence or are arbitrary, capricious, or contrary to law. *Viking Petroleum v. Oil Conservation Commission.* 100 N.M. 451, 672 P.2d 280 (1983), *Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d. 182 (1995). Second, Mitchell objects to Branko's Statement of Issues to the extent that it seeks to raise issues not raised before the Commission. N.M. Stat. Ann. (1978) Section 70-2-25(B) (the issues to be reviewed by the District Court in an appeal of a decision from the Commission "shall be only questions presented to the Commission in the application for rehearing").

On April 7, 1997, Branko filed an Application for Rehearing listing twelve (12) issues which it has repeated in its Appellants' Statement of the Issues. The repetitious nature of these "twelve" issues can be consolidated into three fundamental issues for review:

(1) Whether the Commission properly rejected the claim of Branko that it owned a property interest, either at the time of Mitchell's application or the hearing thereon, making it a proper party entitled to notice for adjudicating a compulsory pooling case before the Oil Conservation Division, where the claim was based on an unapproved assignment of interests in an oil and gas lease made years after the fact but purporting to be effective prior to Mitchell's Application?

(2) Whether the Commission properly rejected Branko's attempt to manipulate the administrative process by acquiring, after the fact, a property interest in a federal oil & gas lease, and then using that acquisition to collaterally attack a valid Division compulsory pooling order that is binding on its predecessor in interest?

(3) Whether, for a variety of legal reasons, Branko is bound by the actions and inactions of its predecessor in interest, Strata Production Company?

Based on the record as a whole, it is clear that the Commission findings are supported by

substantial evidence, are not arbitrary, capricious, or contrary to law. The Commission Order R-10672-A , therefore, should be affirmed.

II. SUMMARY OF THE PROCEEDINGS

Mitchell objects to Branko's Summary of Proceedings as incomplete, disputed and argumentative. Branko's recitation of the facts is inconsistent with the appropriate standard of review in that it wholly fails to acknowledge evidence supporting the Commission Order, and instead elects to recite only its interpretation of the evidence purporting to favor its claims. Therefore, in accordance with Rule 1-074, Mitchell sets forth the following:

Nature of the case:

Pursuant to the New Mexico Oil and Gas Act, N.M. Stat. Ann. Section 70-2-25(B), this case is before the Court on Appellants' Petition for Review of Order R-10672-A entered by the New Mexico Oil Conservation Commission ("the Commission"). This appeal is limited to those issues raised by the Petitioners in their "Application for Rehearing" filed with the Commission on April 7, 1997, which was denied by the Commission.

Parties:

Branko acquired from Strata Production Company ("Strata") a portion of Strata's interest in a federal oil & gas lease (the "Lease"). Branko claims the interests acquired from Strata are not subject to the terms and conditions of a compulsory pooling order issued by the New Mexico Oil Conservation Division on February 13, 1993, granting the application of Mitchell to involuntarily commit all of Strata's interest including that subsequently assigned to Branko.

Mitchell, a Texas corporation authorized to and doing business in the State of New Mexico, is the operator who obtained this compulsory pooling order and drilled the producing

well.

The Division and Commission are statutory bodies created and existing under the provisions of the New Mexico Oil & Gas Act, N.M. Stat. Ann. (1978) Sections 70-2-1 through 70-2-36.

Jurisdiction:

The Fifth Judicial District, Lea County, New Mexico, has jurisdiction of this case pursuant to N.M. Stat. Ann. (1978) Section 70-2-25(B) because the property affected by Commission Order R-10672-A is located within Lea County, New Mexico.

Factual Summary:

On December 8, 1992, Mitchell filed a Compulsory Pooling Application ("Application") with the Division, and on December 9, 1992, Mitchell served Strata with the Application in NMOCD Case 10656. (TR-I, Mitchell Exhibit 19)[1] . Mitchell had obtained a title opinion which showed that Strata was the owner of 100% of the record title and operating rights for the Lease, which covered 80 acres (25%) of the 320 acres sought to be pooled by Mitchell. (TR-I, p 26-27, Mitchell Exhibit 7). This was confirmed by Mr. Mark Murphy, President of Strata, who testified on January 21, 1993 that Strata owned 100% of the record title and operating rights for the Lease. (TR-I, p. 140-141).

Beginning on October 26, 1992, Mr. Steve Smith, a petroleum landman for Mitchell, engaged in numerous conversations and exchanged correspondence with Mr. Mark Murphy. (Tr-I, Mitchell Exhibits 10-16). By exchanging letters dated January 7 and 12, 1993, Mr. Smith and Mr. Murphy described in great detail their recollections. (TR-I, Mitchell Exhibits 15 and

[1] TR-I refers to the transcript and exhibits for NMOCD Case 10656 heard on January 21, 1993.

16). On numerous occasions prior to January 13, 1993, Mr. Murphy told Mr. Smith that Strata had partners, but Mr. Murphy did not disclose that any of these partners claimed to have any ownership interest in the Lease until December 16, 1992 (TR-I, Mitchell Exhibit 16). Mr. Murphy consistently used the term "partners" when he referred to these undisclosed or other alleged leasehold owners. (TR-I, Mitchell Exhibit 16; TR-II p 23, 56).[2] On November 18, 1992, Mr. Murphy told Mr. Smith that Strata would defend itself and its partners' rights during any proceeding including a force pooling hearing. (Tr-I, Mitchell Exhibit 16). By letter dated December 30, 1992, Mr. Murphy represented and warranted to Mitchell that Strata had the right, power and authority to sell 100% of the lease for the benefit of such undisclosed owners. (TR-I, Mitchell Exhibit 12).

At the time Strata was served with the Application, Strata was the only individual or entity with a property interest in this lease whose identity was known to Mitchell. (Tr-I, p.23). At the time Strata was served with the Application, Strata held 100% of both record title[3] and operating rights title.[4] (TR-I, p.27). Strata claimed to have "partners" but Mitchell did not know who these partners were, what if any unrecorded interest they might have, or how to contact them. (TR-I, Mitchell Exhibits 11, 15, 16). Mr. Smith of Mitchell had inquired of Mr. Murphy, "as to who these partners were" and Mr. Murphy only described them, "as long term investors of

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[2] TR-II refers to the transcript and exhibits for NMOCD Case 10510 heard on May 2, 1996.

[3] record title means the party with the primary interest in a federal oil & gas lease who is responsible to the BLM for lease obligations including the payment of rents and who is the party entitled to assign and relinquish the lease.

[4] is synonymous with "working interest owner" and means an interest obtained from the record title owner which authorizes the holder to conduct drilling and related operations, including production and so share in revenues from the sale of that production.

Strata or people that we've been involved in." (TR-II, p 23).

By its actions, Strata induced Mitchell into not making further inquiry into the identity of Strata's "*undisclosed partners*". (Tr-I p. 29, 40, 51-52, 57-59; Mitchell Exhibit 12; TR-II, p. 56, 61-62, 63, 67). Mitchell had neither actual acknowledge nor constructive notice of any written instrument conveying any interest in this lease to these "*undisclosed partners.*" (TR-I p.28-29). In fact there appears to have been none. Nor did Mitchell know the identity of any of these "*undisclosed partners*" until after the Application was served on Strata. (TR-I pp. 47, 60; TR-II, p. 23).

On January 13, 1993, just a week before the Division hearing in this case, and in an effort to delay the pooling proceedings, Strata for the first time disclosed to Mitchell the identity of Strata's partners. (TR-I, p. 47). Strata claimed there were 15 working interest owners and three overriding royalty owners involved in the Strata lease. (TR-I, pp. 28, 47; Mitchell Exhibit 16; TR-II, pp. 23, 71). However, at the same time, Strata still held 100% of both record title and operating rights title. (TR-I p.141).

On January 21, 1993, the Division conducted a hearing in this case at which Strata sought to have the case continued and contended that Mitchell should be required to provide additional notice because Mitchell had failed to provide notification to Strata's "*undisclosed partners.*" (TR-I, p. 6) (emphasis added).

On February 15, 1993, the Division issued Order R-9845 granting Mitchell's application. (R.P. pp. 82-90)[5]. On February 17, 1993, in accordance with this order, Mitchell sent Strata an election letter requesting Strata to elect within thirty days whether to participate with its 25%

[5] R.P. refers to the Record Proper.

working interest under the pooling order. (TR-II, Mitchell Exhibit 1).

Strata filed and then withdrew on the day of the hearing its request for a *de novo* review and hearing before the Commission. Strata failed to timely elect to participate in this well. (TR-II, p 48-49). Mitchell incurred the expense and took the risk to drill the well, which was completed as a producing well. (R.P. pp. 172-176, 179-182, and 191-195).

Then, Strata waited until it was satisfied that Mitchell's well was profitable and by letter dated November 6, 1995, told the partners that Mitchell's well had now produced sufficient gas to have paid for its costs and that they may have a claim against Mitchell to avoid having to pay any of the 200% risk factor penalty set forth in the Compulsory Pooling Order R-9845. (TR-II, p. 59, Branko Exhibit 27).

On November 7, 1995,[6] some six years after the Strata partners claimed to have acquired an interest in this lease, more than 31 months after the entry of the compulsory pooling order in this case, and after Mitchell had drilled the well, Strata finally signed written instruments conveying interests to its undisclosed partners which were then recorded in Lea County on November 8, 1995. (TR-II, Branko Exhibit 17).

On January 29, 1996, certain of these partners (the appellants herein) filed a Motion with the Commission seeking to reopen Case 10656. (R.P. pp. 01-75).

On May 3, 1996, the Division held a hearing on this motion and on October 2, 1996, entered Order R-10672, (R.P. pp. 165-171).

Among other things, the Division found that:

(10) It would circumvent the purpose of the New Mexico Oil and Gas Act to

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[6] The assignments are dated and notarized on November 7, 1995 while the letter transmitting copies to the *undisclosed partners* is dated November 6, 1995.

> allow a record owner of a working interest in the spacing unit at the time said party was served with a compulsory pooling application to avoid or delay having that entire percentage interest pooled by (i) assigning, conveying, selling or otherwise burdening or reducing that interest; or (ii) disclosing previously undisclosed partners or other interest owners who obtained either ownership through the record owner and who are not of public record; after the application and notice of hearing are filed with the Division and served on the party. Taken to the extreme, Strata could have disclosed, one at a time, each of its "partners' each week before a hearing date to delay the hearing 15 times.

The Division then determined that "(11) a cutoff date for notification of affected interest owners is necessary." (R.P. p. 167). However, the Division then found that because Mitchell had not sent notice to Strata's partners affording them a post order election, Case 10656 should be reopened to examine the share of costs that should be apportioned. (R.P. p. 170).

Mitchell appealed this Division order, *de novo*, to the Commission. The Commission agreed with Mitchell, issuing Order R-10672-A (R.P. pp. 251-159), where it essentially concluded the following:

> (1) that actual notice to "each known working interest owner" of an application for compulsory pooling is limited to those working interest owners whose interest is evidenced by a valid and enforceable written instrument of conveyance the existence of which is known to the applicant at the time the application for compulsory pooling was filed; and
>
> (2) that "each known working interest owner" to be furnished with an election opportunity pursuant to a compulsory pooling order is limited to: (a) those working interest owners whose interest is evidenced by a valid and enforceable written instrument the existence of which is known to the applicant at the time the application for compulsory pooling was filed; and (b) to those transferees of said working interest owners whose transfer is evidenced by a valid and enforceable written instrument of transfer which has been delivered to the applicant.

III. ARGUMENT AND AUTHORITIES

A. The Commission Order can only be reversed if it is not supported by substantial evidence or is arbitrary, capricious or otherwise contrary to law.

Branko's Statement of Issues fails to acknowledge or apply the appropriate standard of

review that must be applied by this Court. The applicable standard of review is whether, based on the record on appeal, the Commission's order is substantially supported by the evidence and by the applicable law. *El Paso Natural Gas Co. v. Oil Conservation Com'n.*, 76 N.M. 268, 414 P.2d 296 (1966). In that regard, the standard of review has been summarized as follows:

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rinker v. State Corporation Commission*, 84 N.M. 626, 506 P.2d 783 (1973). [The Court] must view the evidence and all reasonable inferences in the light most favorable to support the findings, and any evidence unfavorable will not be considered. *Martinez v. Sears, Roebuck and Co.*, 81 N.M. 371, 467 P.2d 37 (Ct. App.), 81 N.M. 425, 467 P.2d 997 (1970). Special weight will be given to the experience, technical competence and specialized knowledge of the Commission. *Rutter & Wilbanks Corporation v. Oil Conservation Commission*, 87 N.M. 286, 532 P.2d 582 (1975); *Grace v. Oil Conservation Commission*, 87 N.M. 205, 531 P.2d 939 (1975). [The Court's] review is limited to the evidence presented to the Commission, and the administrative findings of the Commission should be sufficiently extensive to show the basis for the order. *Continental Oil Company v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962). The findings must disclose the reasoning of the Commission in reaching its conclusion. *Fasken v. Oil Conservation Commission*, 87 P.2d 292, 532 P.2d 588 (1975).

Viking Petroleum v. Oil Conservation Commission., supra, 100 N.M. at 453. Contrary to the correct standard of review, Branko improperly presents a recitation of facts that entirely ignores the evidence supporting the Commission order and selectively presents contrary evidence to support its allegations.

B. The Commission correctly found that all proper parties to Mitchell's Application received notice and participated in the hearings.

Branko's appeal is premised on the incorrect assertion that it owned an interest in the Lease either when the application was filed or when the hearing was held. The substantial, if not overwhelming, evidence in the record establishes that Branko did not own such an interest at any material time. Branko's appeal, therefore must fail.

Branko's appeal asserts that they are entitled to notice protection afforded parties whose

property rights may be affected by Commission action because they claim to have a "property right interest" in the Lease at the time this compulsory pooling application was filed. Unfortunately for them, the property interest for which they seek protection was not created until November 6, 1995, some 32 months after the proceedings in this case were concluded. (TR-II, Branko Exhibit 17; TR-II, p. 59). It is undisputed that these two written instruments, by which Strata attempted to conveyed an interest in the lease to its various partners, did not come into existence until November 7, 1995 when signed by Mr. Murphy. (TR-II, p. 59). It is undisputed that these two written instruments had not been approved by the Secretary of Interior.[7] (TR-II, Branko Exhibit 17). It is also undisputed that these written instruments were not recorded until November 7, 1995. (R.P. pp. 53-57, 29-30).

An oil and gas lease is an interest in real property. *O'Kane v. Walker*, 561 F.2d 207 (10th Cir. 1977). Likewise, an overriding royalty interest in a mineral lease is an interest in real property. *Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 879 P.2d 779 (1994). Under New Mexico law, "all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, *including lands operated under lease or contract from the United States...* shall be recorded in the office of the county clerk of the county where the lands are situated." NMSA 1978, Section 70-1-1 (emphasis added). Also "...*no* assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect title or rights to such royalties of any purchaser or transferee in good faith, without knowledge of the *existence of such unrecorded instrument.*" (emphasis added)

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[7] Strata's assignments of interests in the Lease to Branko must be approved by the Secretary of Interior in order to be valid. Until such assignments are approved then they are not valid and the interest remains with Strata. See, *River Gas Corporation v. Karen Pullman*, 960 F. Supp. 264 (D. Utah 1997).

N.M. Stat. Ann. (1978) Section 70-1-2 and *Bolack v. Underwood*, 340 F.2d 816 (10th Cir. 1965).

Mitchell gave notice of its application to Strata. (TR-I, Mitchell Ex. 19). At that time Strata was the only individual or entity of record with a property interest in the lease. (Tr-I, p.23). At the time Strata was served with the compulsory pooling application, public records showed that Strata held 100% of both record title and working interest title. (TR-I, Mitchell Ex. 12). Strata claimed to have "*undisclosed partners*" but did not initially disclose who these partners were, what if any property interest they might have or how Mitchell could contact them. (TR-I, Mitchell Exhibits 11, 15, 16). Moreover, record ownership was inconsistent with the claim.

