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1 of 100 DOCUMENTS

NORTH AMERICAN ROYALTIES, INC., Appellant, v. The CORPORATION COMMISSION OF OKLAHOMA and Dyco Petroleum Corporation, Appellees

No. 58,146

Court of Appeals of Oklahoma, Division Four

1984 OK CIV APP 14; 683 P.2d 539; 1984 Okla. Civ. App. LEXIS 96; 80 Oil & Gas Rep. 527

February 28, 1984

NOTICE:
[**1]

Released for Publication by Order of the Court of Appeals.

SUBSEQUENT HISTORY:
Rehearing Denied March 29, 1984; Certiorari Denied June 19, 1984..

PRIOR HISTORY:
Appeal from Order of Corporation Commission of Oklahoma Owner of pooled working interest appeals provisions of Corporation Commission forced pooling order.

DISPOSITION:
AFFIRMED.

COUNSEL:
Max H Lawrence, Ames, Daugherty, Black, Ashabranner, Rogers & Fowler, Oklahoma City, Oklahoma, for Appellant.

James W. George, James W. George & Associates, Oklahoma City, Oklahoma, for Appellee Dyco Petroleum Corporation

JUDGES:
DeMier, P.J. wrote the opinion. Brightmire, J., and Stubblefield, J., concur.

OPINIONBY:
DeMIER

OPINION:

[*540] **OPINION ON REHEARING**

The earlier opinion rendered in this case and published at *54 O.B.J. 2739 (1983)*, is hereby withdrawn and the following opinion is issued in its place.

FACTS

Appellee, Dyco Petroleum Corporation, presented an application to the Oklahoma Corporation Commission for a pooling order covering the common sources of supply underlying Section 14, Township 15 North, Range 26 West in Roger Mills County. This application was dated September 15, 1981.

Dyco's application was set for hearing before a trial examiner [**2] on November 20, 1981. All notice requirements were met and the hearing held on the date set.

Appellant, North American Royalties, Inc., was one of the parties holding a leasehold interest in Section 14. North American had been given actual notice of the hearing. North American chose not to appear.

[*541] On January 20, 1982, the Corporation Commission issued Order No. 206888, which authorized Dyco to drill and operate the unit well for the development of Section 14. The order went on to provide:

"3. To enable the unit well to be drilled, to avoid the drilling of unnecessary wells and to protect correlative rights, each owner must elect, within 15 days from the date of this order, one of the following alternative methods of effecting the committing of his or its interest in the unit well.

"3.1 *Participate.* To participate in the drilling of the unit well. Any owner who elects to participate in the drilling of the unit well shall be required to pay to Applicant his or its pro rata share of actual costs of drilling, completing and equipping the unit well and, in the event of production, of all actual operating costs, plus a reasonable charge by Applicant for supervision. [**3] Any owner who elects to participate shall pay, within 20 days from the date of this order, all of such owner's pro rata share of the estimated completed well costs as set out in paragraph 2 above, or, within 20 days from the date of this order, furnish evidence satisfactory to Applicant, of such owner's ability to pay such estimated costs. Provided, however, in the event any owner who makes a timely election to participate fails, within said period of 20 days, to pay to Applicant, or to furnish evidence satisfactory to Applicant of such owner's ability to pay, such owner's share of the estimated costs, the previous election to participate by such owner shall be considered void and such owner shall be treated as if he or it had made no election, as set forth in paragraph 4 below.

"3.2 *Cash Bonus Plus Reserved Overriding Royalty.* To relinquish his or its working interest to Applicant for a cash bonus of $500 per mineral acre covered by the relinquished interest plus a reserved overriding royalty equalling 1/16 of 8/8 of all oil and gas, said fractional overriding royalty to be reduced, however, to absorb any now existing non-operating interests in excess of the normal 1/8 lessor's [**4] royalty; provided, however, this option shall not be available to any owner whose working interest is burdened with non-operating interests in excess of 3/16 of all oil and gas; or

"3.3 *Reserved Overriding Royalty.* To relinquish his or its working interest to Applicant for a reserved overriding royalty equalling 1/16 of 7/8 of all oil and 1/8 of 7/8 of all gas, said fractional overriding royalty to be reduced, however, to absorb any now existing non-operating interests in excess of the normal 1/8th lessor's royalty."

A copy of the order was mailed to North American on January 22, 1982. North American did not elect to participate, and, as North American's interest was burdened with non-operating interests in excess of 3/16ths of all oil and gas, by operation of the order, relinquished its working interest to Dyco under the terms set forth in paragraph 3.3.

North American did not seek a rehearing before the Corporation Commission. Instead, on February 19, 1982, North American filed a petition in error in the supreme court for review of Order No. 206888. In this petition North American alleged that it had been deprived of its working interest without compensation and that [**5] Order No. 206888 thus violated provisions of the constitutions of both the United States and the State of Oklahoma.

I

In its argument to this court North American initially maintains that the procedure before the Corporation Commission resulted in a deprivation of its rights to substantive due process. North American concedes that the procedure was such as to meet all requirements necessary to guarantee procedural due process. The argument, thus, is that North American's interest was, in its opinion, undervalued. North American argues that this undervaluation resulted in a deprivation of property without compensation.