Prior to January 13, 1993, all that Mitchell had been told was that Strata had partners. (TR-I pp28-29). The representation alone does not create a protected property interest entitling Branko to notice. Rather, there must be an independent document, such as an assignment, that creates the property interest. It is the property interest that gives rise to the right to notice. The representation does not amount to a disclosure that an individual has an interest in the subject oil and gas lease for which he should be entitled to receive notice of a proceeding before the Commission. No assignment had been made to these individuals and therefore they had no interest. Mr. Murphy admitted during his sworn testimony on January 21, 1993 that Strata still held 100% of the record title and working interest ownership of that lease. (TR-I, p 141, Mitchell Exhibits 7, 19).[8]

Branko was not entitled to notice of these proceedings because it did not acquire a protected property right in the Lease until almost three years after the compulsory pooling proceeding had been concluded. As a result, Branko's reliance upon *Uhden v. New Mexico Oil*

[8] See TR-I at p. 140-141.(Questions by Mr. Kellahin, answers by Mr. Murphy)

Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is entirely misplaced. In the *Uhden* case, Amoco filed an application before the New Mexico Oil Conservation Division seeking to increase well spacing from 160 acres to 320 acres in the Cedar Hills pool, at a time when Mrs. Uhden was a mineral owner whose interest was of record in San Juan County, New Mexico. She had signed a lease to Amoco, and Amoco had a copy of that lease which had been recorded. Amoco did not dispute that Mrs. Uhden had a property interest, but claimed that Mrs. Uhden as its lessor had signed a lease which contained provisions which authorized Amoco to change the spacing and therefore, by authorizing Amoco to make the spacing change, it was not necessary to advise her of the hearing. Unlike Mrs. Uhden, Branko was not conveyed an interest in the lease until November 7, 1995, and therefore, at the time of these proceedings, was not owners of real property entitled to notice.

Strata's belated disclosure of its *undisclosed partners* in an attempt to delay the hearing on Mitchell's application did not vest Branko with a protected property interest or entitle Branko to notice. Neither the Commission nor Mitchell should be expected or required to recognize the *undisclosed partners* as having a property interest to be protected prior to the time Strata conveyed an interest to them. While Strata represented that Branko owned working interest and overriding royalty interests, there was and is no documentary evidence to substantiate that representation. In fact, the later assignments made by Strata confirm that the representation was not accurate when made. In other words, the evidence in the record establishes conclusively that Branko did not own a protected property interest such as would entitle the owner to notice of the application and hearing prior to the time the assignment were made in November, 1995.

C. Branko is bound by the actions of its predecessor, Strata, and the prior Orders of the Division.

Branko is bound by the actions of Strata Production Company such that Mitchell's service of the Application and order on Strata bar Branko from any relief:

(a) Branko is bound by and took its interest in the Lease subject to the interest of Strata.

Branko acquired its interest from Strata by assignment dated November 7, 1995. It is axiomatic that Strata could not convey anything more than it owned. Moreover, Strata was subject to and bound by the force pooling order and its election not to participate when it made the assignment. As to Strata, the Order was *res judicata*, and Strata could not attack the order. Branko cannot, by simply selecting an effective date that pre-dated Mitchell's Application, avoid the binding effect of the order, nor can it avoid Strata's election to not participate in the Mitchell well. As a successor to Strata, Branko takes any interest subject to limitations in Strata's right, title, and interest, which includes the force pooling order. Branko is as equally estopped as Strata to retroactively and collaterally attack the force pooling order and Strata's election.

(b) Branko is estopped to deny the partnership with Strata, and is bound by the notice given to Strata.

Strata's belated and conveniently timed disclosure of Branko as its "*undisclosed partners*" is ultimately without merit. If accepted at face value, Strata's conduct creates is an inference that a partnership existed between Strata and Branko. It does not change the facts that only Strata was a record title owner of the property and that no written evidence of any assignment to Branko existed or was presented. In other words, Strata's assertion that Branko owned an interest in the Lease was an unsubstantiated assertion. The fact that it was unsubstantiated and inaccurate was confirmed by Strata's subsequent assignment of interest.

Nonetheless, it is recognized that where one hold himself out as a partner, one is estopped to deny the partnership. N.M. Stat. Ann. (1978) Section 54-1-16. Mr. Murphy's conduct did just that. He confirmed his ability to bind the *undisclosed partners*. On November 18, 1992, Mr. Murphy told Mr. Smith that Strata would defend itself and its partners' rights during any proceeding including a force pooling hearing. (Tr-I; Mitchell Exhibit 16). By letter dated December 30, 1992, Mr. Murphy represented and warranted to Mitchell that Strata had the right, power and authority to sell 100% of the lease for the benefit of such undisclosed owners. (TR-I Mitchell Exhibit 12). It is also well established that partnership property belongs to the partnership, not the individual partner. *In re Lucas,* 107 B.R. 332 (D.N.M. 1989). Therefore, if there was a partnership, the partnership, not Branko, had the property interest and would have been entitled to notice. Under New Mexico law, notice to a partner constitutes notice to the partnership. N.M. Stat. Ann. (1978) Section 54-1-12. Similarly, service of process on a partnership by delivery to any general partner is effective services on the partnership. Rule 1-004(F)(2) N.M.R.A. 1997; *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976) *Loucks v. Albuquerque Nat. Bank*, 76 N.M. 735, 418 P.2d 191 (1966). If there was a partnership, then the notice given to Strata was sufficient to give notice to the partnership.

D. Branko cannot manipulate the administrative process to bootstrap a constitutional claim.

When asked why he had let more than two and one-half years elapse before sending his partners notice that they might have some rights under the compulsory pooling order, Mr. Murphy admitted, "I can't give you a good answer,...." (TR-II, p. 50). If Branko and Strata were partners, Strata had the fiduciary obligation to tell its partners. At the hearing on May 2, 1996, Mr. Carroll, attorney for the Division, inquired if Strata had defended itself and its partners at the

January 23, 1996 hearing, and asked Mr. Murphy, "Did you do that?" to which Mr. Murphy replied, in part, "..my view was that we ought to have.." (TR-II, p. 52-53). Division Order R-10672, issued October 3, 1996, notes "a number of peculiarities in this proceeding that are troubling to the Division."[9] Strata appeared and participated in the original compulsory pooling proceedings, argued lack of notice on behalf of Branko before the Division in 1993, filed an application for *de novo* review in that case to continue to argue lack of proper notice to its partners Branko, then abandoned the notice issue the afternoon before that hearing. Then, after the well has paid out, Branko, Strata's partners, return to once again argue this notice issue.

Branko's entire claim is predicated on assignments of interest made long after the fact but conveniently purporting to be effective before Mitchell even filed its application. The constitutional guarantees of due process are critical to an orderly administration of justice. But the administration of justice does not allow and the administrative process cannot be manipulated to bootstrap a constitutional claim where there was none at the time of the initial application and hearing. Yet that is precisely what Branko seeks to accomplish in this appeal. Branko would have the court impose an obligation to provide notice to potential parties based on assignments of interest that may or may not be made at some undefined time in the future. Alternatively, Branko seeks a result that would render any force pooling order essentially unenforceable, and would subject all similar orders to collateral attack at any time in the future as long as the assignor makes the assignment effective prior to the application. Branko asks that this Court ignore the facts: Strata was the record title owner at all material times; Strata was properly served with the forced pooling application; Strata participated in the hearing for the forced

[9] See Finding (14) Order R-10672

pooling order, Strata received notice of it election to participate; Strata elected not to participate; Branko and Strata waited for Mitchell to drill, complete and produce the well until it had produced enough to pay for all drilling and completion costs; and that only after all that did Strata make any assignment to Branko. For these reasons, it would be patently unfair for Branko to manipulate the administrative process in order to make a claim that it was denied the guarantees of constitutional due process.

IV. STATEMENT OF RELIEF SOUGHT

Mitchell requests that the Court enter its order dismissing this appeal with prejudice, affirming the Commission Order R-10672-A and granting Mitchell such further relief as the Court deems proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 25th day of September, 1997 to the following counsel of record:

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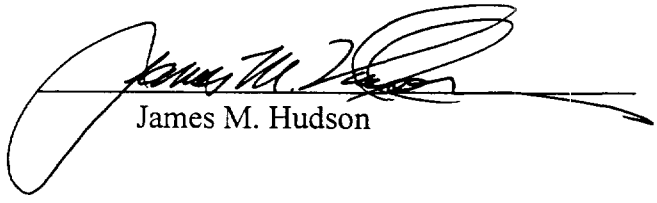

James M. Hudson

MITCHELL\RESPONSE.FIN

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FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' STATEMENT OF APPELLATE ISSUES

Plaintiffs hereby submit their statement of appellate issues and authorities in support of their appeal from the Oil Conservation Commission:

I. STATEMENT OF THE ISSUES

The Plaintiffs hereby submit the following Statement of Issues to be decided by the Court in this cause:

1. Whether the Oil Conservation Commission ("Commission") failed to find that all of the Plaintiffs' acquired and owned protected property interests in the S½ of the SW¼ of

Section 28 as to all depths on or before April 1, 1990 and owned such interests on January 21, 1993, the date of the original Oil Conservation Division ("Division") hearing in this matter.

2. Whether the Commission erred in failing to find that Mitchell Energy Corporation ("Mitchell") was provided with and received actual notice of the Plaintiffs' interests in the S½ of the SW¼ of Section 28 a number of times prior to the January 21, 1993 hearing in this matter.

3. Whether the Commission erred in failing to find that despite the property interests owned by the Plaintiffs and Mitchell's actual knowledge of such interests, the Plaintiffs were not given proper and constitutional notice of the January 21, 1993 hearing as provided by law and *Uhden v. New Mexico Oil Conservation Commission, et al.*, 122 N.M. 528, 817 P.2d 721 (1995).

4. Whether the Commission erred in failing to find and conclude that the Plaintiffs were not properly offered an opportunity to be heard at the January 21, 1993 hearing.

5. Whether the Commission erred in its failure to find that Mitchell and the Commission have not complied with the statutory pooling provisions of NMSA 1978, § 70-2-17(C) (1995 Repl.).

6. Whether the Commission erred in failing to find that the failure to provide notice of the January 21, 1993 hearing in this case deprived the Plaintiffs of their property without due process of law in contravention of Article 2, § 18 of the New Mexico Constitution and the 14th Amendment to the United States Constitution.

7. Whether the Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants of the cases resulting in Order R-9845.

8. Whether the Commission's Finding of Fact No. 10 is supported by the facts of the case.

9. Whether the Commission's conclusion of law that the Plaintiffs were not interest owners in the subject property is supported by the law or the facts of the case.

10. Whether the Commission erred in failing to find that Commission Order No. R-9845 is void as to the Plaintiffs.

11. Whether the Division erred in its failure to reopen the case and amend Order No. R-9845 to conform to the property rights of the Plaintiffs.

12. Whether the Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable.

II. SUMMARY OF THE PROCEEDINGS

On December 8, 1992, in connection with its proposal to drill the Mitchell Tomahawk "28" Federal Com No. 1 Well ("Tomahawk Well"), Mitchell filed its application with the Division requesting an order pooling all mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM ("Application"), a copy of which is attached as Exhibit A.[1] Prior to filing the application, Mitchell entered into negotiations with Strata Production Company ("Strata"), a working interest owner in the S/2 SW/4 of Section 28. (R. at Tr. of 1993 Hearing at 28-46, 50-53, 118-128.) During the course of the negotiations, Strata's President, Mark Murphy, continually informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved in the subject property. (R. at Tr. of 1993 Hearing at 29, 34-35, 39, 42, 46, 51-53, 58, 122, 128.) These negotiations were eventually

[1] The Application was omitted from the record submitted to this Court. Filed concurrently herewith is Plaintiffs' unopposed motion to supplement the record with a copy of Mitchell's Application.

unsuccessful. (R. at Mitchell Exhibit No. 16 of 1993 Hearing). On January 13, 1993, prior to the hearing, Strata's President, Mark Murphy, sent, via facsimile, a list of all working interest owners and their interests in the subject property to Mr. Smith of Mitchell Energy. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Of the working interest owners, only Strata was notified of the hearing on Mitchell's application. (R. at 238) A hearing was then held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. (R. at Mitchell Exhibit 1 from 1996 Hearing). Mitchell did not spud the Tomahawk Well until May 18, 1993.

It is clear that prior to the hearing in this matter, Mitchell was aware of all of the Plaintiffs' property interests in the S/2 SW/4 of Section 28. (R. at Branko Exhibit No. 24 of 1996 Hearing). Notwithstanding this knowledge, Mitchell and the Commission willfully failed to notify the Plaintiffs of the hearing on January 21, 1993, even though Mitchell had the Plaintiffs' addresses and knowledge of their interests. *Id.*

On January 29, 1996, Plaintiffs filed a motion with the Division to reopen case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. (R. at 1-75.) Plaintiffs' motion to reopen the case was granted on October 2, 1996 by order of the Division. (R. at 237-243). On October 30, 1996 Mitchell requested a de novo hearing, (R. at 178) which was granted by the Commission. A hearing de novo was held on January 16, 1997 before the Commission. This hearing resulted in Order No. R-10672-A. (R. at 251-259.) Pursuant to such order, the Commission concluded that at the time that Mitchell filed its Application in 1992 the Plaintiffs in this case were not

interest owners entitled to notice pursuant to NMSA 1978, §70-2-17 and OCD Rule 1207. (R. at 259.)

On April 7, 1997, Plaintiffs then filed an Application for Rehearing with the Commission. (R. at 260-263.) Plaintiffs' Application for Rehearing was denied by the Commission pursuant to NMSA 1978, §70-2-25(A) on April 17, 1997. Pursuant to NMSA 1978, §70-2-25 Plaintiffs filed their petition for review of the Commission's decision.

III. ARGUMENT AND AUTHORITIES

At the time of the application and hearing, Plaintiffs owned working interests and/or overriding royalty interests in a part of the property which was the subject of the pooling application of Mitchell. Mitchell was aware of all of the Plaintiffs' interests prior to the hearing and could have acquired knowledge of such interests even earlier with the exercise of some minimal diligence. Plaintiffs' property interests are interests in real property and as such, are protected property rights for purposes of the due process clause of the United States and New Mexico Constitutions. The Division's granting of Mitchell's pooling request is a state action which affects the Plaintiffs' property interests. Plaintiffs have, by reason of such action, been deprived of their legal right as working interest and overriding royalty interest owners to participate in the production of the Tomahawk Well pursuant to their respective interests.[2] Before the Division could take any action affecting the property interests of Plaintiffs, the Plaintiffs must have been provided with constitutionally sufficient notice and a fair opportunity

[2] The Plaintiffs' property interests have been affected as they now must pay the 200% penalty provided in R-9845 rather than participate in the Tomahawk Well as working interest owners.

to be heard. Here, no such notice was given, and therefore, any action taken by the Division without such notice that affects the Plaintiffs' property interest is void as to Plaintiffs.

A. Lack of Notice of the Hearing in this Case Deprived Plaintiffs of Their Property Without Due Process of Law and Contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

This Court need look only to the case of *Uhden v. New Mexico Oil Conservation Commission, et al.,* 112 N.M. 528, 817 P.2d 721 (1991), to determine the merits of Plaintiffs' case. In *Uhden*, Ms. Uhden, was the owner in fee of an oil and gas estate in San Juan County. In 1978, Uhden executed an oil and gas lease in favor of Amoco Production Company ("Amoco"). The lease contained a pooling clause. Pursuant to its rights under the lease, Amoco drilled the Cahn Well which was originally spaced on 160 acres. Based on the size of the initial spacing unit, Uhden initially received a royalty interest equal to 6.25% of production from the Cahn Well. In 1983, Amoco filed an application with the Division seeking an increase in well spacing from 160 acres to 320 acres. The Cahn Well and Uhden's royalty interest thereunder were both affected by the application. Even though Amoco had actual notice of Uhden's mailing address, Amoco provided notice of the application by publication only. In January 1984, the Commission granted temporary approval of Amoco's application, and in February 1986, the Commission granted final and permanent approval, both without notice to Uhden. The net effect to Uhden was a reduced royalty interest equal to 3.125% of production from the Cahn Well. Uhden unsuccessfully sought relief through the Commission, and then appealed to the district court which affirmed the orders of the Commission. Ms. Uhden then appealed to the New Mexico Supreme Court. The New Mexico Supreme Court ruled that Uhden clearly had a

property right in the oil and gas lease which was protected by due process of law. Further, in regard to the notice to which Uhden was entitled, the court held that

> if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.

Id., 112 N.M. at 531, 817 P.2d at 724. As a result of the improper notice given to Ms. Uhden, the Division's orders were "void" as to her. *Id.*

In this case, Plaintiffs have a protected property interest as a result of their interest in the affected property. Mitchell was aware of the names, addresses, and even the nature and extent of each of the movant's interests prior to the hearing. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Notice of the hearing was provided only by publication. Mitchell did not attempt to serve Plaintiffs personally as required by *Uhden*.[3] The hearing resulted in an order by the Division that affected the Plaintiffs' interests by depriving them of the opportunity to participate in the Tomahawk Well. The order entered as a result of the hearing is therefore void as to Plaintiffs.

B. Plaintiffs, as Working Interest and/or Overriding Royalty Interest Owners Under a Federal Oil and Gas Lease, Have Protected Property Interests Under the Due Process Clause.

Each of the Plaintiffs has an interest in a federal oil and gas lease which covers various lands including the S/2 SW/4 of Section 28. These interests were acquired by Plaintiffs well before the Application was filed in this case by Mitchell and well before the hearing held on

[3] In fact, notwithstanding the holding in *Uhden*, the Commission still does not require notice of such proceedings by personal service. *See* OCD Rule 1204 which requires notice by mail.

January 21, 1993. In fact, all of the Plaintiffs acquired their respective interests prior to April 1, 1990. (R. at Branko Exhibits 1-17 of 1996 Hearing.) In *Uhden, supra*, the court held that Uhden had a property right in the oil and gas lease by virtue of her royalty interest. *Id.*, 112 N.M. at 530, 817 P.2d at 723. Amoco argued that due to Uhden's lessor/lessee relationship with Amoco that her property right was somehow diminished. The court was not persuaded by this argument and held that

> [i]n this state a grant or reservation of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this state, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property.

Id., (citing Duvall v. Stone, 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citations omitted)).

The Plaintiffs in this case own working interests[4] and/or overriding royalty interests in a federal oil and gas lease. Under New Mexico law, these interests constitute an interest in real property. *See Bolack v. Underwood*, 540 F.2d 816, 820 (10th Cir. 1965), *citing Rock Island Oil and Refining Co., et al. v. Simons, et ux.*, 73 N.M. 142, 386 P.2d 239 (1963). Therefore, the Plaintiffs' interest at issue in this case constitute constitutionally protected property rights. *See Uhden, supra.* As provided in *Uhden*, the Plaintiffs in this case were entitled to personal service of the notice of the Division's hearing, since their whereabouts and identities were known to Mitchell. *See Uhden*, 112 N.M. at 531, 817 P.2d at 724.

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[4] A working interest is an operating interest under an oil and gas lease. *H. Williams and C. Meyers,* Manual of Oil and Gas Terms, 1225 (9th Ed. 1994)

C. Mitchell Was Aware of the Plaintiffs' Interests and Should Have Given Them Notice of the Proceedings as Required By Due Process of Law and *Uhden.*

It is undisputed that Mitchell had actual knowledge of the Plaintiffs' interest in the property. Mitchell received, via facsimile and certified mail, a complete list of the Plaintiffs, their addresses, and a description of their interests in the affected lease. (R. at Branko Exhibit No. 24, 1996 Hearing.) This information was provided to Mitchell on January 13, 1993, prior to the hearing held on January 21, 1993. Further, such information was available to Mitchell, in that, Mitchell could simply have asked for such information anytime prior. Mitchell, however, failed to exercise due diligence, or any diligence, in ascertaining the identities of Plaintiffs even though Mitchell knew they existed. Mitchell therefore purposely kept itself ignorant as to the identity of the Plaintiffs. Such a tactic, however, does not comport with due process and as a result, Plaintiffs' rights have been violated. As previously stated the Tomahawk Well was not spudded until May 18, 1993. Therefore, the hearing which took place on January 21, 1993 could have been continued to allow for personal service of notice to the Plaintiffs, without any inconvenience to Mitchell. Mitchell, however, proceeded to the January hearing without providing notice to the Plaintiffs despite the fact that it had actual knowledge as to the Plaintiffs' identity and whereabouts. (R. at Branko Exhibit 24, 1996 Hearing); (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). This lack of notice makes the order that was issued pursuant to the Division hearing, *void* as to Plaintiffs.

D. The Commission's Conclusion That Branko Was Not An Interest Owner Entitled to Notice is Clearly Erroneous.

The Commission, in upholding the Division orders, found in its Order of January 16, 1997 that Plaintiffs were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and

OCD Rule 1207. (R. at 259.) Such a finding, however, is not in accordance with New Mexico law. The Commission appears to base its conclusion that Plaintiffs were not interest owners on the fact that Plaintiffs' interests in the lease were not *recorded* prior to November 7, 1995. *Id.* The New Mexico pooling statute, NMSA 1978, § 70-2-17(C) (1995 Repl.), is not concerned only with interest owners who have recorded their interests in county real estate records. The filing of interests in county real estate records is done solely for the purpose of providing one type of notice, constructive notice, to subsequent third-party purchasers. Nowhere in the New Mexico pooling statute does the statute refer to recorded interests nor require the recordation of such interests. Further, the Division rules do not require that notice be afforded only to those who have recorded interests. Division Rule 1207(A) provides that "[a]ctual notice shall be given to each *known* individual" (emphasis added). The Division rule specifically requires notice to be provided to each *known individual* who has an interest in the outcome of the proceedings. As has been stated, Mitchell was made aware of the interests of the Plaintiffs prior to the 1993 hearing. The basis asserted by the Commission in finding that Plaintiffs had no protectable interest further fails the test provided by the New Mexico Supreme Court as articulated in *Uhden.* The New Mexico Supreme Court has stated that

> *If a party's identity and whereabouts are known or could be ascertained through due diligence,* the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by *personal service to such parties* whose property rights may be affected as a result.

Uhden, 112 N.M. at 531, 817 P.2d at 724 (emphasis added). Again, the test is not whether the interest has been recorded with the county clerk, as suggested by the Commission, but rather,

whether the party's identity and whereabouts are known or could be ascertained through due diligence.

The holding in *Uhden* is in accordance with real property law in New Mexico. The New Mexico Supreme Court stated that "an unacknowledged [and unrecorded] deed is binding between the parties thereto, their heirs and representatives, *and persons having actual notice of the instrument.*" *Baker v. Baker*, 90 N.M. 38, 40, 559 P.2d 415, 417 (1977) (citations omitted) (emphasis added). Although the Commission contends that Plaintiffs did not have an interest at the time Mitchell filed the 1992 Application and at the time of the 1993 hearing, such a finding is clearly erroneous. Mitchell had actual knowledge of the Plaintiffs' interests no later than January 13, 1993. (R. at Branko Exhibit 24, 1996 Hearing.) Further, by its own admission Mitchell had knowledge that there were other interest owners prior to January 1993. (R. at Tr. of 1996 Hearing at 19-20, 61-62).

Mitchell had knowledge of the existence of the Plaintiffs' interests as early as October of 1992, and had a duty at that time under *Uhden* to use due diligence to ascertain the identity and whereabouts of the Plaintiffs. It was at this time that Mr. Murphy informed Steve Smith of the existence of Plaintiffs. (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). When questioned as to why he did not attempt to discover the identities of the Plaintiffs, Mr. Smith responded that he did not make any attempts "because." (R. at Tr. of May 2, 1996 Hearing at 66.) Mitchell had merely to inquire of Strata as to the interests owned by, identity and whereabouts of the Plaintiffs. When this inquiry was eventually made in January of 1993, Mitchell was immediately given all information regarding the Plaintiffs from Mr. Murphy of Strata prior to the hearing. (R. at Branko Exhibit 24, 1996 Hearing.)

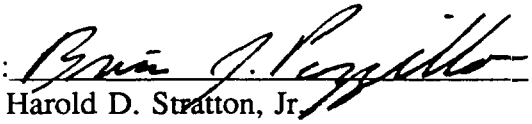
Under the facts of this case, Defendants have acted in a manner which violates Plaintiffs' due process rights. At all relevant times, Defendants were aware of Plaintiffs' existence and chose to act in a manner which was inconsistent with Plaintiffs' rights.

IV. STATEMENT OF RELIEF SOUGHT

Plaintiffs request that this Court enter an order vacating Orders No. R-9845 and No. R-10672-A and holding that Order No. R-9845 is void, invalid and unenforceable as to Plaintiffs.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: 

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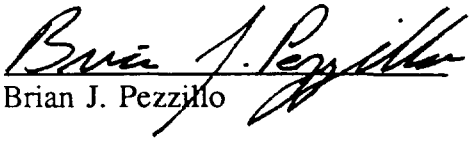
By: 
Brian J. Pezzillo

FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,	)	
Plaintiffs,	)	
vs.	)	No. CV-97-159 G
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	)	
Defendants.	)	

DEFENDANT MITCHELL ENERGY CORPORATION'S
UNOPPOSED MOTION FOR EXTENSION OF TIME

COMES NOW Defendant Mitchell Energy Corporation, by and through its undersigned attorneys and hereby moves this Court for the entry of an Order granting it a ten day extension of time, to and including October 2, 1997, in which to file its response to Plaintiffs' Statement of Appellate Issues in the above styled and numbered cause. In support of this Motion, Defendant states:

1. Plaintiffs filed their Statement of Appellate Issues on or about August 20, 1997. Defendant's response to the Statement of Appellate Issues is due on or about September 22, 1997.

2. The undersigned counsel has been, and will continue to be for the next week or so, involved in settlement negotiations of two major litigation cases. These negotiations have kept counsel out of the office much of the time.

3. Opposing counsel, Brian J. Pezzillo has been contacted with regard to this extension and has no objection. Therefore, a proposed Order is being submitted herewith.

WHEREFORE, Defendant Mitchell Energy Corporation respectfully requests that this Court enter its Order granting it a ten day extension of time, to and including October 2, 1997, in which to file its response to Plaintiffs' Statement of Appellate Issues in the above styled and numbered cause, and for such other and further relief as the Court may deem just and proper.

HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

By: _____

Harold L. Hensley, Jr.
James M. Hudson
P. O. Box 10
Roswell, New Mexico 88202
(505) 622-6510
Fax: (505) 623-9332

ATTORNEYS FOR DEFENDANT
MITCHELL ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, via first class mail, postage prepaid, to Plaintiffs, c/o their attorneys, Stratton & Cavin, P.A. (Harold D. Stratton, Jr. and Brian J. Pezzillo), P. O. Box 1216, Albuquerque, New Mexico, 87103, this 12th day of September, 1997, and a copy to all other counsel of record.

James M. Hudson

FIFTH JUDICIAL DISTRICT COURT

COUNTY OF LEA

STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,	)	
Plaintiffs,	)	
vs.	)	No. CV-97-159 G
THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,	)	
Defendants.	)	

ORDER GRANTING DEFENDANT MITCHELL ENERGY CORPORATION'S MOTION FOR EXTENSION OF TIME

THIS MATTER having come before the Court on the Unopposed Motion of Defendant Mitchell Energy Corporation for the entry of an Order granting it a ten day extension of time, to and including October 2, 1997, in which to file a response to Plaintiffs' Statement of Appellate Issues in the above styled and numbered cause. The Court being fully advised in the premises finds that said Motion is well taken.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant Mitchell Energy Corporation be, and it hereby is, granted a ten day extension of time, to and including October 2, 1997, in which to file a response to Plaintiffs' Statement of Appellate Issues in the above styled and numbered cause.

R. W. Gallini
District Judge

SUBMITTED BY:

HINKLE, COX, EATON, COFFIELD & HENSLEY

James M. Hudson

APPROVED BY:

STRATTON & CAVIN, P.A.

Approved telephonically 9/12/97
Brian J. Pezzillo

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' STATEMENT OF APPELLATE ISSUES

Plaintiffs hereby submit their statement of appellate issues and authorities in support of their appeal from the Oil Conservation Commission:

I. STATEMENT OF THE ISSUES

The Plaintiffs hereby submit the following Statement of Issues to be decided by the Court in this cause:

1. Whether the Oil Conservation Commission ("Commission") failed to find that all of the Plaintiffs' acquired and owned protected property interests in the S½ of the SW¼ of

Section 28 as to all depths on or before April 1, 1990 and owned such interests on January 21, 1993, the date of the original Oil Conservation Division ("Division") hearing in this matter.

2. Whether the Commission erred in failing to find that Mitchell Energy Corporation ("Mitchell") was provided with and received actual notice of the Plaintiffs' interests in the S½ of the SW¼ of Section 28 a number of times prior to the January 21, 1993 hearing in this matter.

3. Whether the Commission erred in failing to find that despite the property interests owned by the Plaintiffs and Mitchell's actual knowledge of such interests, the Plaintiffs were not given proper and constitutional notice of the January 21, 1993 hearing as provided by law and *Uhden v. New Mexico Oil Conservation Commission, et al.*, 122 N.M. 528, 817 P.2d 721 (1995).

4. Whether the Commission erred in failing to find and conclude that the Plaintiffs were not properly offered an opportunity to be heard at the January 21, 1993 hearing.

5. Whether the Commission erred in its failure to find that Mitchell and the Commission have not complied with the statutory pooling provisions of NMSA 1978, § 70-2-17(C) (1995 Repl.).

6. Whether the Commission erred in failing to find that the failure to provide notice of the January 21, 1993 hearing in this case deprived the Plaintiffs of their property without due process of law in contravention of Article 2, § 18 of the New Mexico Constitution and the 14th Amendment to the United States Constitution.

7. Whether the Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants of the cases resulting in Order R-9845.

8. Whether the Commission's Finding of Fact No. 10 is supported by the facts of the case.

9. Whether the Commission's conclusion of law that the Plaintiffs were not interest owners in the subject property is supported by the law or the facts of the case.

10. Whether the Commission erred in failing to find that Commission Order No. R-9845 is void as to the Plaintiffs.

11. Whether the Division erred in its failure to reopen the case and amend Order No. R-9845 to conform to the property rights of the Plaintiffs.

12. Whether the Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable.

II. SUMMARY OF THE PROCEEDINGS

On December 8, 1992, in connection with its proposal to drill the Mitchell Tomahawk "28" Federal Com No. 1 Well ("Tomahawk Well"), Mitchell filed its application with the Division requesting an order pooling all mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM ("Application"), a copy of which is attached as Exhibit A.[1] Prior to filing the application, Mitchell entered into negotiations with Strata Production Company ("Strata"), a working interest owner in the S/2 SW/4 of Section 28. (R. at Tr. of 1993 Hearing at 28-46, 50-53, 118-128.) During the course of the negotiations, Strata's President, Mark Murphy, continually informed the representative for Mitchell, Steve Smith, that there were other working interest owners involved in the subject property. (R. at Tr. of 1993 Hearing at 29, 34-35, 39, 42, 46, 51-53, 58, 122, 128.) These negotiations were eventually

[1] The Application was omitted from the record submitted to this Court. Filed concurrently herewith is Plaintiffs' unopposed motion to supplement the record with a copy of Mitchell's Application.

unsuccessful. (R. at Mitchell Exhibit No. 16 of 1993 Hearing). On January 13, 1993, prior to the hearing, Strata's President, Mark Murphy, sent, via facsimile, a list of all working interest owners and their interests in the subject property to Mr. Smith of Mitchell Energy. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Of the working interest owners, only Strata was notified of the hearing on Mitchell's application. (R. at 238) A hearing was then held on January 21, 1993, and the Division entered Order No. R-9845 granting Mitchell's pooling request on February 15, 1993. (R. at Mitchell Exhibit 1 from 1996 Hearing). Mitchell did not spud the Tomahawk Well until May 18, 1993.

It is clear that prior to the hearing in this matter, Mitchell was aware of all of the Plaintiffs' property interests in the S/2 SW/4 of Section 28. (R. at Branko Exhibit No. 24 of 1996 Hearing). Notwithstanding this knowledge, Mitchell and the Commission willfully failed to notify the Plaintiffs of the hearing on January 21, 1993, even though Mitchell had the Plaintiffs' addresses and knowledge of their interests. *Id.*

On January 29, 1996, Plaintiffs filed a motion with the Division to reopen case No. 10656, due to the fact that Mitchell failed to give notice to those parties who had working interests and overriding royalty interests. (R. at 1-75.) Plaintiffs' motion to reopen the case was granted on October 2, 1996 by order of the Division. (R. at 237-243). On October 30, 1996 Mitchell requested a de novo hearing, (R. at 178) which was granted by the Commission. A hearing de novo was held on January 16, 1997 before the Commission. This hearing resulted in Order No. R-10672-A. (R. at 251-259.) Pursuant to such order, the Commission concluded that at the time that Mitchell filed its Application in 1992 the Plaintiffs in this case were not

interest owners entitled to notice pursuant to NMSA 1978, §70-2-17 and OCD Rule 1207. (R. at 259.)