[*542] The Oklahoma forced pooling statute, under which Order No. 206888 was generated, has routinely been held to be constitutional, and the burden of showing an unconstitutional application in this case rests upon appellant. *Sellers v. Corporation Commission, Okl., 624 P.2d 1061 (1981).* Appellant has failed to meet this burden. The Supreme Court of Oklahoma, in the case of *Patterson v. Stanolind Oil & Gas Co., 182 Okl. 155, 77 P.2d 83 (1938), appeal dismissed, 305 U.S. 376, 83 L. Ed. 231, 59 S. Ct. 259 (1939),* stated:

"Thus, in our opinion, [**6] it is well established that the police power of the state extends to protecting the correlative rights of owners in a common source of oil and gas supply and this power may be lawfully exercised by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply . . . The extent of private contract in such matters being at all times subject to limitation by the inherent police power of the state, any muniment of title is important to assume or to convey any property right in the common source of supply superior to or entirely independent of said sovereign power. Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the State or Federal Constitution which prohibit the taking of property without just compensation or without due process of law and forbid the impairment of contract obligations. As we view it, the property here involved has not been taken or confiscated: its use has merely been restricted [**7] and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect. In *Brown et al. v. Humble Oil & Refining Company,* supra 126 Tex. 296, 83 S.W.2d

935 (1935), the following words were quoted with approval from *Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, 478:*

"'All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.'"

The Corporation Commission's duty in this case was to set a just and reasonable amount of compensation to be paid to those working interest owners who did not wish to participate in the drilling of the unit well. The measure of this compensation is the fair market [**8] value of the interest. *Miller v. Corporation Commission, Okl., 635 P.2d 1006 (1981).* The Commission took evidence in this case of the fair market value of a normal working interest in Section 14. The evidence in the record supports the valuation set by the Commission. North American's interest, however, was burdened with excess overriding royalties granted out of that interest which impaired the fair market value of the interest retained.

North American complains that, in effect, it is now getting nothing for its interest. Presumably North American received some benefit in exchange for the overrides granted which impaired the market value of the interest it retained. North American also had the opportunity under the order to elect to participate in the unit well. By the exercise of that option appellant would have retained its full working interest. North American's contention that it was deprived of substantive due process in this case is without merit.

II

Appellant also argues that Order No. 206888 forces it to assume the responsibility [*543] for the excess overrides granted by it out of its working interest. In support of its contention that such a result is [**9] erroneous appellant cites the case of *O'Neill v. American Quasar Petroleum Co., Okl., 617 P.2d 181 (1980).*

We would agree with appellant that *O'Neill* would preclude such a result. We find, however, that appellant's argument is based upon a misunderstanding of Order No. 206888. Appellant argues that the language in paragraph 3.3 which states that "said fractional overriding royalty to be reduced, however, to absorb any now existing non-operating interests in excess of the normal 1/8th lessor's royalty," requires that appellant be responsible for the payment of the excess non-operating interests. While such a result may be fair where, as here, a lessee has unduly burdened its working interest and then abandoned it in a forced pooling proceeding, it is simply not the meaning of the order. The order states that the unit operator's obligation to pay the override granted in exchange for the working interest pooled is to be reduced to absorb the amount of excess burdens previously granted from that interest. This provides the mechanism to relieve the unit operator of the onus of giving the same consideration for an overburdened working interest as for an unburdened interest. [**10]

This result is made clear by the court's statement in *O'Neill, 617 P.2d at 185:*

"However, the overrides do not come from the original lessee's interest when he chooses not to participate but are attributable to the unit operator. The statute specifies that overriding royalties, production payments, royalties in excess of 1/8th, or other obligations shall be paid by the lessee out of his share of the working interest .... The statute provides the excess royalty is to be paid by the lessee out of his working interest. Under the last quoted statutory provision (52 O.S.1971 § 87.1(d)) when an owner of a working interest elects not to participate in a unit well, electing rather to accept a bonus or royalty in lieu thereof, that working interest becomes the property of a person authorized to drill the well, and that unit operator is required to pay the bonus. *Youngblood v. Seewald, 299 F.2d 680 (Okl. 10 Cir. 1961)* ...."

The Commission's order must be read in the context of the statutory authority underlying the Commission's actions. When this is done, any possible merit in appellant's argument dissolves.

The Corporation Commission order appealed from [**11] is hereby affirmed.

BRIGHTMIRE, J., and STUBBLEFIELD, J., concur.

LEXSEE 617 p2d 181

APPLICANT: American Quasar Petroleum Co., In the Matter of Pooling Interests and Adjudicating the Rights and Equities of Oil and Gas Owners in the Pennsylvanian, Tonkawa, Cottage Grove, Oswego, Cleveland, Big Lime, Red Fork [Cherokee], Atoka, Morrow, Chester, Mississippian, Hunton, Viola, Simpson, and Arbuckle Common Sources of Supply Underlying all of Section 12, Township 18 North, Range 20 West, Dewey County, Oklahoma. Joseph I. O'Neill, Jr.; Howard L. Kennedy and Jacqueline Kennedy, husband and wife; John F. Mitchell and Evelyn Mitchell, husband and wife; and William E. Hulsizer and Phyllis N. Hulsizer, husband and wife, Appellants, v. AMERICAN QUASAR PETROLEUM CO., Appellee

No. 50,741

Supreme Court of Oklahoma

1980 OK 2; 617 P.2d 181; 1980 Okla. LEXIS 317; 68 Oil & Gas Rep. 282

January 8, 1980

SUBSEQUENT HISTORY:
[**1]

As Modified January 11, 1980. Rehearing Denied October 10, 1980.

PRIOR HISTORY:
Appeal from an order of the Oklahoma Corporation Commission. Owners of royalty interests in drilling and spacing unit appeal from Corporation Commission order pooling interests in the unit, correctly alleging the Commission has no statutory authority to issue a pooling order requiring nonparticipating royalty owners to either participate in drilling unit well or in the alternative to accept a lesser royalty, notwithstanding the fact the nonparticipating royalty owners' interest is convertible to a working interest upon payout.

DISPOSITION:
REVERSED AND REMANDED.

COUNSEL:
Guy E. Taylor, Oklahoma City, Oklahoma, for Appellants.