On April 7, 1997, Plaintiffs then filed an Application for Rehearing with the Commission. (R. at 260-263.) Plaintiffs' Application for Rehearing was denied by the Commission pursuant to NMSA 1978, §70-2-25(A) on April 17, 1997. Pursuant to NMSA 1978, §70-2-25 Plaintiffs filed their petition for review of the Commission's decision.

III. ARGUMENT AND AUTHORITIES

At the time of the application and hearing, Plaintiffs owned working interests and/or overriding royalty interests in a part of the property which was the subject of the pooling application of Mitchell. Mitchell was aware of all of the Plaintiffs' interests prior to the hearing and could have acquired knowledge of such interests even earlier with the exercise of some minimal diligence. Plaintiffs' property interests are interests in real property and as such, are protected property rights for purposes of the due process clause of the United States and New Mexico Constitutions. The Division's granting of Mitchell's pooling request is a state action which affects the Plaintiffs' property interests. Plaintiffs have, by reason of such action, been deprived of their legal right as working interest and overriding royalty interest owners to participate in the production of the Tomahawk Well pursuant to their respective interests.[2] Before the Division could take any action affecting the property interests of Plaintiffs, the Plaintiffs must have been provided with constitutionally sufficient notice and a fair opportunity

[2] The Plaintiffs' property interests have been affected as they now must pay the 200% penalty provided in R-9845 rather than participate in the Tomahawk Well as working interest owners.

to be heard. Here, no such notice was given, and therefore, any action taken by the Division without such notice that affects the Plaintiffs' property interest is void as to Plaintiffs.

A. Lack of Notice of the Hearing in this Case Deprived Plaintiffs of Their Property Without Due Process of Law and Contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

This Court need look only to the case of *Uhden v. New Mexico Oil Conservation Commission, et al.*, 112 N.M. 528, 817 P.2d 721 (1991), to determine the merits of Plaintiffs' case. In *Uhden*, Ms. Uhden, was the owner in fee of an oil and gas estate in San Juan County. In 1978, Uhden executed an oil and gas lease in favor of Amoco Production Company ("Amoco"). The lease contained a pooling clause. Pursuant to its rights under the lease, Amoco drilled the Cahn Well which was originally spaced on 160 acres. Based on the size of the initial spacing unit, Uhden initially received a royalty interest equal to 6.25% of production from the Cahn Well. In 1983, Amoco filed an application with the Division seeking an increase in well spacing from 160 acres to 320 acres. The Cahn Well and Uhden's royalty interest thereunder were both affected by the application. Even though Amoco had actual notice of Uhden's mailing address, Amoco provided notice of the application by publication only. In January 1984, the Commission granted temporary approval of Amoco's application, and in February 1986, the Commission granted final and permanent approval, both without notice to Uhden. The net effect to Uhden was a reduced royalty interest equal to 3.125% of production from the Cahn Well. Uhden unsuccessfully sought relief through the Commission, and then appealed to the district court which affirmed the orders of the Commission. Ms. Uhden then appealed to the New Mexico Supreme Court. The New Mexico Supreme Court ruled that Uhden clearly had a

property right in the oil and gas lease which was protected by due process of law. Further, in regard to the notice to which Uhden was entitled, the court held that

> if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.

Id., 112 N.M. at 531, 817 P.2d at 724. As a result of the improper notice given to Ms. Uhden, the Division's orders were "void" as to her. *Id.*

In this case, Plaintiffs have a protected property interest as a result of their interest in the affected property. Mitchell was aware of the names, addresses, and even the nature and extent of each of the movant's interests prior to the hearing. (R. at Branko Exhibit No. 24 of 1996 Hearing.) Notice of the hearing was provided only by publication. Mitchell did not attempt to serve Plaintiffs personally as required by *Uhden*.[3] The hearing resulted in an order by the Division that affected the Plaintiffs' interests by depriving them of the opportunity to participate in the Tomahawk Well. The order entered as a result of the hearing is therefore void as to Plaintiffs.

B. Plaintiffs, as Working Interest and/or Overriding Royalty Interest Owners Under a Federal Oil and Gas Lease, Have Protected Property Interests Under the Due Process Clause.

Each of the Plaintiffs has an interest in a federal oil and gas lease which covers various lands including the S/2 SW/4 of Section 28. These interests were acquired by Plaintiffs well before the Application was filed in this case by Mitchell and well before the hearing held on

[3] In fact, notwithstanding the holding in *Uhden*, the Commission still does not require notice of such proceedings by personal service. *See* OCD Rule 1204 which requires notice by mail.

January 21, 1993. In fact, all of the Plaintiffs acquired their respective interests prior to April 1, 1990. (R. at Branko Exhibits 1-17 of 1996 Hearing.) In *Uhden, supra*, the court held that Uhden had a property right in the oil and gas lease by virtue of her royalty interest. *Id.*, 112 N.M. at 530, 817 P.2d at 723. Amoco argued that due to Uhden's lessor/lessee relationship with Amoco that her property right was somehow diminished. The court was not persuaded by this argument and held that

> [i]n this state a grant or reservation of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this state, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property.

Id., (citing Duvall v. Stone, 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citations omitted)).

The Plaintiffs in this case own working interests[4] and/or overriding royalty interests in a federal oil and gas lease. Under New Mexico law, these interests constitute an interest in real property. *See Bolack v. Underwood*, 540 F.2d 816, 820 (10th Cir. 1965), *citing Rock Island Oil and Refining Co., et al. v. Simons, et ux.*, 73 N.M. 142, 386 P.2d 239 (1963). Therefore, the Plaintiffs' interest at issue in this case constitute constitutionally protected property rights. *See Uhden, supra.* As provided in *Uhden*, the Plaintiffs in this case were entitled to personal service of the notice of the Division's hearing, since their whereabouts and identities were known to Mitchell. *See Uhden*, 112 N.M. at 531, 817 P.2d at 724.

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[4] A working interest is an operating interest under an oil and gas lease. *H. Williams and C. Meyers*, Manual of Oil and Gas Terms, 1225 (9th Ed. 1994)

C. Mitchell Was Aware of the Plaintiffs' Interests and Should Have Given Them Notice of the Proceedings as Required By Due Process of Law and *Uhden.*

It is undisputed that Mitchell had actual knowledge of the Plaintiffs' interest in the property. Mitchell received, via facsimile and certified mail, a complete list of the Plaintiffs, their addresses, and a description of their interests in the affected lease. (R. at Branko Exhibit No. 24, 1996 Hearing.) This information was provided to Mitchell on January 13, 1993, prior to the hearing held on January 21, 1993. Further, such information was available to Mitchell, in that, Mitchell could simply have asked for such information anytime prior. Mitchell, however, failed to exercise due diligence, or any diligence, in ascertaining the identities of Plaintiffs even though Mitchell knew they existed. Mitchell therefore purposely kept itself ignorant as to the identity of the Plaintiffs. Such a tactic, however, does not comport with due process and as a result, Plaintiffs' rights have been violated. As previously stated the Tomahawk Well was not spudded until May 18, 1993. Therefore, the hearing which took place on January 21, 1993 could have been continued to allow for personal service of notice to the Plaintiffs, without any inconvenience to Mitchell. Mitchell, however, proceeded to the January hearing without providing notice to the Plaintiffs despite the fact that it had actual knowledge as to the Plaintiffs' identity and whereabouts. (R. at Branko Exhibit 24, 1996 Hearing); (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). This lack of notice makes the order that was issued pursuant to the Division hearing, *void* as to Plaintiffs.

D. The Commission's Conclusion That Branko Was Not An Interest Owner Entitled to Notice is Clearly Erroneous.

The Commission, in upholding the Division orders, found in its Order of January 16, 1997 that Plaintiffs were not interest owners entitled to notice pursuant to NMSA 1978, § 70-2-17 and

OCD Rule 1207. (R. at 259.) Such a finding, however, is not in accordance with New Mexico law. The Commission appears to base its conclusion that Plaintiffs were not interest owners on the fact that Plaintiffs' interests in the lease were not *recorded* prior to November 7, 1995. *Id.* The New Mexico pooling statute, NMSA 1978, § 70-2-17(C) (1995 Repl.), is not concerned only with interest owners who have recorded their interests in county real estate records. The filing of interests in county real estate records is done solely for the purpose of providing one type of notice, constructive notice, to subsequent third-party purchasers. Nowhere in the New Mexico pooling statute does the statute refer to recorded interests nor require the recordation of such interests. Further, the Division rules do not require that notice be afforded only to those who have recorded interests. Division Rule 1207(A) provides that "[a]ctual notice shall be given to each *known* individual" (emphasis added). The Division rule specifically requires notice to be provided to each *known individual* who has an interest in the outcome of the proceedings. As has been stated, Mitchell was made aware of the interests of the Plaintiffs prior to the 1993 hearing. The basis asserted by the Commission in finding that Plaintiffs had no protectable interest further fails the test provided by the New Mexico Supreme Court as articulated in *Uhden.* The New Mexico Supreme Court has stated that

> *If a party's identity and whereabouts are known or could be ascertained through due diligence,* the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by *personal service to such parties* whose property rights may be affected as a result.

Uhden, 112 N.M. at 531, 817 P.2d at 724 (emphasis added). Again, the test is not whether the interest has been recorded with the county clerk, as suggested by the Commission, but rather,

whether the party's identity and whereabouts are known or could be ascertained through due diligence.

The holding in *Uhden* is in accordance with real property law in New Mexico. The New Mexico Supreme Court stated that "an unacknowledged [and unrecorded] deed is binding between the parties thereto, their heirs and representatives, *and persons having actual notice of the instrument.*" *Baker v. Baker*, 90 N.M. 38, 40, 559 P.2d 415, 417 (1977) (citations omitted) (emphasis added). Although the Commission contends that Plaintiffs did not have an interest at the time Mitchell filed the 1992 Application and at the time of the 1993 hearing, such a finding is clearly erroneous. Mitchell had actual knowledge of the Plaintiffs' interests no later than January 13, 1993. (R. at Branko Exhibit 24, 1996 Hearing.) Further, by its own admission Mitchell had knowledge that there were other interest owners prior to January 1993. (R. at Tr. of 1996 Hearing at 19-20, 61-62).

Mitchell had knowledge of the existence of the Plaintiffs' interests as early as October of 1992, and had a duty at that time under *Uhden* to use due diligence to ascertain the identity and whereabouts of the Plaintiffs. It was at this time that Mr. Murphy informed Steve Smith of the existence of Plaintiffs. (R. at Tr. of 1996 Hearing at 19-20, 61-62, 66). When questioned as to why he did not attempt to discover the identities of the Plaintiffs, Mr. Smith responded that he did not make any attempts "because." (R. at Tr. of May 2, 1996 Hearing at 66.) Mitchell had merely to inquire of Strata as to the interests owned by, identity and whereabouts of the Plaintiffs. When this inquiry was eventually made in January of 1993, Mitchell was immediately given all information regarding the Plaintiffs from Mr. Murphy of Strata prior to the hearing. (R. at Branko Exhibit 24, 1996 Hearing.)

Under the facts of this case, Defendants have acted in a manner which violates Plaintiffs' due process rights. At all relevant times, Defendants were aware of Plaintiffs' existence and chose to act in a manner which was inconsistent with Plaintiffs' rights.

IV. STATEMENT OF RELIEF SOUGHT

Plaintiffs request that this Court enter an order vacating Orders No. R-9845 and No. R-10672-A and holding that Order No. R-9845 is void, invalid and unenforceable as to Plaintiffs.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorney for Plaintiffs
Post Office Box 1216
Albuquerque, New Mexico 87103
(505) 243-5400

I hereby certify that a true and correct copy of the foregoing pleading was served via first-class mail on opposing counsel of record at the following addresses:

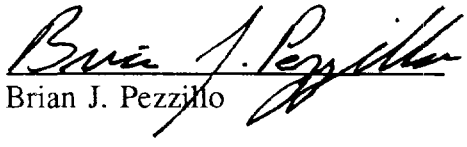
Marilyn S. Hebert
Special Assistant Attorney General
2040 South Pacheco
Santa Fe, NM 87505

Harold L. Hensley, Jr.
Hinkle, Cox, Eaton, Coffield
P. O. Box 10
Roswell, NM 88202-0010

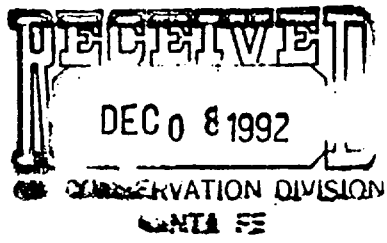
W. Thomas Kellahin
P. O. Box 2265
Santa Fe, NM 87504-2265

this 20th day of August, 1997.

STRATTON & CAVIN, P.A.

By: 
Brian J. Pezzillo

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

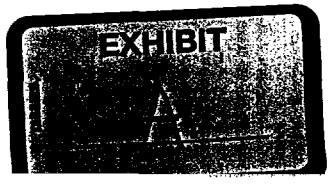


IN THE MATTER OF THE APPLICATION
OF MITCHELL ENERGY CORPORATION
FOR COMPULSORY POOLING, AND AN
UNORTHODOX GAS WELL LOCATION
LEA COUNTY, NEW MEXICO.

CASE NO. 10656

A P P L I C A T I O N

Comes now MITCHELL ENERGY CORPORATION, by its attorneys, Kellahin & Kellahin, and in accordance with Section 70-2-17(c) (1978) applies to the New Mexico Oil Conservation Division for an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to Mitchell Energy Corporation's Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from



the North line (Unit F) of said Section 28. Applicant further proposes that it be designated the operator and that the Division set a charge for the risk involved in drilling and completing said well.

In support of its application, Mitchell Energy Corporation ("Mitchell") states:

1. Mitchell has a working interest ownership in the oil and gas minerals underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico.

2. Mitchell proposes that a standard 320-acre spacing unit be pooled and dedicated to its Tomahawk "28" Fed COM #1 Well to be drilled and located at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28.

3. All of the working interest ownership of the oil & gas minerals from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28 has voluntarily agreed to the formation of this spacing unit for this well WITH THE EXCEPTION OF:

Party:	Interest:
Strata Production Company 648 Petroleum Building Roswell, New Mexico 88201 Attn: Mr. Mark B. Murphy	25%

4. Mitchell has proposed the subject well to all parties but, as of the date of this application, Mitchell has not be able to obtain a voluntary agreement from Strata Production Company.

5. Pursuant to Section 70-2-17(c) NMSA (1978) and in order to obtain its just and equitable share of potential production underlying this spacing unit, Mitchell needs an order of the Division pooling the identified and described mineral interests involved in order to protect correlative rights and prevent waste.

6. In accordance with the Division's notice requirements, a copy of this application has been sent to Strata Production Company and the offset operators identified in paragraph 7 (below) notifying it of this case and of the applicant's request for a hearing of this matter before the Division on the next available Examiner's docket now scheduled for December 7, 1993.

7. Because of a combination of geological and topographical reasons, applicant must locate the subject well at the proposed unorthodox well location rather than the closest standard location. Said well encroaches towards the following operators:

(a) Southwestern Resources, Inc.
111 West Country Club Road
Roswell, New Mexico 88201

(b) Enerlock Resources, Inc.
616 Mechem Drive
Ruidoso, New Mexico 88345-6903

(c) Santa Fe Energy Operating Partners, L. P.
550 West Texas
Suite 1330
Midland, Texas 79701

(d) Maralo, Inc.
P.O. Box 832
Midland, Texas 79702

(e) Phillips Petroleum Co.
4001 Penbrook, Suite 401
Odessa, Texas 79762

(f) Oryx Energy Corp. (formerly Sun Exploration & Production Co.)
Box 2880
Dallas, Texas 75221-2880

(g) Grace Petroleum Corporation
6501 North Broadway
Oklahoma City, Oklahoma 73116-8246

WHEREFORE, Mitchell, as applicant, requests that this application be set for hearing on December 7, 1993 before the Division's duly appointed examiner, and that after notice and hearing as required by law, the Division enter its order pooling the mineral interest described in this spacing unit for the drilling of the subject well at the proposed unorthodox gas well location upon terms and conditions which include:

(1) Mitchell Energy Corporation be named operator;

(2) The order make provisions for applicant and all working interest owners to participate in the costs of drilling, completing, equipping and operating the well;

(3) In the event a working interest owner fails to elect to participate, then provision be made to recover out of production, the costs of the drilling, completing, equipping and operating the well, including a risk factor penalty of 200%;

(4) For such other and further relief as may be proper.

RESPECTFULLY SUBMITTED:

W. THOMAS KELLAHIN
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87501
(505) 982-4285
Attorneys for Applicant

App1201.031

CASE 10656**: Application of Mitchell Energy Corporation for compulsory pooling and an unorthodox gas well location, Lea County, New Mexico.** Applicant, in the above-styled cause, seeks an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to its Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28. Also to be considered will be the costs of drilling and completing said well and the allocation of the costs thereof as well as actual operating costs and charges for supervision, designation of applicant as the operator of the well and a charge for risk involved in drilling said well. Said unit is located approximately 22 miles southeast from Maljamar, New Mexico.

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

ORDER GRANTING FILING OF SUPPLEMENTAL RECORD

THIS MATTER has come before the Court on Plaintiffs' Unopposed Motion for filing of a supplemental record. The Court finds that this Motion is well taken and therefore grants Plaintiffs' request.

WHEREFORE, this Court orders that Mitchell Energy Corporation's Application with the Oil Conservation Division requesting an order pooling all mineral interests from the top of the Wolfcamp Formation to the base of the Pennsylvanian Formation underlying the W½ of Section 28, Township 20 South, Range 33 East, N.M.P.M. shall be filed as a supplemental record in the above-captioned cause.

HONORABLE RALPH W. GALLINI
DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiffs
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
Telephone: (505) 243-5400

By: Telephonically Approved 08/20/97
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 S. Pacheco
Santa Fe, New Mexico 87505
Telephone: (505) 827-1364

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: Telephonically Approved 08/20/97
James M. Hudson
Attorneys for Defendant
P.O. Box 10
Roswell, New Mexico 88201
Telephone: (505) 622-6510

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAND, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' UNOPPOSED MOTION TO FILE SUPPLEMENTAL RECORD

Plaintiffs submit their unopposed Motion to supplement the record on appeal in the above-captioned cause, and state in support as follows:

1. Defendant Mitchell Energy Corporation filed an Application with the Oil Conservation Division requesting an order pooling all mineral interests from the top of the Wolfcamp Formation to the base of the Pennsylvanian Formation underlying the W½ of Section 28, Township 20 South, Range 33 East, N.M.P.M. ("Application") on December 8, 1992, a copy of which is attached as Exhibit "A." This Application was omitted from the record submitted to the Court in this cause.

2. Pursuant to SCRA 1986, 1-074(I), Plaintiffs request that this Court enter an order granting permission for the filing of the Application as a supplemental record.

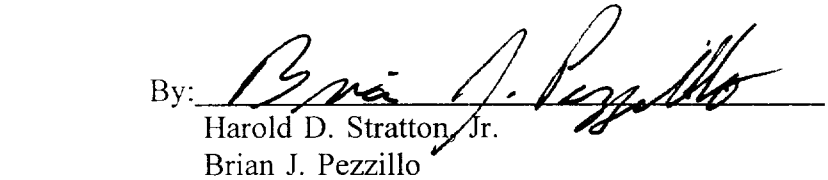
3. Plaintiffs have contacted opposing counsel, Ms. Marilyn S. Hebert, Special Assistant Attorney General, and have been informed that Ms. Hebert concurs in this Motion.

4. Plaintiffs have contacted Defendant's counsel, James Hudson, and have been informed that Defendant concurs in this Motion.

WHEREFORE, Plaintiff respectfully requests that this Court enter its order granting the filing of a supplemental record, and for such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: 

Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiffs
P.O. Box 1216
Albuquerque, NM 87103-1216
Telephone: (505) 243-5400

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion to File Supplemental Record was sent via first class mail this 20th day of August, 1997, to:

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 S. Pacheco
Santa Fe, New Mexico 87505

James M. Hudson
Hinkle, Cox, Eaton, Coffield & Hensley
P.O. Box 10
Roswell, New Mexico 88201

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

Brian J. Pezzillo

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

IN THE MATTER OF THE APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING, AND AN UNORTHODOX GAS WELL LOCATION LEA COUNTY, NEW MEXICO.

CASE NO. 10656

A P P L I C A T I O N

Comes now MITCHELL ENERGY CORPORATION, by its attorneys, Kellahin & Kellahin, and in accordance with Section 70-2-17(c) (1978) applies to the New Mexico Oil Conservation Division for an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to Mitchell Energy Corporation's Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from

the North line (Unit F) of said Section 28. Applicant further proposes that it be designated the operator and that the Division set a charge for the risk involved in drilling and completing said well.

In support of its application, Mitchell Energy Corporation ("Mitchell") states:

1. Mitchell has a working interest ownership in the oil and gas minerals underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico.

2. Mitchell proposes that a standard 320-acre spacing unit be pooled and dedicated to its Tomahawk "28" Fed COM #1 Well to be drilled and located at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28.

3. All of the working interest ownership of the oil & gas minerals from the top of the Wolfcamp formation to the base of the Pennsylvanian formation underlying the W/2 of Section 28 has voluntarily agreed to the formation of this spacing unit for this well WITH THE EXCEPTION OF:

Party:	Interest:
Strata Production Company 648 Petroleum Building Roswell, New Mexico 88201 Attn: Mr. Mark B. Murphy	25%

4. Mitchell has proposed the subject well to all parties but, as of the date of this application, Mitchell has not be able to obtain a voluntary agreement from Strata Production Company.

5. Pursuant to Section 70-2-17(c) NMSA (1978) and in order to obtain its just and equitable share of potential production underlying this spacing unit, Mitchell needs an order of the Division pooling the identified and described mineral interests involved in order to protect correlative rights and prevent waste.

6. In accordance with the Division's notice requirements, a copy of this application has been sent to Strata Production Company and the offset operators identified in paragraph 7 (below) notifying it of this case and of the applicant's request for a hearing of this matter before the Division on the next available Examiner's docket now scheduled for December 7, 1993.

7. Because of a combination of geological and topographical reasons, applicant must locate the subject well at the proposed unorthodox well location rather than the closest standard location. Said well encroaches towards the following operators:

(a) Southwestern Resources, Inc.
111 West Country Club Road
Roswell, New Mexico 88201

(b) Enerlock Resources, Inc.
616 Mechem Drive
Ruidoso, New Mexico 88345-6903

(c) Santa Fe Energy Operating Partners, L. P.
550 West Texas
Suite 1330
Midland, Texas 79701

(d) Maralo, Inc.
P.O. Box 832
Midland, Texas 79702

(e) Phillips Petroleum Co.
4001 Penbrook, Suite 401
Odessa, Texas 79762

(f) Oryx Energy Corp. (formerly Sun Exploration & Production Co.)
Box 2880
Dallas, Texas 75221-2880

(g) Grace Petroleum Corporation
6501 North Broadway
Oklahoma City, Oklahoma 73116-8246

WHEREFORE, Mitchell, as applicant, requests that this application be set for hearing on December 7, 1993 before the Division's duly appointed examiner, and that after notice and hearing as required by law, the Division enter its order pooling the mineral interest described in this spacing unit for the drilling of the subject well at the proposed unorthodox gas well location upon terms and conditions which include:

(1) Mitchell Energy Corporation be named operator;

(2) The order make provisions for applicant and all working interest owners to participate in the costs of drilling, completing, equipping and operating the well;

(3) In the event a working interest owner fails to elect to participate, then provision be made to recover out of production, the costs of the drilling, completing, equipping and operating the well, including a risk factor penalty of 200%;

(4) For such other and further relief as may be proper.

RESPECTFULLY SUBMITTED:

W. THOMAS KELLAHIN
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87501
(505) 982-4285
Attorneys for Applicant

App1201.031

CASE 10656: **Application of Mitchell Energy Corporation for compulsory pooling and an unorthodox gas well location, Lea County, New Mexico.** Applicant, in the above-styled cause, seeks an order pooling all mineral interests from the top of the Wolfcamp to the base of the Pennsylvanian underlying the W/2 of Section 28, T20S, R33E, NMPM, Lea County, New Mexico, forming a standard 320-acre spacing and proration unit for any and all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes but is not necessarily limited to the South Salt Lake-Morrow Gas Pool. Said unit is to be dedicated to its Tomahawk "28" Federal COM #1 Well to be drilled and completed at an unorthodox gas well location 1980 feet from the West line and 1650 feet from the North line (Unit F) of said Section 28. Also to be considered will be the costs of drilling and completing said well and the allocation of the costs thereof as well as actual operating costs and charges for supervision, designation of applicant as the operator of the well and a charge for risk involved in drilling said well. Said unit is located approximately 22 miles southeast from Maljamar, New Mexico.

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. CV 97-159G

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

ORDER GRANTING PLAINTIFFS' REQUEST FOR EXTENSION OF TIME TO SUBMIT STATEMENT OF APPELLATE ISSUES

THIS MATTER having come before the Court on the Motion for Plaintiffs' request for extension of time to submit their Statement of Appellate Issues, and the Court, having reviewed the Motion filed by Plaintiffs finds that the Motion should be granted.

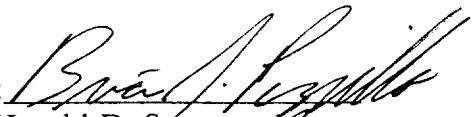
ORDERED that Plaintiffs' deadline for submitting its Statement of Appellate Issues shall be filed no later than August 22, 1997.

R. W. Gallini

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED AND APPROVED BY,

STRATTON & CAVIN, P.A.

By: 

Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiff
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

By: Telephonically Approved 8/5/97
James M . Hudson
Hinkle, Cox, Eaton, Coffield & Hensley
P.O. Box 10
Roswell, NM 88202
(505) 622-6510

By: Telephonically Approved 8/5/97
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

COPY

5TH JUDICIAL DIST COURT
LEA CO

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

97 AUG -6 PM 2:35

CLERK OF THE DIST COURT

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. CV 97-159G

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' UNOPPOSED MOTION FOR EXTENSION OF TIME TO SUBMIT PLAINTIFFS' STATEMENT OF APPELLATE ISSUES

Plaintiffs move the Court for a 14 day extension of time in which to file its Statement of Appellate Issues in the above captioned cause.

1. Pursuant to SCRA 1986, 1-074(J), Plaintiffs' deadline for filing its Statement of Appellate Issues is August 8, 1997.

2. Due to complications in receiving a copy of the record submitted to the Court, Plaintiffs respectfully request an extension of time of 14 days, making the deadline for filing the Plaintiffs' Statement of Appellate Issues August 22, 1997.

3. Plaintiffs have contacted opposing counsel, Ms. Marilyn S. Hebert, Special Assistant Attorney General, and have been informed that Ms. Hebert concurs in this Motion.

4. Plaintiffs have contacted opposing counsel for Defendant, Mr. James M. Hudson, and have been informed that Mr. Hudson concurs in this Motion.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order to this unopposed motion granting the extension of 14 days, for Plaintiffs to file their Statement of Appellate Issues with this Court.

Respectfully Submitted,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiff
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

By: Telephonically Approved 8/5/97
James M . Hudson
Hinkle, Cox, Eaton, Coffield & Hensley
P.O. Box 10
Roswell, NM 88202
(505) 622-6510

By: Telephonically Approved 8/5/97
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

I hereby certify a true and correct copy
of the foregoing was mailed to:

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

Harold Hensley, Jr.
P.O. Box 10
Roswell, NM 88202

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505

this 5th day of August, 1997.

By _____
Brian J. Pezzillo

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. CV 97-159G

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Defendants.

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2. Due to complications in receiving a copy of the record submitted to the Court, Plaintiffs respectfully request an extension of time of 14 days, making the deadline for filing the Plaintiffs' Statement of Appellate Issues August 22, 1997.

3. Plaintiffs have contacted opposing counsel, Ms. Marilyn S. Hebert, Special Assistant Attorney General, and have been informed that Ms. Hebert concurs in this Motion.

4. Plaintiffs have contacted opposing counsel for Defendant, Mr. James M. Hudson, and have been informed that Mr. Hudson concurs in this Motion.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order to this unopposed motion granting the extension of 14 days, for Plaintiffs to file their Statement of Appellate Issues with this Court.

Respectfully Submitted,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiff
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

By: Telephonically Approved 8/5/97
James M . Hudson
Hinkle, Cox, Eaton, Coffield & Hensley
P.O. Box 10
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(505) 622-6510

By: Telephonically Approved 8/5/97
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

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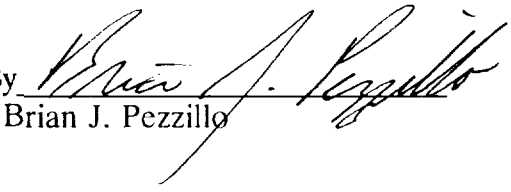
Santa Fe, NM 87504-2265

Harold Hensley, Jr.
P.O. Box 10
Roswell, NM 88202

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505

this 5th day of August, 1997.

By 
Brian J. Pezzillo

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. CV 97-159G

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

ORDER GRANTING PLAINTIFFS' REQUEST FOR EXTENSION OF TIME TO SUBMIT STATEMENT OF APPELLATE ISSUES

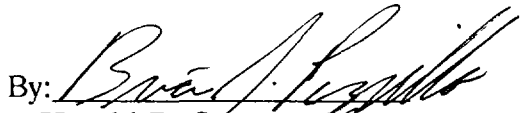
THIS MATTER having come before the Court on the Motion for Plaintiffs' request for extension of time to submit their Statement of Appellate Issues, and the Court, having reviewed the Motion filed by Plaintiffs finds that the Motion should be granted.

ORDERED that Plaintiffs' deadline for submitting its Statement of Appellate Issues shall be filed no later than August 22, 1997.

R. W. GALLINI
DISTRICT JUDGE

SUBMITTED AND APPROVED BY,

STRATTON & CAVIN, P.A.

By: 

Harold D. Stratton, Jr.
Brian J. Pezzillo
Attorneys for Plaintiff
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

By: Telephonically Approved 8/5/97
James M . Hudson
Hinkle, Cox, Eaton, Coffield & Hensley
P.O. Box 10
Roswell, NM 88202
(505) 622-6510

By: Telephonically Approved 8/5/97
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S.H. CAVIN, ROBERT W. EATON,
TERRY KRAMER, and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE McCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE S. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION,

Defendants.

RESPONSE OF NEW MEXICO OIL CONSERVATION COMMISSION TO PLAINTIFFS' MOTION FOR FILING OF APPELLATE BRIEFS AND FOR ORAL ARGUMENT

The New Mexico Oil Conservation Commission ("Commission"), by and through its undersigned attorney, hereby responds to the Plaintiffs' Motion:

1. The issues in this matter have been considered at two administrative adjudicatory hearings. Findings of fact were made by both the Oil Conservation Division ("Division") and the Commission and are included in their respective orders. (Division Order - RP 82; Commission Order - RP 251)

2. The Plaintiffs and Defendant Mitchell Energy Corporation ("Mitchell") have submitted numerous motions and memoranda of law on the issues of this case. (Plaintiffs' Motion and Memorandum - RP 02; Mitchell's Reply to Motion - RP 77; Plaintiffs' Brief - RP 92; Mitchell's Memorandum - RP 126; Plaintiffs' Reply Memorandum- RP 146; Mitchell's Memorandum - RP 200)

3. The Court has before it sufficient argument and authority from the Record on Appeal to determined whether the Commission's decision is supported by the record in accord with **Zamora v. Village of Ruidoso Downs**, 120 N.M. 778, 907 P.2d 182 (1995).

4. There is no need for additional briefing of or oral argument on these issues.

WHEREFORE, the Commission requests that the Plaintiffs motion be denied.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

Certificate of Service

I, Marilyn S. Hebert, hereby certify that a copy of the above-entitled pleading was mailed to all counsel of record on the 30TH day of July, 1997.

Marilyn S. Hebert

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

COPY

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PLAINTIFFS' MOTION FOR FILING OF APPELLATE BRIEFS AND FOR ORAL ARGUMENT

Plaintiffs, by and through their undersigned attorney, Harold D. Stratton, Jr., hereby moves this Court for entry of an order granting permission for the filing of appellate briefs in the above entitled action. Further, Plaintiff requests this Court enter an order granting permission for oral argument upon the issues presented by this appeal.