Watson, McKenzie & Moricoli, by: H. B. Watson, Jr., Richard K. Books, Oklahoma City, Oklahoma, for Appellee.

JUDGES:
Hargrave, J., wrote the opinion. Lavender, C.J., Hodges, Simms, Doolin, JJ., concur. Irwin, V.C.J., Barnes, Opala, JJ., concur in part and dissent in part. Williams, J., dissents.

OPINIONBY:
HARGRAVE

OPINION:

[*182] The appellants, William E. Hulsizer and his wife Phyllis, own an overriding royalty interest in the leasehold of Joseph I. O'Neill, Jr. totaling 1% of 8/8ths in and to 77.31 [**2] acres of a 640-acre drilling and spacing unit located in Section 12-18N-20W of Dewey County, Oklahoma. Mr. O'Neill also assigned an override of 1.5625% of all oil and gas produced to appellants Howard L. and Jacqueline Kennedy, which was convertible at the election of the assignees to a 6.25% working interest upon payout of the unit well. An identical override of 1.5625% convertible to a 6.25% working interest at payout was granted to John F. Mitchell and Evelyn Mitchell. Additionally a 5.46875% override was granted by O'Neill to John R. Withrow. Therefore the 77.31 acre leasehold interest owned by O'Neill was burdened by a 9 + % overriding royalty and a contingent interest equal to 1/8th of the leasehold vesting upon payout of a well.

[*183] A year and eight months later lessee O'Neill was notified that American Quasar Petroleum Company intended to drill a well on the previously established unit. Thereafter appellee filed its application with the Corporation Commission requesting Section 12 be pooled. The cause was set for hearing and at the day and time appointed for that hearing, appellants' counsel requested a continuance for the purpose of requesting additional evidence. [**3] Appellee resisted the continuance on the ground that it was presently awaiting the Commission's order so that they could begin drilling. The hearing was held the afternoon of the originally scheduled day, February 8, 1977, before the Commission en banc. The Commission's order gave any owner of a right to drill on the unit four alternatives. They were: (1) to participate in development by paying a proportionate cost of the well, (2) To receive a cash bonus of $100 per acre and the normal 1/8th royalty interest; (3) To receive $75 per acre bonus and a 1/16th of 8/8ths in addition to the normal royalty of 1/8th; or (4) To receive in addition to the normal 1/8th royalty an override of 1/16th of 7/8ths on oil and 1/8th of 7/8ths on natural gas. These alternatives were not given to O'Neill, the Kennedys, the Mitchells or the Hulsizers and the alternatives allowed these parties were either to participate in the development or to accept the fair share of the production listed in Item (4) above. Upon failure to elect within 20 days the order provided the appellants were deemed to have elected to take the override of 1/16th of 7/8ths oil and 1/8th of 7/8ths gas in addition to the 1/8th [**4] royalty. The last mentioned provision (fair share of production) was accepted reserving the right to appeal.

We reach only the appellants' first proposition of error asserting that the Corporation Commission does not have statutory authority to adjudicate the rights and equities of owners of an overriding royalty interest. 52 O.S. 1971, § 87.1(d) [since amended] provides statutory authority for the Commission to force a pooling of separately owned interests in a unit. In pertinent part that statute provides:

.... Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such *owners to pool and develop* their lands in the spacing unit as a unit .... (Emphasis supplied.)

The statute gives the Commission the authority to require the owners to pool and develop as a unit. The Corporation Commission is a tribunal of limited jurisdiction and its power is derived from [**5] and defined exclusively by the provisions set forth in and necessarily implied by the Statutes of the State of Oklahoma. *Kingwood Oil Co. v. Hall-Jones Oil Co., Okl., 396 P.2d 510 (1964).* The definition of the term "Owner" is set forth in 52 O.S. 1971, § 86.1(d) as follows: "The term 'Owner' shall mean a person who has the right to drill into and to produce from any common source of supply and to appropriate the production, either for himself or for himself and others." Inserting the definition for the word defined, we read the statute to state: Where such persons having the right to drill and produce have not agreed to pool their interests and where one such person having a right to drill into and produce from any common source of supply, has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall upon proper application, require such persons having the right to drill or produce, to pool and develop their land in the unit as a unit. The statute therefore authorizes the Commission to pool a party's interest where that party owns a right to drill into and [**6] produce from a common source of supply. Does an owner of an overriding royalty interest possess a right to drill or produce? If so, then the above mentioned statute, 52 O.S. 1971, § 87.1(d), empowers the Commission to require the owner of the override to pool and develop their land.

[*184] The term overriding royalty refers to a percentage carved from the lessee's working interest, free and clear of any expense incident to production and sale of oil and gas produced from the leasehold. *De Mik v. Cargill, Okl., 485 P.2d 229 (1971),* reviewed certain attributes of an overriding royalty interest. The nature of an overriding royalty interest is such that only when oil and gas are reduced to possession does the interest attach. Prior to this event the owner of an override has no assertable right in the leasehold, and the vesting of an overriding royalty owner's rights are dependent upon the happening of a future event or condition. In *Cities Service Oil Co. v. Geolograph Co., 208 Okla. 179, 254 P.2d 775 (1953)* quoting from *Thornburgh v. Cole, 201 Okl. 609, 207 P.2d 1096,* this Court stated that an overriding royalty is a certain percentage of the working interest which [**7] as between the lessee and assignee of the mineral lease is not charged with the cost of development or production. The Court discussed the fact that the term "Overriding royalty" was a term of peculiar significance and common usage in the industry, and when the term was used by those familiar with the industry it "must have been" the purpose of the parties that payments made should be free and clear of all cost and expenses.