1. Pursuant to SCRA 1986, 1-074(P), Plaintiffs request the Court enter an order granting oral argument in the above-entitled action.

2. Pursuant to SCRA 1986, 1-074(O), Plaintiffs request that the Court enter an order permitting the filing of appellate briefs in the above entitled action.

3. Plaintiffs have contacted opposing counsel, Ms. Marilyn S. Hebert, Special Assistant Attorney General, and have been informed that Ms. Hebert will not concur in this motion.

4. Plaintiffs have attempted to reach Defendants' counsel, W. Thomas Kellahin and have been unsuccessful.

5. Plaintiff has further attempted to reach Defendants counsel, Harold Hensley, Jr., and have been unsuccessful.

WHEREFORE, Plaintiff respectfully requests that this Court enter its order granting the filing of appellate briefs and permitting oral arguments in this appeal, and for such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Attorneys for Plaintiff
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

I hereby certify a true and correct copy
of the foregoing was mailed to:

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

Harold Hensley, Jr.
P.O. Box 10
Roswell, NM 88202

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505

this 22nd day of July, 1997.

By _____
Harold D. Stratton, Jr.

COPY

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S.H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE McCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE S. SCOTT, III, SCOTT EXPLORATION, INC., A New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

NOTICE OF HEARING

A hearing in this case is set before the **HONORABLE RALPH W. GALLINI** as follows:

Date of Hearing:	September 17, 1997
Time of Hearing:	9:00 a.m.
Length of Hearing:	Fifteen (15) minutes
Place of Hearing:	Lea County Courthouse, Lovington, New Mexico
Matter to be Heard:	Plaintiffs' Motion to allow the filing of appellate briefs and oral argument.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
Harold D. Stratton, Jr.
Attorneys for Plaintiffs
P.O. Box 1216
Albuquerque, New Mexico 87103-1216
(505) 243-5400

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

Harold Hensley, Jr.
P.O. Box 10
Roswell, NM 88202

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505

this 22nd day of July, 1997.

By _____
Harold D. Stratton, Jr.

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S.H.CAVIN, ROBERT W. EATON,
TERRY KRAMER and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE McCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE S. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs,

v. **CV 97-159G**

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION,

Defendants.

RECORD ON APPEAL
Title Page

The following are the attorneys of record in this case:

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

Harold D. Stratton, Jr
P.O Box 1216
Albuquerque, NM 87103
(505) 243-5400

Attorney for Branko, Inc. et al.

Harold Hensley, Jr.
James M. Hudson
P.O. Box 10
Roswell, NM 88202
(505) 622-6510

Attorneys for Mitchell Energy Corporation

Respectfully Submitted,.

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the above-titled pleading was mailed to all counsel of record of the 10th day of July, 1997.

Marilyn S. Hebert

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC. a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah general partnership, CANDACE MCCLELLAN, STEPHEN T. MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation,GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC. a New Mexico corporation, CHARLES L. WELLBORN, WINN INVESTMENTS, INC. a New Mexico corporation, LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Petitioners,

vs. **CV 97-159G**

THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and MITCHELL ENERGY CORPORATION,

Respondents.

ANSWER OF MITCHELL ENERGY CORPORATION

Respondent, Mitchell Energy Corporation ("Mitchell") for its Answer to the Petition for Review of Administrative Order of the New Mexico Oil Conservation Commission ("Commission") states:

1. Denies the allegation of paragraph 1 and states that Petitioners were not working interest and/or overriding royalty owners at any time relevant to the proceedings before the Commission for which Petitioners now complain.

2. Admits the allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. Denies the allegations of paragraph 4 and states that Petitioners' predecessor in interest, Strata, was the proper and only party subject to Division Order R-9845 entered in Case 10656 which is res judicata and is not now subject to appeal by the Petitioners.

5. Admits the allegation of paragraph 5 and states that Order R-9845 was entered by the Division granting Mitchell's application for compulsory pooling of Strata's 25% working interest ownership in the subject spacing unit but denies that Petitioners were entitled to notice of said Order R-9845 or any elections thereunder.

6. Admits the allegation of paragraph 6 that Order R-9845 authorized Mitchell to withhold from Strata's 25% working interest ownership in the spacing unit but denies that it had any duty to provide said election to any of the Petitioners.

7. Denies the allegations of paragraph 7 and states that Petitioners did not have an ownership interest in the subject property at any time relevant to the proceeding in Case 10656.

8. Admits the allegation of paragraph 8 that Mitchell did not give Petitioners notice of the filing of Case 10656 or an itemized schedule of estimated well costs as alleged in the first sentence of paragraph 8. Further, Mitchell is without information or knowledge sufficient to form belief as to the truth of the allegations contained in the second sentence of paragraph 8 and therefore denies same.

9. Denies the allegations of paragraph 9 and states that Petitioners' were not entitled to make any elections under any of the terms and conditions of Order R-9845.

10. Denies the allegations of paragraph 10.

11. The Petition for Review contains a partial omission of paragraph 11 and therefore Mitchell is unable to either admit or deny. Mitchell admits that a hearing was held in Case 11510 and that the Division entered Order R-10672 which was appealed by Mitchell to the Commission which reversed the decision of the Division and entered Order R-10672-A.

12. Admits the allegations of paragraph 12.

13. Admits the allegations of paragraph 13.

14. Admits the allegations of paragraph 14,.

15. Denies the allegations of paragraph 15.

FIRST AFFIRMATIVE DEFENSE

Petitioners fail to state a claim upon which relief can be granted because Petitioners did not become working interest and/or overriding royalty owners in this spacing unit until November 8, 1995, some three years after their predecessor in interest, Strata Production Company ("Strata"), was served with the compulsory pooling application in Case 10656 and therefore did not own any property interest in the Strata lease at any time relevant to the proceedings before the Commission for which Petitioners now complain.

SECOND AFFIRMATIVE DEFENSE

Petitioners fail to state a claim upon which relief can be granted because Petitioners' predecessor in interest, Strata, failed to timely appeal Order R-9845 which is res judicata and therefore Petitioners are barred and estopped to now assert the claims made in this Petition.

THIRD AFFIRMATIVE DEFENSE

Petitioners have failed to state a claim upon which relief can be granted because they are bound by Strata's failure to timely elect to participate in accordance with the terms of Order R-9845 entered in Case 10656 which authorized Mitchell to withhold from Strata's 25% working interest ownership in the spacing unit, Strata's share of the costs of the well plus an additional 200% penalty.

FOURTH AFFIRMATIVE DEFENSE

Petitioners fail to state a claim upon which relief can be granted because Mitchell provided the "post order" notice and schedule of estimated well costs and thirty (30) day election period to Strata but had no duty to provide such notice, schedule or election to Petitioners.

FIFTH AFFIRMATIVE DEFENSE

Petitioners fail to state a claim upon which relief can be granted because Order R-9845 did not increase well spacing but rather legally, conclusively and properly pooled the entire 25 % working interest of Strata from whom Petitioners later obtained their interest **which is subject** to said Order R-9845.

SIXTH AFFIRMATIVE DEFENSE

Petitioners fail to state a claim upon which relief can be granted because only Strata had knowledged of the nature, extent and basis for any claimed interest on the part of Petitioners at the time Mitchell was required to give notice of the administrative hearing before the New Mexico Oil Conservation Division and if Strata believed some question existed as to whether such parties should be notified, Strata should have advised Petitioners of the hearing which Strata failed and refused to do.

WHEREFORE, having fully answered the Petitioner, Mitchell requests that the Court enter its order dismissing the Petition with prejudice, affirming the Commission Order R-10672-A and granting Mitchell such further relief as the Court deems proper.

W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico, 87504-2265
(505) 982-4285 Fax: (505) 982-2047

FOR

Harold Hensley, Jr.
James M. Hudson
P. O. Box 10
Roswell, New Mexico 88202
(505) 622-6510 Fax (505) 623-9332

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 24 day of June, 1997 to:

Harold D. Stratton, Jr.
P. O. Box 1216
Albuquerque, New Mexico 87103

Marilyn S. Hebert, Esq.
Oil, Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico

W. Thomas Kellahin

FIFTH JUDICIAL DISTRICT

STATE OF NEW MEXICO

COUNTY OF LEA

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED IN MY OFFICE

97 MAY 30 AM 10: 08

JAMES M. FERNANDEZ
DISTRICT COURT CLERK

DOCKETING ORDER

The Civil Docket for July, August, September, October, will be called in Lea County at the Lea County Courthouse in Lovington beginning at **9:00 A.M. on Thursday, June 19, 1997.** All Civil cases at issue (all answers filed) thru May 31,1997 will be called before **Judge R.W. Gallini** at 9:00 A.M. followed by **Judge Gary L. Clingman at 10:00.** (Cases will be set for trial during the months of July thru October. Entry of appearance does not constitute an answer.

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

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

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

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

R. W. Gallini

JUDGE R. W. GALLINI

JUDGE GARY L. CLINGMAN

CASE HISTORY

D-0506-CV-0000097159 BRANKO INC ETAL VS THE NEW MEX

TYPE: CONTRACT/DEBT & MONEY DUE CURRENT STATUS: PN PENDING 04-25-1997
DATE FILED: 04-25-1997

--- JUDGES ---
INITIAL ASSIGNMENT 04-25-1997 RALPH W GALLINI

				ATTORNEYS
P	001	ACTIVE	BRANKO INC ETAL	HAROLD D. STRATTON JR.
P	002	ACTIVE	BROWN DUANE	HAROLD D. STRATTON JR.
P	003	ACTIVE	CAVIN S H	HAROLD D. STRATTON JR.
P	004	ACTIVE	EATON ROBERT W	HAROLD D. STRATTON JR.
P	005	ACTIVE	KRAMER TERRY	HAROLD D. STRATTON JR.
P	006	ACTIVE	KRAMER BARB	HAROLD D. STRATTON JR.
P	007	ACTIVE	LANDWEST	HAROLD D. STRATTON JR.
P	008	ACTIVE	MCCLELLAND CANDACE	HAROLD D. STRATTON JR.
P	009	ACTIVE	MITCHELL STEPHEN T	HAROLD D. STRATTON JR.
P	010	ACTIVE	PERMIAN HUNTER CORPORATION	HAROLD D. STRATTON JR.
P	011	ACTIVE	SCOTT III GEORGE L	HAROLD D. STRATTON JR.
P	012	ACTIVE	SCOTT EXPLORATION INC	HAROLD D. STRATTON JR.
P	013	ACTIVE	WELLBORN CHARLES I	HAROLD D. STRATTON JR.
P	014	ACTIVE	WINN INVESTMENTS INC	HAROLD D. STRATTON JR.
P	015	ACTIVE	WORRALL LORI SCOTT	HAROLD D. STRATTON JR.
P	016	ACTIVE	XION INVESTMENTS	HAROLD D. STRATTON JR.
			VS.	
D	001		NM OIL CONSERVAT.	MARILYN S. HEBERT
D	002	ACTIVE	MITCHELL ENERGY CORPORATION	JAMES M. HUDSON (Hinkle) 6/13/97

CAUSE OF ACTION

04-25-1997 1 1 CONTRACT MISCELLANEOUS

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC. a New Mexico corporation,
DUANE BROWN, S. H. CAVIN, ROBERT W. EATON,
TERRY KRAMER and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE MCCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC. a New Mexico corporation,
CHARLES L. WELLBORN, WINN INVESTMENTS, INC. a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Petitioners,

vs. CV 97-159G

THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and MITCHELL ENERGY CORPORATION,

Respondents.

ENTRY OF APPEARANCE

Comes now W. Thomas Kellahin, Kellahin & Kellahin, attorney at law and enters his appearance on behalf of Mitchell Energy Corporation.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first class mail, postage prepaid this 26 day of May, 1997 to:

Harold D. Stratton, Jr.
P. O. Box 1216
Albuquerque, New Mexico 87103

Marilyn S. Hebert, Esq.
Oil, Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico

W. Thomas Kellahin

NEW MEXICO E. .RGY, MINERALS
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-7131

May 15, 1997

Ms. Janie G. Hernandez
District Court Clerk
Fifth Judicial District
100 N. Main, Box 6-C
Lovington, NM 88260

Re: **Branko, Inc. et al. v. New Mexico Oil Conservation Commission**

Dear Ms. Hernandez:

Enclosed for filing please find my Entry of Appearance and Answer in the above-referenced matter. Please file the originals and endorse the copies and return to me in the envelope provided.

Thank you for your assistance.

Sincerely.

Marilyn S. Hebert

cc: Harold D. Stratton, Jr.
W. Thomas Kellahin

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S. H. CAVIN, ROBERT W. EATON,
TERRY KRAMER and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE MCCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE L. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs

CV97-159G

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION

Defendants.

ENTRY OF APPEARANCE

Comes now Marilyn S. Hebert, special assistant attorney general, and enters her appearance on behalf of the New Mexico Oil Conservation Commission.

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Entry of Appearance** was delivered by first-class mail, postage prepaid, this 15th day of May, 1997, to:

Harold D. Stratton, Jr.
Post Office Box 1216
Albuquerque, New Mexico 87103

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

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation,
DUANE BROWN, S. H. CAVIN, ROBERT W. EATON,
TERRY KRAMER and BARB KRAMER, husband and wife,
LANDWEST, a Utah general partnership,
CANDACE MCCLELLAN, STEPHEN T. MITCHELL,
PERMIAN HUNTER CORPORATION, a New Mexico corporation,
GEORGE L. SCOTT III, SCOTT EXPLORATION, INC., a New Mexico corporation,
CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation,
LORI SCOTT WORRAL and XION INVESTMENTS, a Utah general partnership,

Plaintiffs

CV97-159G

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION
and MITCHELL ENERGY CORPORATION

Defendants.

ANSWER OF NEW MEXICO OIL CONSERVATION COMMISSION TO PETITION FOR REVIEW

The New Mexico Oil Conservation Commission ("Commission") for its Answer to the Petition for Review of Administrative Order of Commission ("Petition") states:

1. The Commission is without knowledge or information sufficient to form a belief as to truth of the allegations in paragraphs 1, 7, and 9 of the Petition, and therefore the Commission denies same.

2. The Commission admits that it did not give the Plaintiffs notice of the filing of Case No. 10656 or an itemized schedule of estimated well costs as alleged in the first sentence of paragraph 8, but the Commission has no duty to provide such notice or schedule. The Commission provides public notice of the entry of its orders and of its hearings. The Commission is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph 8, and therefore the Commission denies same.

3. The Commission denies that it promulgated Order No. R-9845 as alleged in paragraph 4. Order No. R-9845 was issued by the New Mexico Oil Conservation Division ("Division").

4. The Commission admits the allegations of paragraphs 2, 3, 5, 6, 12, 13, 14 of the Petition.

5. The Commission denies the allegations of paragraphs 10 and 15 of the Petition.

6. The Petition does not include a paragraph numbered "11"; the number sequence of the Petition goes from paragraph 10 to paragraph 12. However, there is a fragmentary sentence and a complete sentence between paragraphs 10 and 12. The Commission admits that a hearing was held in this matter by a hearing officer for the Oil Conservation Division on May 2, 1996, and the Division entered Order No. R-10672.

WHEREFORE, having fully answered the Petition, the Commission requests that the Court enter its order dismissing the Petition with prejudice, and granting such further relief as the Court deems proper.

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Answer of the New Mexico Oil Conservation Commission to the Petition for Review** was delivered by first-class mail, postage prepaid, this 15th day of May, 1997, to:

Harold D. Stratton, Jr.
Post Office Box 1216
Albuquerque, New Mexico 87103

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

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

Attorney General of New Mexico

PO Drawer 1508
Santa Fe, New Mexico 87504-1508

505/827-6000
Fax 505/827-5826

TOM UDALL
Attorney General

MANUEL TIJERINA
Deputy Attorney General

No. 6436

THE OFFICE OF THE ATTORNEY GENERAL

TRANSMITTAL SLIP

TO: Legal Department **SERVED:** April 29, 1997

DEPARTMENT: NM Oil Conservation **TRANSMITTED:** May 2, 1997

DIVISION: Legal **RETURNED:**

FROM: Sylvia D. Quintana, Litigation Division

XX Attachments

CASE NAME AND CAUSE NO.: Branko, Inc., et al. v. New Mexico Oil Conservation Commission & Mitchell Energy; No. CV97-159G

The Office of the Attorney General has received a copy of the enclosed pleading. Examination of the allegations made against the State of New Mexico seems to indicate your agency as the state agency (if any) having an interest in the subject matter of the suit.