The owner of an overriding royalty interest has *no* assertable right in the oil and gas leasehold prior to the time when the hydrocarbons are reduced to possession. *De Mik v. Cargill, supra.* This being true, it necessarily follows that the owner of an override has no right to drill and produce from a common source of supply on the unit. Therefore the owner of an override is not an "Owner" as defined by 52 O.S. 1971, § 86.1(d). The appellee and the Corporation Commission suggested in the oral presentation of this cause that the Commission's power to require "owners to pool and develop" as specified in 52 O.S. 1971 § 87.1(d) is not limited to those classes of owners defined in 52 O.S. 1971 § 86.1(d) as those having a right to drill into and produce [**8] from a common source by virtue of the second paragraph of 52 O.S. 1971 § 87.1(d), wherein it is provided:

For the purpose of this section the owner, or owners, of oil and gas rights in and under *an unleased tract* of land shall be regarded as a lessee to the extent of seven-eighths (7/8) interest and a lessor to the remaining one-eighth (1/8) interest therein. [E.A.]

We cannot conclude that this section implies the power to completely rearrange contractual rights and duties of the owners of all overriding royalty interests in the state by converting their non-participating investment into a working interest where the royalty is in excess of one-eighth. To do so would be a major disruption of the investments made therein and of the industry that created them. Such a profound upheaval is not contemplated by the last-quoted provision. The language quoted simply solved the dilemma in regard to the Commission's power to, in effect, give a forced lease on unleased tracts and indicates the treatment to be given to the interests after that is done. There is no indication in the language quoted which justifies a broader application than in instances where the Commission deals [**9] with unleased tracts.

The Commission's authority under § 87.1(d) to require owners to pool their interests and contribute to the costs of development and operation, does not authorize the Commission to require owners of an override to contribute as they are, by statute, not owners. This conclusion is confirmed by the fact that no order pooling the royalty interests in a unit is necessary or contemplated by the statute because the creation of a unit, by operation of law, pools royalty interests. The last paragraph of 52 O.S. 1971, § 87.1(d) provides:

In the event a producing well, or wells, are completed upon a unit ... any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit *shall* share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, ... in the [*185] proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; .... (Emphasis added.)

In contrast to the fact that § 87.1(d) contemplates the pooling of royalty interests by operation of law upon the formation of a unit, the first [**10] paragraph of that section of the statute expressly provides that the owners of a right to drill may voluntarily pool their interests or upon proper application the Commission shall require the owners to pool and develop when the owners have not agreed to do so. Thus the creation of a drilling and spacing unit pools royalty interests by operation of law, but working interests are pooled only by voluntary agreement or a separate Commission order. *Whitaker v. Texaco, Inc., 283 F.2d 169 (Okl. 10 Cir. 1960).* From the preceding discussion we conclude the Corporation Commission is not clothed with authority by virtue of 52 O.S. 1971, § 87.1(d) to enter an order such as that before us requiring the owner of an overriding royalty interest within a unit to elect between participation or acceptance of an alternative which disturbs the terms of the grant of the override. Insofar as the order attempts to disturb the rights of the overriding royalty owners under § 87.1(d) the order is erroneous and is reversed.

The Commission's order allowed the lessee, O'Neill, to participate in the development of the well or accept a 1/8th of 7/8ths interest on natural gas and 1/16th of 7/8ths on oil [**11] in addition to accepting the normal 1/8th royalty interest in lieu of participation. The paragraph of the order allowing O'Neill that interest also requires the overriding royalty owners (except one omitted royalty owner) to receive their share out of O'Neill's above-mentioned interest, without regard to whether O'Neill chooses to participate or take an interest in lieu thereof. The order clearly provides that the original lessee is to bear all override burdens of the leasehold out of what he receives for his working interest. It appears that in setting O'Neill's royalty the Commission contemplated that the overrides were to come out of O'Neill's interest. However, the overrides do not come from the original lessee's interest when he chooses not to participate but are attributable to the unit operator. The statute specifies that overriding royalties, production payments, royalties in excess of 1/8th, or other obligations shall be paid by the lessee out of his share of the working interest. The last paragraph of 52 O.S. 1971, § 87.1(d) states in part:

.... Provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates [**12] ... royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding royalty, to production payment

or other obligation, *then the lessee* of said lease *out of his share* of the *working interests* from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom must pay any other obligation due in respect to the separately owned tract or interest held by him. (Emphasis added.)

These provisions of 52 O.S. 1971, § 87.1(d) conflict with the order as written because where O'Neill elects, as he did here, not to participate, he is no longer possessed of a working interest in the unit well. The statute provides the excess royalty is to be paid by the lessee out of his working interest. Under the last quoted statutory provision (52 O.S. 1971 § 87.1(d)) when an owner of a working interest elects not to participate in a unit well, electing rather to accept a bonus or royalty in lieu thereof, that working interest becomes the property of the person authorized to drill the well and that unit operator is required to pay the bonus *Flood v. Seewald, 299 F.2d 680* [**13] *(Okla. 10 Cir. 1961)*. Inasmuch as the order sets the amount of O'Neill's option on the basis that (although not participating) he will stand the override obligations owed the appellants, that portion of the order must be vacated and remanded for a determination of what fair compensation for that working interest is in view of the fact that the unit operator must stand these override obligations in the event O'Neill does not participate. [*186] The order of the Corporation Commission is reversed and remanded for proceedings consistent with the views expressed herein.

If the Commission may not require an override owner to participate in the drilling operation and share the costs thereof, and if, as noted above, the owner of a lease may pass unbearable override burdens to third parties in contemplation of a pooling order which will transfer the burden of satisfying those overrides to the owners of the working interest when the lessee chooses not to participate, it is conceivable that a lessee acting in bad faith might burden a lease to the point it becomes useless. The existence of such a potential problem does not militate, in and of itself, that the Legislature has afforded the [**14] Corporation Commission the power to change an overriding royalty into a working interest to alleviate that situation. In our opinion, such power is not clearly indicated by the Legislature, and the effect of such a grant of power on the State, its people and the oil and gas industry in general is a matter to be weighed against the potential abuse in the legislative arena and not in this forum.

The order of the Corporation Commission is reversed.

REVERSED AND REMANDED.

LAVENDER, C.J., HODGES, SIMMS, DOOLIN, JJ., Concur.

IRWIN, V.C.J., BARNES, OPALA, JJ., Concur in Part and Dissent in Part.

WILLIAMS, J., Dissents.

CONCURBY:
OPALA (In Part) Appellee.

DISSENTBY:
IRWIN; OPALA (In Part)

DISSENT:

IRWIN, V.C.J., DISSENTING:

If my calculations are correct, the O'Neill lease was subject to a greater overriding royalty interest than the override of 1/16th of 7/8ths on natural gas allowed under alternative (4) in the Commission's pooling order. Stated another way, the overriding royalty interest burdens against the O'Neill lease exceeded what the Corporation Commission determined to be the fair and reasonable value of the 7/8ths working interest free and clear of burdens. Therefore, one of the issues [**15] presented and one of first impression is: If the burden against a pooled lease (e.g., a 3/16ths override) is greater than a fair and reasonable bonus for the 7/8ths working interest (e.g., a bonus of 1/8th override) and if the lessee elects not to participate in the development, does the Corporation Commission have the authority to amend or modify (reduce) the 3/16ths override, or must the poolor take the lease subject to the 3/16ths override.

In my opinion, the holder of the 3/16ths overriding royalty interest may be a proper party in a forced pooling proceeding, and the Commission has the authority to require such holder to make an election concerning how he will participate in the bonus (a 1/8th override) although such bonus would be less than the holder's 3/16ths overriding royalty interest. My views are premised upon the following reasons.

I am of the opinion that contractual rights [illegible] overriding royalty interests, production payments [illegible] may be amended and modified to the extent necessary to conform to the requirements of forced pooling under 52 O.S. 1971, § 87.1(d).

The right of the Legislature to act under the police power of the State is a part of the existing [**16] law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract. *Layton v. Pan American Petroleum Corporation, Okl., 383 P.2d 624 (1963)*. Since the State has the authority to regulate the production of oil and gas, a private contract

in derogation of this authority, must yield to the State's authority. *Patterson v. Stanolind Oil & Gas Co., 182 Okl. 155, 77 P.2d 83 (1938).* "[A] state has the constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landowners of the migratory gas and oil underlying their land, fairly distributing among them the cost of production and apportionment." *Hunter Co. v. McHugh, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5.* If a poolor is required to pay a bonus or satisfy a burden in excess of a fair and reasonable bonus for 7/8ths working interest when a [*187] pooled lessee elects not to participate in the development but to accept a bonus, there would be no equitable distribution of the production or fair apportionment of the cost. In my opinion, when a pooled lessee elects not to participate but elects to accept a [**17] bonus, the poolor may not be required to pay a bonus or satisfy a burden in excess of the fair and reasonable value of the 7/8ths working interest. If a poolor were required to do so, the authority of the Commission in forced pooling proceedings would be thwarted.

Our decision in *Holmes v. Corporation Commission, Okl., 466 P.2d 630 (1970)* tacitly recognized the above views although the specific issue presented there was the amount of the penalty. In *Holmes,* an oil and gas lessee of the east half of a 640 acre drilling and spacing unit assigned the lease to Holmes (his sister) reserving a $2,000.00 per acre production payment payable out of 1/2 of 7/8ths of the production. The lessee of the west 320 acres filed an application for pooling. The evidence disclosed that the value of the leasehold estate, from which a $2,000.00 per acre production payment had been reserved, was from $50.00 to $100.00 per acre, n1 and the cost of drilling and completing the well would be approximately $100,000.00.

> n1 If the pooled-lessee had elected not to participate in the production, and if the $2,000.00 per acre production payment had become the obligation of the poolor, Holmes would have been entitled to receive a $640,000.00 production payment from the production allowable to 1/2 of 7/8ths of the production in the east 320 acres before poolor would have been entitled to any production or costs allowable to that interest. This $640,000.00 production payment would have been an obligation of poolor, if produced, although the fair and reasonable value of an oil and gas lease on the minerals was from $50.00 to $100.00 per acre.

[**18]

The Commission entered its pooling order and provided that the protestants (Holmes and her brother) were to elect whether they would participate in the working interest and pay their proportionate share of the cost of development, or not participate in the cost and not receive their share of the 7/8ths working interest until the applicant for the pooling order had recovered 250% of the share of the cost allowable to that interest. It was argued on appeal that the penalty should have been 150% instead of the 250%.

Although the authority of the Commission was not placed in issue, it is evident that the pooling order in *Holmes* modified the lease contract between Holmes and her brother, and in effect, treated Holmes and her brother as joint owners of the 7/8ths working interest, i.e., the $2,000.00 per acre production payment was not material in determining the value of the lease or the amount of the penalty. Stated in another way, although the $2,000.00 per acre production payment was a burden against the pooled lessee's interest, it was not a burden against the interest of the poolor, the applicant for the pooling order.