Please acknowledge receipt of the attached pleading by signing and returning this letter to the Office of the Attorney General immediately.

SIGNED: Paul Carroll

DATE: 5/6/97

DEPARTMENT/DIVISION: NMEMNRD, Oil Conservation Division

COPY

1125
4/29/97
5dg
6436

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah General Partnership, CANDACE MCCLELLAND, STEPHEN T MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah General Partnership,

CV97-159 G

Plaintiffs,

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

SUMMONS

TO: TOM UDALL
Attorney General
407 Galisteo Street
Bataan Memorial Building, Rm. 260
Santa Fe, NM 87501

Defendant, Greeting:

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

You are notified that, unless you serve and file a responsive pleading or motion, the Plaintiff(s) will apply to the court for the relief demanded in the Complaint.

COPY

Hobbs
Judge Galloway

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

CV 97-159 G

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah General Partnership, CANDACE MCCLELLAND, STEPHEN T MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah General Partnership,

Plaintiffs,

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

Was AG served?

SUMMONS

TO: WILLIAM J. LEMAY
Director
Oil Conservation Division
New Mexico Department of Energy, Minerals and Natural Resources
2040 S. Pacheco
Santa Fe, NM 87505

Petition filed April 25, 19

Defendant, Greeting:

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

You are notified that, unless you serve and file a responsive pleading or motion, the Plaintiff(s) will apply to the court for the relief demanded in the Complaint.

Attorney for the Plaintiff: Stratton & Cavin, P.A.
Address: Harold D. Stratton, Jr.
Stephen D. Ingram
Post Office Box 1216
Albuquerque, NM 87103
(505) 243-5400

Witness the Honorable R. W. GALLEGOS, District Judge of Said Court of the State of New Mexico and Seal of the District Court of Said County, this 2nd day of April, 1996.

Janie G. Hernandez
CLERK OF THE DISTRICT COURT

(SEAL)

By: Sharon Delgado
Deputy

NOTE

This summons does not require you to see, telephone or write to the District Judge of the Court at this time.

It does require you or your attorney to file your legal defense to this case in writing with the Clerk of the District Court within 30 days after the summons is legally served on you. If you do not do this, the party suing may get a Court Judgment by default against you.

RETURN

STATE OF NEW MEXICO)
) SS.
COUNTY OF _____)

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY:

I certify that I served the within Summons in said County on the _____ day of _____, 1996, by delivering a copy thereof, with copy of Complaint attached, in the following manner:

RETURN FOR COMPLETION BY OTHER PERSON MAKING SERVICE:

I, being duly sworn, on oath, say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served the within Summons in said County on the _____ day of _____, 1996 by delivering a copy thereof, with a copy of Complaint attached, in the following manner:

[ ] To Defendant _____ (used when Defendant receives copy of Summons or refuses to receive Summons.)

[ ] To _____, a person over fifteen (15) years of age and residing at the usual place of abode of Defendant _____, who at the time of such service was absent therefrom.

[ ] By posting a copy of the Summons and Complaint in the most public part of the premises of Defendant _____ (used if no person found at dwelling house or usual place of abode)

[ ] To _____, an agent authorized to receive service of process for Defendant _____.

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

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

Fees:

_____
Signature of Private Citizen Making Service

SHERIFF OF _____
COUNTY State of New Mexico

Subscribed and sworn to before me this
_____ day of _____, 1996

_____
SHERIFF

_____
Notary of Other Officer Authorized
to Administer Oaths

By:_____
Deputy

_____
Title

COPY

FIFTH JUDICIAL DISTRICT
LEA COUNTY NEW MEXICO
FILED IN MY OFFICE

97 APR 25 PM 3:55

JANIE C. HERNANDEZ
DISTRICT COURT CLERK

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

CV 97-10-98

BRANKO, INC., a New Mexico corporation, DUANE BROWN, S. H. CAVIN, ROBERT W. EATON, TERRY KRAMER and BARB KRAMER, husband and wife, LANDWEST, a Utah General Partnership, CANDACE MCCLELLAND, STEPHEN T MITCHELL, PERMIAN HUNTER CORPORATION, a New Mexico corporation, GEORGE L. SCOTT, III, SCOTT EXPLORATION, INC., a New Mexico corporation, CHARLES I. WELLBORN, WINN INVESTMENTS, INC., a New Mexico corporation, LORI SCOTT WORRALL and XION INVESTMENTS, a Utah General Partnership,

Plaintiffs,

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION and MITCHELL ENERGY CORPORATION,

Defendants.

PETITION FOR REVIEW OF ADMINISTRATIVE ORDER OF THE NEW MEXICO OIL CONSERVATION COMMISSION

The Plaintiffs, for their claim for relief, state:

1. The Plaintiffs are working interest and/or overriding royalty interest owners in the w/o S/2 SW/4 of Section 28, Township 20 South, Range 30 East, N.M.P.M., Lea County, New Mexico.

2. The Defendant, Mitchell Energy Corporation ("Mitchell"), is the operator of the Tomahawk "28" Federal Com No. 1 well ("Tomahawk Well"), located at 1980 FWL and 1650 A FNL of Section 28, Township 20 South, Range 33 East, N.M.P.M., Lea County, New Mexico.

3. The Defendant, New Mexico Oil Conservation Commission ("Commission"), is the agency of New Mexico state government which regulates oil and gas operations within the State of New Mexico, pursuant to N.M.S.A. 1978, §§ 70-2-1 *et seq.*

4. Upon application of Mitchell, Case No. 10656, the Commission promulgated Order No. R-9845 (a copy of which is attached hereto, marked Exhibit "A" and incorporated herein by reference) dated February 15, 1993. In Order No. R-9845, the Commission pooled all mineral interests, including interests of the Plaintiffs, from the top of the Wolf Camp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, Township 20 South, Range 33 East, N.M.P.M., Lea County, New Mexico, to form a standard 320-acre gas spacing and proration unit for all formations and/or pools developed on 320-acre spacing within said vertical extent, which included but was not necessarily limited to the Undesignated Halfway-Atoka Gas Pool and the Undesignated Salt Lake-Morrow Gas Pool, said unit being dedicated to Mitchell's Tomahawk Well to be drilled at an unorthodox gas well location.

5. Order No. R-9845 also provided that Mitchell was, within ninety (90) days prior to commencing the Tomahawk Well, to furnish to the Oil Conservation Division and each known working interest owner in the subject unit an itemized schedule of estimated well costs. Order No. R-9845 further provided that within thirty (30) days from the date the schedule of estimated well costs that each non-consenting working interest owner should have the right to pay their share of estimated well costs to Mitchell in lieu of paying their share of reasonable well costs out of production and that any such owner that pays their share of estimated well costs should remain liable for operating costs, but not liable for risk charges.

6. Order No. R-9845 further provided that the operator (Mitchell) was authorized to withhold, as a charge for risk involved in drilling the Tomahawk Well, in the amount of 200% of the pro rata share of reasonable well costs attributable to each non-consenting working interest owner who had not paid their share of estimated well costs within thirty (30) days from the date the schedule of estimated well costs was provided to them.

7. The Plaintiffs' names, addresses and ownership interest in the subject property were known to Mitchell prior to the hearing in Case No. 10656, and the entry of Order No. R-9845, and were either known or should have been known by Mitchell prior to the filing of their application in Case No. 10656.

8. The Plaintiffs were not given notice, by Mitchell or the Commission, of the filing of Case No. 10656, the entry of Order No. R-9845, an itemized schedule of estimated well costs, or any other notice of any of the pending actions in Case No. 10656. The Plaintiffs did not learn of the entry of Order No. R-9845 or the existence of Case No. 10656 until sometime in 1995.

9. Because the Plaintiffs were not notified of the proceedings in Case No. 10656 and the entry of Order No. R-9845, they were unable to make an election as to whether to participate in the Tomahawk Well in the period allowed and under the time provided in the Order which has now expired.

10. Since the Plaintiffs had no notice of the application of Mitchell to increase the well spacing and pool their interests, their due process rights were violated, and Order No. R-9845 is void and invalid as to them.

Plaintiffs regarding the subject matter of such Order and Case No. 10656. A hearing was held by the Oil Conservation Division hearing officer and Order No. R-10672 in Case No. 11510, was entered reopening Case No. 10656.

12. Mitchell then applied for a hearing *de novo* before the Commission. After the hearing, the Commission, on March 19, 1997, entered its Order No. R-10672-A, a copy of which is attached hereto, marked as Exhibit "B" and incorporated herein by reference, denying the motion of the Plaintiffs.

13. The Plaintiffs then filed their Application for Rehearing on April 7, 1997, a copy of which is attached hereto as Exhibit "C" and incorporated herein by reference. The Application for Rehearing was considered denied on April 17, 1997 by failure of the Commission to act, pursuant to N.M.S.A. 1978, §70-2-25(A) (1995 Repl.).

14. The Plaintiffs hereby appeal this matter pursuant to N.M.S.A. 1978, §70-2-25 (1995 Repl.) to this Court as the property which is the subject of this action is located in Lea County, New Mexico.

15. The Orders appealed from are invalid as described in the Plaintiff's Application for Rehearing for the reasons included in the Application, which include but are not limited to the following:

a. Orders No. R-9845 violates, or was entered in violation of, State and Federal Constitutional provisions regarding due process of law and the taking of property by state action without due process;

b. Orders No. R-9845 was entered pursuant to unlawful procedure;

c. Orders No. R-9845 and R-10672-A are contrary to law;

d. Orders No. R-9845 and R-10672-A are not supported by substantial evidence; and

e. Orders No. R-9845 and R-10672-A are arbitrary, capricious, and constitute an abuse of discretion.

WHEREFORE, the Plaintiffs pray for a judgment and order of this Court vacating Orders No. R-9845 and No. R-10672-A and holding that Order No. R-9845 is void, invalid and unenforceable as to the Plaintiffs.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

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

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

CASE NO. 10656
ORDER NO. R-9845

APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on January 21, 1993, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 15th day of February, 1993, the Division Director, having considered the testimony, the record and the recommendations of the Examiner, and being fully advised in the premises,

FINDS THAT:

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

(2) The applicant, Mitchell Energy Corporation ("Mitchell"), seeks an order pooling all mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, forming a 320-acre gas spacing and proration unit for all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes, but is not necessarily limited to, the Undesignated Halfway-Atoka Gas Pool and the Undesignated South Salt Lake-Morrow Gas Pool.

(3) The applicant has the right to drill and proposes to drill its Tomahawk "28" Federal Com Well No. 1 at an unorthodox gas well location 1650 feet from the North line and 1980 feet from the West line (Unit F) of said Section 28.

(4) Strata Production Company ("Strata") appeared at the hearing in opposition to the granting of Mitchell's application.

(5) The operating rights (working interests) for all of Section 28, except the S/2 S/2 and the SW/4 NE/4, are subject to Joint Operating Agreement No. 1130 between Mitchell Energy Corporation, Santa Fe Energy Operating Partners, L.P., and Maralo Inc. designating Mitchell Energy Corporation as the operator. The SW/4 NE/4 is an unleased federal oil and gas tract. The S/2 SW/4 and SW/4 SE/4 is a federal oil and gas lease with record title and operating rights (no overriding royalty) held by Strata Production Corporation. The SE/4 SE/4 is a federal oil and gas lease held by Pitche Energy.

(6) Mitchell has proposed to all working interest owners the formation of the subject spacing unit and drilling of the subject well and has obtained the voluntary agreement of 75% of the working interest ownership in the subject spacing unit for the proposed well.

(7) At all times relevant hereto, the S/2 SW/4 which constitutes the remaining 25% working interest in the subject spacing unit has been under the ownership and control of Strata.

(8) Despite good faith efforts undertaken over a reasonable period of time, Mitchell has been unable to reach a voluntary agreement with Strata concerning voluntary participation in the subject spacing unit and the proposed well.

(9) Strata appeared at the hearing in opposition to Mitchell's proposed W/2 orientation of the spacing unit, the well location, and the overhead charges. In addition, Strata contended that Mitchell had failed to provide notification to Strata's "undisclosed partners" as identified on Mitchell Exhibit No. 17 in this case.

(10) In support of its motion for continuance, Strata claimed that Mitchell knew all along that Strata had "undisclosed partners" and it was Mitchell's duty to request Strata to disclose the names and addresses and then to provide those parties with an opportunity to join or compulsory pool each party.

On the notice issue raised by Strata, Mitchell presented exhibits and testimony which demonstrated that:

(a) abstracts and Title Opinions established that Strata held the record title and all operating rights to the S/2 SW/4 of said Section 28 as of the date the well was proposed to Strata (November 20, 1992), and as

of the date Strata received notification of the compulsory pooling application (December 20, 1992), and as of the date of the hearing in this case;

(b) *by letter dated November 20, 1992 Mitchell proposed to Strata the subject well and proposed spacing unit requesting voluntary participation in the well or in the alternative, proposed farmout terms to Strata;*

(c) *on November 20, 1992, Mitchell was the first working interest owner in Section 28 to propose a Morrow gas well to the working interest owners;*

(d) *although Strata declined to participate in the well, during the next two months, Mitchell and Strata through numerous telephone calls and correspondence between the parties discussed other alternatives including Mitchell purchasing or farming in Strata's interest;*

(e) *Mitchell understood and believed that Strata was dealing for and on behalf of Strata and all of Strata's "undisclosed partners;"*

(f) *by letter dated December 30, 1992 (Mitchell Hearing Exhibit No. 12), Strata offered to sell Mitchell 100% of its record title and operating rights and this offer included representations that while Strata had "undisclosed partners" Strata had the right, power and authority to bind said undisclosed partners; and*

(g) *after negotiations between Mitchell and Strata failed, by letter dated January 13, 1993, Strata for the first time provided Mitchell with the names and addresses of Strata's fifteen "undisclosed partners." (Mitchell Hearing Exhibit No. 17), but no evidence was provided that these "partners" owned an interest in the mineral estate.*

FINDING: At all times during negotiations and at the time the application was filed and notice was given, Strata was the record title owner of the mineral interests in question and the Division has jurisdiction over the interest held in Strata's name.

(11) Mitchell has made a good faith effort to reach a voluntary agreement with the record owner of the interests and is entitled to compulsory pooling.

(12) It would circumvent the purposes of the New Mexico Oil and Gas Act to allow a party owning a working interest in the spacing unit at the time said party was served with a compulsory pooling application to avoid or delay having that entire percentage interest pooled by assigning, conveying, selling or otherwise burdening or reducing that interest after the application and notice of hearing are filed with the Division and served on the party.

(13) Strata's motion to continue for lack of notice to its "undisclosed partners" should be denied.

(14) Mitchell's estimated cost for a completed well is $1,377,300. with monthly overhead rates of $6,470 while drilling and $647 while producing.

(15) Strata stipulated to Mitchell's proposed estimate of well costs ("AFE") identified on Mitchell Exhibit No. 19 as fair and reasonable but requested the Ernst & Young tabulation of average overhead rates be applied in this case.

(16) Because a substantial majority of the working interest owners has agreed to overhead rates which have now escalated in accordance with COPAS procedures to be slightly in excess of the Ernst & Young average rates, the rates proposed by Mitchell are fair and should be adopted in this case.

(17) Based on the geologic evidence presented at the hearing, the orientation of the stand-up 320-acre spacing unit for the first well in said Section 28 serves to provide the best opportunity for full development of potential Pennsylvanian gas in the section with two wells.

(18) Because of a combination of archeological restrictions and surface use limitations, Mitchell has been unable to obtain approval from the United States Bureau of Land Management (BLM), which is the surface management agency for said section, for an acceptable standard gas well location in the W/2 spacing unit, and therefore seeks the proposed unorthodox location which it anticipates will satisfy all the requirements of the BLM.

(19) Approval of this application as set forth in the above findings and in the following order will serve to protect correlative rights, prevent waste and afford the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the production in any pool resulting from this order.

(20) Mitchell Energy Corporation should be designated the operator of the subject well and unit.

(21) Any non-consenting working interest owner should be afforded the opportunity to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production.

(22) Any non-consenting working interest owner who does not pay his share of estimated well costs should have withheld from production his share of reasonable well costs plus an additional 200 percent thereof as a reasonable charge for the risk involved in the drilling of the well.