In *Youngblood v. Seewald, 299 F.2d 680 (10th Cir. 1961),* [**19] a declaratory judgment action was brought to determine the effect of a pooling order of the Oklahoma Corporation Commission. An oil and gas lease owned by McClain was involved. This lease was subject to a 3/16ths royalty interest in favor of the lessors and also an override of 1/8th of 7/8ths which had been reserved by McClain's assignor. Of the several options offered in the pooling order, McClain elected to take an overriding royalty of 1/8th of 8/8ths in lieu of his right to participate in the working interest. The Commission pooling order did not state who was liable for the additional 1/16th royalty interest in favor of the lessor and the override of 1/8th of 7/8ths in favor of McClain's assignor. The issue presented was whether Seewald, (the poolor) or McClain, (the poolee) was liable for the burden on the lease. The trial court held that when McClain accepted a 1/8th of 8/8ths overriding royalty in lieu of participating in the well, he was required to pay from his royalty income all burdens on the lease over and above the statutory 1/8th royalty.

The Tenth Circuit Court of Appeals said that:

"The value of McClain's working interest could not be determined without [**20] considering the burdens on the lease. It [*188] could well be that without any overriding burdens the value would have been far in excess of **** 1/8th of 8/8ths royalty *** *. The result of the trial court's interpretation is that McClain would receive nothing, and he would be unable, out of the 1/8th he accepted, to pay the lessor's excess royalty and Youngblood's (McClain's assignor) override in full."

The Court held that since McClain did not elect to participate in the well, his working interest became the property of Seewald, the poolor entity authorized to drill, and that the owner of the working interest (poolor-Seewald) must satisfy the burdens on the lease.

Although it might appear that *Youngblood* stands for the rule that when an owner of a working interest elects to accept a bonus or override instead of participating in the unit well, the unit operator is obligated to satisfy the burdens against the pooled lease from his interest in the production, *Youngblood* will not support such rule. In the first place *Youngblood* specifically did "not consider whether the Commission has the power to restrict overriding burdens when all the parties are before [**21] the Commission". Secondly, the Commission did not attempt to disturb the excess royalty or the overriding royalty. Thirdly, the poolor made no attempt to show that the excess royalty and override and the bonus paid to the pooled lessee was in excess of the fair and reasonable value of the lease.

In my opinion, our pooling statute clearly provides for an equitable distribution of the production and a fair apportionment of the costs, and a lessee whose lease may be pooled, may not burden his lease so that a poolor would be required to pay more than a fair and reasonable bonus for the 7/8ths working interest.

52 O.S. 1971, § 87.1(d) speaks directly to the manner in which production is distributed and cost apportioned when owners agree to pooling, or a pooled lessee elects to participate in the development. However, the statute establishes only guidelines when a pooled lessee does not want to participate in the development. The Commission has (by rule) granted the pooled lessee a right of election. In *Anderson v. Corporation Commission, Okl., 327 P.2d 699 (1957)*, we upheld a Commission order which allowed the pooled-lessee the right to participate in the development or accept [**22] a bonus for its 7/8ths working interest. Section 87.1(d), inter alia, provides:

"**** provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates a royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding royalty, to production payment or other obligation, then the lessee of said lease out of his share of the working interest from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom meet any other obligation due in respect to the separately owned tract or interest held by him."

The above proviso appears clear and unambiguous and to me it simply states: "Where a lease stipulates a royalty in excess of 1/8th of the production, or is subject to an overriding royalty, production payments, etc., such excess burdens should be satisfied out of the pooled lessee's working interest." If the bonus for the lessee's working interest (free and clear of the burdens in excess of the 1/8th royalty) is not sufficient to satisfy the excess burdens, I find no language whatsoever that would impose the burdens [**23] against the poolor. If the above is a correct interpretation, a poolor is required to pay no more than a fair and reasonable bonus if the pooled-lessee elects not to participate in the development.

I am unable to find a material legal distinction between the above statutory language and comparable language first adopted in 1935 (1935 Session Laws, Ch. 59, at pg. 235), n2 codified as 52 O.S. 1961, § 87, [*189] and repealed in 1947. The 1935 enactment did not provide for forced pooling, and it is evident that any overriding royalty interest, production payment or other obligation in excess of the normal 1/8th royalty, would be satisfied from the 7/8ths working interest from which it originated and from no other interest. Although the language has been modified to some extent so as to be consistent with other changes in our pooling laws, the basic context has remained unchanged.

> n2 "**** Provided, where the lease of a person who has sustained his share of the cost of drilling the well on the majority, **** stipulates a royalty in excess of one-eighth (1/8) of the production, or said le[illegible]hall be subject to an overriding royalty, t[illegible] payment, or other obligation, than the l[illegible]d lease, out of his share of the seven-eighth[illegible]8) of the production **** shall sustain and pay said excess royalty, overriding royalty, or oil payment *** *."

[**24]

I respectfully dissent. I am authorized to state that Williams, Barnes, and Opala, JJ., concur in the views expressed herein.

OPALA, J., concurring in part and dissenting in part:

Our review is sought of an order by the Corporation Commission [commis[illegible]] pooling a 640-acre spacing unit for oil and gas development. Three couples [Hulsizers, Mitchells and Kennedys] -- all overriding royalty owners -- appear here as appellants. Two of them [Mitchells and Kennedys] also have a conversion option to a working interest after payout of well costs. All interests before us underlie a 77.31-acre tract in the pooled unit. The oil-and-gas lessee of that tract [O'Neill]

-- one of the original appellants -- was allowed to dismiss his appeal.

The order under review extends to the lessee, *as well as to all the other appealing interests*, an election between participating in the development or accepting, in lieu of a cash bonus, a fair-share-of-production formula in overriding royalty of 1/16 of 7/8 on oil and casinghead gas and of 1/8 of 7/8 on natural gas and natural gas condensate. Should the lessee decline to participate, he is to bear, out of his share, all override burdens [**25] upon his leasehold estate. Without prejudicing their appeal rights, appellants and the lessee all elected not to participate in drilling.

The threshold issue the court deals with here is whether, in the exercise of its pooling authority, the commission may reach for modification interests of those who are *sans* drilling rights *in praesenti* [e.g. owners of overriding royalty, excess royalty, production payment claims, conversion options or similar interests]. The court resolves this issue with an unqualifiedly negative answer thrust upon it by an overly restrictive search for solution sought to be extracted from the narrow text of a single phrase in 52 O.S. 1971 § 87.1(d). I cannot accede to the court's view.

By its very nature the commission's *power to force pooling* is brought to bear upon, and its exercise stands confined to, *owners* of drilling rights. 52 O.S. 1971 § § 86.1(d) and 87.1(d). But its *power to affect for modification interests within the pooled unit* is not similarly restricted to that class of interest holders. The two powers -- distinct in purpose -- are not always co-extensive in sweep. The latter, which is incidental to the former, may [**26] be far more expansive when its exercise is necessary to bring about needed adjustment of rights to accomplish forced pooling. n1 Leaseholds, or other working interests, may be so laden with obligations in excess of the usual 1/8 royalty as to constitute by themselves a cumbersome, if not indeed a negative asset, for fair market value appraisal as a working interest. Whenever this occurs, an obstacle to pooling might arise which the commission must have the power to deal with by being able to reach the various burdens for necessary adjustment of the working interest value. I would therefore hold that, *upon proper finding of a tenable ground therefor, supported by substantial evidence, the* commission has the authority to affect, in forced pooling, overriding royalty or other [*190] interests not coupled with drilling rights or working interest *in praesenti*. *Layton v. Pan American Petroleum Corporation, Okl., 383 P.2d 624* [1963]; *Patterson v. Stanolind Oil & Gas Co., 182 Okl. 155, 77 P.2d 83* [1938]; see e.g., *Holmes v. Corporation Commission, Okl., 466 P.2d 630* [1970].

n1 Capturing the essence of this distinction, a federal court said that in Oklahoma royalty interests are pooled *"by operation of law"* upon entry of the commission's spacing order, but working interests may not be pooled except by agreement or compulsory unitization order. *Whitaker v. Texaco, Inc., 283 F.2d 169, 172* [10th Cir. 1960].

[**27]

The other issue the court deals with here is whether a pooling order must provide, as a matter of law, that, with the pooled lessee's election not to participate in drilling, the obligation to pay all of his override or similar burdens shall stand imposed on the unit operator. The court resolves this issue with another absolute answer from which I am compelled to recede.

There is, in my view, *no* statutory impediment to allowing flexibility in allocating lease obligations. My examination of 52 O.S. 1971 § 87.1(d) does not lead me to conclude that its provisions mandate either course. *Where a proper finding is made and substantial evidence sustains* the existence of some tenable ground for imposing override or like obligations either on the pooled lessee -- whether participant or not -- or on the unit operator as part of some pooled rights fair-share-adjustment formula, the commission's decision should be sustained. n2 In the overall adjustment of rights in the pooled area, obligations burdening a leasehold in excess of the usual 1/8 royalty may be imposed on the unit operator or remain the liability of the lessee, but in no case may the unit operator be compelled to pay [**28] more than the fair market value of the working interests being pooled. The course taken in each case must, of necessity, depend on the manner in which the working interest involved came to be fitted into the operation [whether by participation, via a fair reduction coupled with a cash bonus or without a bonus].

n2 *Superior Oil Co. v. Oklahoma Corp. Commission, 206 Okl. 213, 242 P.2d 454, 457* [1952].

Cited by the court in support of its conclusion is *Youngblood v. Seewald, 299 F.2d 680* [10th Cir. 1961]. That case is neither *authority* for this court nor is it persuasive by force of analogy. The question reached there was confined to declaring the quantum of rights an override owner had vis-a-vis the unit operator. Both parties relied on their diverse interpretation of a not-too-clear commission order. The federal court placed on the commission order a construction deemed by it to be

warranted by state statutes and by the face of the record. I can derive from *Youngblood* [**29] no intellectual benefit for a decision in this case.

Left undetermined by the commission's findings and unexplained by its order are these salient questions: (1) Why were Hulsizers -- who own nothing more than an override interest -- extended the opportunity to elect between participation and a production share? (2) Why was there a need to affect their override interest? (3) Why was John Withrow -- another override interest owner -- treated differently from Hulsizers? (4) Were Mitchells and Kennedys -- as conversion option holders -- extended an election opportunity because their interest to participate *in futuro* [after payout of well costs] was treated as equivalent to one *in praesenti* or because the poolor desired to "accelerate" that interest and hence advance it for immediate satisfaction? (5) Does the commission order operate to "extinguish" the Mitchell and Kennedy conversion option interests? (6) Could appellants have elected to participate even though their lessee did not choose a like course? (7) If the last answer be in the affirmative, what would be the appellants' working interest share and their "proportionate part" of production costs?

Without the commission's [**30] answer to most of these questions the regimen imposed by the order before us is too vague for judicial construction. The most serious impediment to present review lies in the commission's utter failure to make essential explanatory findings as to the very basis upon which its determination is sought to be rested. n3 For this reason alone I would be constrained to reverse.

n3 *Tecumseh Gas System, Inc. v. State, Okl., 537 P.2d 421* [1975]. See also *State v. Guardian Funeral Home, Okl., 429 P.2d 732, 736* [1967].

[*191] I would reverse with directions to make specific findings that are responsive to the issues formed and inherent in the proceedings below, applying principles of law expressed in this opinion.

I am authorized to state that Irwin, V.C.J. and Barnes, J., concur in these views.