(23) Any non-consenting interest owner should be afforded the opportunity to object to the actual well costs but actual well costs should be adopted as the reasonable well costs in the absence of such objection.

(24) Following determination of reasonable well costs, any non-consenting working interest owner who has paid his share of estimated costs should pay to the operator any amount that reasonable well costs exceed estimated well costs and should receive from the operator any amount that paid estimated well costs exceed reasonable well costs.

(25) $6470.00 per month while drilling and $647.00 per month while producing should be fixed as reasonable charges for supervision (combined fixed rates); the operator should be authorized to withhold from production the proportionate share of such supervision charges attributable to each non-consenting working interest, and in addition thereto, the operator should be authorized to withhold from production the proportionate share of actual expenditures required for operating the subject well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(26) All proceeds from production from the subject well which are not disbursed for any reason should be placed in escrow to be paid to the true owner thereof upon demand and proof of ownership.

(27) Upon the failure of the operator of said pooled unit to commence drilling of the well to which said unit is dedicated on or before May 15, 1993, the order pooling said unit should become null and void and of no further effect whatsoever.

(28) Should all the parties to this force-pooling reach voluntary agreement subsequent to entry of this order, this order should thereafter be of no further effect.

(29) The operator of the well and unit should notify the Director of the Division in writing of the subsequent voluntary agreement of all parties subject to the force-pooling provisions of this order.

IT IS THEREFORE ORDERED THAT:

(1) The motion of Strata Production Company to continue this matter for lack of notice to its "undisclosed partners" as identified on Mitchell Energy Corporation's Exhibit No. 17 in this case is hereby **denied.**

(2) All mineral interests, whatever they may be, from the top of the Wolfcamp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 320-acre gas spacing and proration unit for all formations and/or pools developed on 320-acre spacing within said vertical extent, which presently includes, but is not necessarily limited to the Undesignated Halfway-Atoka Gas Pool and the Undesiganted Salt Lake-Morrow Gas Pool, said unit to be dedicated to its Tomahawk "28" Federal Com Well No. 1 to be drilled at an unorthodox gas well location 1650 feet from the North line and 1980 feet from the West line (Unit F) of said Section 28.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 15th day of May, 1993, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the above-described area.

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 15th day of May, 1993, Decretory Paragraph No. (2) of this order shall be null and void and of no effect whatsoever, unless said operator obtains a time extension from the Division for good cause shown.

PROVIDED FURTHER THAT, should said well not be drilled to completion, or abandonment, within 120 days after commencement thereof, said operator shall appear before the Division Director and show cause why Decretory Paragraph No. (2) of this order should not be rescinded.

(3) Mitchell Energy Corporation is hereby designated the operator of the subject well and unit.

(4) After the effective date of this order and within 90 days prior to commencing said well, the operator shall furnish the Division and each known working interest owner in the subject unit an itemized schedule of estimated well costs.

(5) Within 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting working interest owner shall have the right to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production, and any such owner who pays his share of estimated well costs as provided above shall remain liable for operating costs but shall not be liable for risk charges.

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

(7) Within 60 days following determination of reasonable well costs, any non-consenting working interest owner who has paid his share of estimated costs in advance as provided above shall pay to the operator his pro rata share of the amount that reasonable well costs exceed estimated well costs and shall receive from the operator his pro rata share of the amount that estimated well costs exceed reasonable well costs.

(8) The operator is hereby authorized to withhold the following costs and charges from production:

(A) The pro rata share of reasonable well costs attributable to each non-consenting working interest owner who has not paid his share of estimated well costs within 30 days from the date the schedule of estimated well costs is furnished to him; and

(B) As a charge for the risk involved in the drilling of the well, 200 percent of the pro rata share of reasonable well costs

attributable to each non-consenting working interest owner who has not paid his share of estimated well costs within 30 days from the date the schedule of estimated well costs is furnished to him.

(9) The operator shall distribute said costs and charges withheld from production to the parties who advanced the well costs.

(10) $6,470 per month while drilling and $647 per month while producing are hereby fixed as reasonable charges for supervision (combined fixed rates); the operator is hereby authorized to withhold from production the proportionate share of such supervision charges attributable to each non-consenting working interest, and in addition thereto, the operator is hereby authorized to withhold from production the proportionate share of actual expenditures required for operating such well, not in excess of what are reasonable, attributable to each non-consenting working interest. The operator is hereby authorized to make annual adjustments of said combined fixed rates as of the first day of April each year in accordance with the COPAS accounting schedule utilized by the industry.

(11) Any unleased mineral interest shall be considered a seven-eighths (7/8) working interest and a one-eighth (1/8) royalty interest for the purpose of allocating costs and charges under the terms of this order.

(12) Any well costs or charges which are to be paid out of production shall be withheld only from the working interest's share of production, and no costs or charges shall be withheld from production attributable to royalty interests.

(13) All proceeds from production from the subject well which are not disbursed for any reason shall be placed in escrow in Lea County, New Mexico, to be paid to the true owner thereof upon demand and proof of ownership; the operator shall notify the Division of the name and address of said escrow agent within 30 days from the date of first deposit with said escrow agent.

(14) Should all the parties to this force-pooling reach voluntary agreement subsequent to entry of this order, this order shall thereafter be of no further effect.

(15) The operator of the subject well and unit shall notify the Director of the Division in writing of the subsequent voluntary agreement of all parties subject to the force-pooling provisions of this order.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

WILLIAM J. LEMAY
Director

SEAL

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

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

DE NOVO
CASE NO. 11510
Order No. R-10672-A

APPLICATION OF BRANKO, INC. ET AL. TO REOPEN CASE NO. 10656 (ORDER NO. R-9845) CAPTIONED "APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO."

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on January 16, 1997, at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the **"Commission"** on Mitchell Energy Corporation's **(Mitchell)** Request for a *De Novo* Hearing in Case No. 11510 (Division Order R-10672) filed with the Commission on October 30, 1996.

Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Branko, Inc. et al. was represented by Harold D. Stratton, Jr. of Stratton & Cavin, P.A. The New Mexico Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department **(OCD)** was represented by Rand Carroll.

Now, on this 19th day of March, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

7) On January 31, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* **(Motion)** in Case No. 10656, Order No. R-9845 was filed with the OCD by Harold D. Stratton of Stratton and Cavin, P.A. on behalf of the following: Branko, Inc., a New Mexico corporation; Duane Brown; S.H. Cavin; Robert W. Eaton; Terry and Barb Kramer, husband and wife; Landwest, a Utah general partnership; Candace McClelland; Stephen T. Mitchell; Permian Hunter Corporation, a New Mexico corporation; George L. Scott, III; Scott Exploration, Inc., a New Mexico corporation; Charles I. Wellborn; Winn Investments, Inc., a New Mexico corporation; Lori Scott Worrall; and Xion Investments, a Utah general partnership **(Branko)**.

8) On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 **(Reply)**.

9) On May 2, 1996, a hearing **(1996 Hearing)** on the Motion to Reopen Case No. 10656 was held before OCD Hearing Examiner Stogner. The case was assigned a number, Case No. 11510. Branko was represented by Harold D. Stratton of Stratton & Cavin, P.A.; Mitchell was represented by Kellahin.

10) On October 2, 1996, the OCD Division Director entered Order No. R-10672 in Case No. 11510 which reopened Case No. 10656.

11) On October 30, 1996, Mitchell filed a Request for a Hearing *De Novo* of Case No. 11510, Order No. R-10672 before the Commission.

B. Summary of the Parties' Claims

1) Branko's claims as alleged in its Motion:

a) Mitchell failed to give proper notice to Branko, as required by law, of Mitchell's 1992 Application in Case No. 10656.

b) Mitchell failed to give proper notice as required by law of the OCD 1993 Hearing on Mitchell's 1992 Application.

c) Mitchell failed to provide Branko with an opportunity to participate in Mitchell's Tomahawk 28 Well located in what Branko refers to as the Strata North Gavilon Lease, a federal oil and gas lease **(Lease)**.

d) All of the entities referred to as "Branko" acquired and owned interests in the Lease on or before April 1, 1990, prior to the date Mitchell filed its 1992 Application with the OCD.

3) Mitchell and Branko stipulated to the introduction of the evidence from the 1993 Hearing and the 1996 Hearing as well as exhibits introduced at the January 16, 1997 Commission hearing.

4) The parties did not present any testimony at the January 16, 1997 Commission hearing, but through counsel the parties made oral argument.

5) Branko was not a party of record to Case No. 10656.

6) Mitchell obtained a title opinion that showed that Strata was the owner of 100% of the record title and operating rights for the Lease, and Mark Murphy, president of Strata, confirmed that at the 1993 Hearing.

7) At the 1993 Hearing there was conflicting testimony regarding the nature of the interests, if any, obtained by the entities through Strata. Fifteen of these entities became the party "Branko" that moved to reopen Case No. 10656 in 1996.

a) Stephen J. Smith, Mitchell's landman, testified that Mark Murphy, president of Strata, "...always described them as silent partners...." (1993 Hearing Tr. p. 56). Smith also testified: "I understood that he [Murphy] was acting as a go-between, as I was." (1993 Hearing Tr. p 58). Smith also testified that Mitchell relied on the fact that Strata was the record title owner to 100 percent interest [of the tract in question], "...and his [Murphy's] representation to us that he spoke for these silent partners and was capable of binding them in an agreement." (1993 Hearing Tr. p. 61).

b) Mark Murphy testified that he informed Smith during a conversation on October 26, 1992, that Strata had other partners, and "...that until a deal, specific deal was negotiated that we [Strata] could recommend, that I couldn't represent those partners; that, however, historically, normally when we reached an agreement that we could recommend to our partners, they would, in most cases, go along with that deal, but I could not guarantee that." (1993 Hearing Tr. p. 122). He also testified that he never represented that he could bind the other parties until they approved the terms of the deal. (1993 Hearing Tr. p. 126).

On direct examination, Murphy was asked: "Who are these parties, as a general rule?" Murphy responded: "As a general rule, they're long-term investors of Strata." (1993 Hearing Tr. p. 127). Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17, were long-term partners of Strata. (1993 Hearing Tr. p. 129). Murphy also stated: "as a matter of fact, many times in leasehold situations like this, you don't immediately make assignments to all the parties until a well is drilled or some action taken. So if you do sell it, you only have to handle one assignment from Strata to whoever the purchaser is. If we [Strata] assign this out to all these parties, they would have

a) Branko Exhibits No. 1 through 16 are affidavits of the entities comprising Branko. These affidavits state: each entity's undivided interest in the leasehold operating rights or overriding royalty interest in the Lease; all but one of the interests were acquired in 1989, with one affiant stating that its interest was acquired in 1990; and each interest owner states the amount paid for the interest.

b) Branko Exhibit No. 17 is the affidavit of Mark B. Murphy, president of Strata, dated January 17, 1996. The affidavit states that Strata bought the Lease at a federal lease sale in late 1989. Also in late 1989 Strata sold interests in the leasehold operating rights of the Lease to Branko subject to a 1.5% geologic override.

In Paragraph 6 of the affidavit, Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove in Paragraph 5, **Strata retained all of the record title interest subject to the beneficial interest of the parties as described in Exhibit A hereto."** (Emphasis added.) Exhibit A is the January 13, 1993 letter from Strata to Mitchell that contains Strata's list of "leasehold partners and ownership" some of whom became Branko.

Exhibit B to the affidavit is the federal BLM form titled "Transfer of Operating Rights (Sublease) in a Lease for Oil and Gas or Geothermal Resources" executed by Murphy for Strata on November 7, 1995. It is the transfer of overriding royalty interests. On the first page of Exhibit B at the bottom of the form marked with an asterisk is the following statement: **"Strata owns 100% of the record title interest and leasehold operating rights.** Strata is conveying a 1.5% overriding royalty interest to the parties and in the percentages indicated at Exhibit A hereto. **Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed."** (Emphasis added.)

Exhibit C to the affidavit is the same federal BLM form also executed by Murphy for Strata on November 7, 1995, but this is the transfer of operating rights.

Both Exhibit B and Exhibit C state that the transfer "...shall be effective as of ...November 1, 1989." Neither Exhibit B nor Exhibit C is signed by the transferee.

c) Branko Exhibit No. 23 is a January 1993 letter from Strata to Mitchell. On page 3 of the letter is the statement: "Strata would defend itself and it's [sic] partners [sic] rights during any proceeding including a force pooling hearing."

10) No evidence was presented that Branko had a recordable interest in the Lease until the execution by Murphy for Strata of the BLM transfer forms on November 7, 1995.

NMSA 1978, Section 70-1-2 states: "Such records shall be notice to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record, and no assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right of such royalties of any purchaser or transferee in good faith, without knowledge of the existence of such unrecorded instrument."

No evidence was presented that Branko's interests in the Lease were recorded prior to November 7, 1995; Strata was the record owner of the Lease at the time Mitchell filed the 1992 Application and at the time of the 1993 Hearing.

The Commission concludes that at the time the 1992 Application was filed with the OCD, Branko was not an interest owner entitled to notice pursuant to NMSA 1978, Section 70-2-17 and OCD Rule 1207.

IT IS THEREFORE ORDERED THAT:

(1) Branko's Motion be, and hereby is, denied.

(2) The OCD Order R-9845 issued February 15, 1993, is in full force and effect.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, Member

WILLIAM W. WEISS, Member

WILLIAM J. LEMAY, Chairman

S E A L

COPY

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

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

CASE NO. 11510
Order No. R-10672-A

APPLICATION OF BRANKO, INC. ET AL. TO REOPEN CASE NO. 10656 (ORDER NO R-9845) CAPTIONED "APPLICATION OF MITCHELL ENERGY CORPORATION FOR COMPULSORY POOLING AND AN UNORTHODOX GAS WELL LOCATION, LEA COUNTY, NEW MEXICO.

APPLICATION FOR REHEARING

Movants, Branko, Inc. et al., pursuant to NMSA 1978, § 70-2-25 (1995 Repl.), hereby apply for rehearing of the above-order. Movants submit that the above-order is erroneous as follows:

1. The Oil Conservation Commission ("Commission") failed to find that all of the Movants' acquired and owned protected property interests in the S½ of the SW¼ of Section 28 as to all depths on or before April 1, 1990 and owned such interests on January 13, 1993, the date of the original Oil Conservation Division hearing in this matter.

2. The Commission erred in failing to find that Mitchell Energy Corporation ("Mitchell") was provided with and received actual notice of the Movants' interests in the S½ of the SW¼ of Section 28 a number of times prior to the January 13, 1993 hearing in this matter.

3. The Commission erred in failing to find that despite the property interests owned by the Movants and Mitchell's actual knowledge of such interests, the Movants were not given

proper and constitutional notice of the January 21, 1993 hearing as provided by law and *Uhden v. New Mexico Oil Conservation Commission, et al.*, 122 N.M. 528, 817 P.2d 721 (1995).

4. The Commission erred in failing to find and conclude that the Movants were not properly offered an opportunity to be heard at the January 21, 1993 hearing.

5. The Commission erred in its failure to find that Mitchell and the Commission has not complied with the statutory pooling provisions of NMSA 1978, § 70-2-17(C) (1995 Repl.).

6. The Commission erred in failing to find that the failure to provide notice of the January 21, 1993 hearing in this case deprived the Movants of their property without due process of law in contravention of Article 2, § 18 of the New Mexico Constitution and the 14th Amendment to the United States Constitution.

7. The Commission erred in finding that proper, adequate and constitutionally sufficient notice was given to the applicants of the cases resulting in Order R-9845.

8. The Commission's Finding of Fact No. 10 is not supported by the facts of the case.

9. The Commission's conclusion of law that the Movants were not interest owners in the subject property is not supported by the law or the facts of the case.

10. The Commission erred in failing to find that Commission Order No. R-9845 is void as to the Movants.

11. The Division erred in its failure to reopen the case and amend Order No. R-9845 to conform to the property rights of the Movants.

12. The Commission erred in finding that to be protected as a property interest, such interest must be recorded or recordable.

WHEREFORE, Movants request that Order No. R-10672-A be reversed and that Order No. R-9845 be vacated as to the Movants.

RESPECTFULLY SUBMITTED,

STRATTON & CAVIN, P.A.

By: _____
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I hereby certify that a true and correct copies of the foregoing Application for a Rehearing were mailed this 7th day of April, 1997 to all counsel of record at the following addresses:

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