LEXSEE 617 p2d 181

APPLICANT: American Quasar Petroleum Co., In the Matter of Pooling Interests and Adjudicating the Rights and Equities of Oil and Gas Owners in the Pennsylvanian, Tonkawa, Cottage Grove, Oswego, Cleveland, Big Lime, Red Fork [Cherokee], Atoka, Morrow, Chester, Mississippian, Hunton, Viola, Simpson, and Arbuckle Common Sources of Supply Underlying all of Section 12, Township 18 North, Range 20 West, Dewey County, Oklahoma. Joseph I. O'Neill, Jr.; Howard L. Kennedy and Jacqueline Kennedy, husband and wife; John F. Mitchell and Evelyn Mitchell, husband and wife; and William E. Hulsizer and Phyllis N. Hulsizer, husband and wife, Appellants, v. AMERICAN QUASAR PETROLEUM CO., Appellee

No. 50,741

Supreme Court of Oklahoma

1980 OK 2; 617 P.2d 181; 1980 Okla. LEXIS 317; 68 Oil & Gas Rep. 282

January 8, 1980

SUBSEQUENT HISTORY:
[**1]

As Modified January 11, 1980. Rehearing Denied October 10, 1980.

PRIOR HISTORY:
Appeal from an order of the Oklahoma Corporation Commission. Owners of royalty interests in drilling and spacing unit appeal from Corporation Commission order pooling interests in the unit, correctly alleging the Commission has no statutory authority to issue a pooling order requiring nonparticipating royalty owners to either participate in drilling unit well or in the alternative to accept a lesser royalty, notwithstanding the fact the nonparticipating royalty owners' interest is convertible to a working interest upon payout.

DISPOSITION:
REVERSED AND REMANDED.

COUNSEL:
Guy E. Taylor, Oklahoma City, Oklahoma, for Appellants.

Watson, McKenzie & Moricoli, by: H. B. Watson, Jr., Richard K. Books, Oklahoma City, Oklahoma, for Appellee.

JUDGES:
Hargrave, J., wrote the opinion. Lavender, C.J., Hodges, Simms, Doolin, JJ., concur. Irwin, V.C.J., Barnes, Opala, JJ., concur in part and dissent in part. Williams, J., dissents.

OPINIONBY:
HARGRAVE

OPINION:

[*182] The appellants, William E. Hulsizer and his wife Phyllis, own an overriding royalty interest in the leasehold of Joseph I. O'Neill, Jr. totaling 1% of 8/8ths in and to 77.31 [**2] acres of a 640-acre drilling and spacing unit located in Section 12-18N-20W of Dewey County, Oklahoma. Mr. O'Neill also assigned an override of 1.5625% of all oil and gas produced to appellants Howard L. and Jacqueline Kennedy, which was convertible at the election of the assignees to a 6.25% working interest upon payout of the unit well. An identical override of 1.5625% convertible to a 6.25% working interest at payout was granted to John F. Mitchell and Evelyn Mitchell. Additionally a 5.46875% override was granted by O'Neill to John R. Withrow. Therefore the 77.31 acre leasehold interest owned by O'Neill was burdened by a 9 + % overriding royalty and a contingent interest equal to 1/8th of the leasehold vesting upon payout of a well.

Rio Pecos Corporation

~~7922~~ R-7335 — on 40 acres of 320 unit

Owners of lease, post app, carved out 50% ORRI — Required owners to reduce ORRI to 12½% or be excluded from the Unit w/ automatic approval of non-std Unit.

~~8854~~ R-7984, Caulkins Oil Company

Owners of lease pre-application provided for ORRI of ¢3.96/mcf of gas to a related entity - Same result

~~8854~~ R-8047 Robert E. Chandler

Involved the characterization of a "net profits" interest. The contractual language called for an interest in proceeds less expenses incurred by named lease owner. Conclusion — cost recovery properly charged against net profits interest

Do not to comm affi

R-10656 - ~~Mitchell~~ Branbo

Issue was notice to owner of unrecorded interest

R-10672 — Mitchell) connected cases

disclosed to Nearburg.

R-11109 - Nearburg - allowed cost recovery out of working interests, including "interest net to profits interest. The details of which were not

MEMORANDUM

To: Michael Stogner
From: David Brooks

Date: June 12, 2001

Re: Case No. 12601; Application of Bettis, boyle & Stovall to Reoven and Amend Order No R 11573

I attach letter from attorney, William F. Carr, together with the Oklahoma court opinion he cited at the hearing on this matter. These documents should go in the case file.

Based on what I heard at the hearing on May 31, I believe that the Application to amend should be granted. The cited case is not really in point and lends no real support to Mr. Carr's argument. However, denial of the application would allow the owner of the non consenting interest to shift a portion of the risk to the parties who have paid for the well in an unconscionable way.

Whether or not the lease that the applicant asks the Division to disregard is collusive, and there is some evidence that it is, it is clearly manipulative. The party leasing an unleased interest during the pendancy of a forced pooling proceeding affecting that interest, has not incentive to limit the royalty because he is taking no risk. If the well is successful enough to pay back the costs and penalty, he has gotten a windfall. If not, he has spent no money. In either case, the royalty owner has gotten a greater share of the well than he would have gotten either from leasing to the operator or from being pooled as an unleased interest.

I believe granting of the application can be defended under the statute, although the issue is certainly not free from doubt. It seems to me this is one instance where the Division should be assertive to prevent the regulatory scheme from being abused

*182 Okla. 155, *; 77 P.2d 83, **;*
*1938 Okla. LEXIS 89, ****

PATTERSON v. **STANOLIND** OIL & GAS CO. et al.

No. 27884.

SUPREME COURT OF OKLAHOMA

182 Okla. 155; 77 P.2d 83; 1938 Okla. LEXIS 89

March 1, 1938, Decided

PRIOR HISTORY: **[***1]** Appeal from District Court, Tulsa County; Prentiss E. Rowe, Judge.

Action by Russell B. **Patterson** against the **Stanolind** Oil & Gas Company and Amerada Petroleum Corporation for the recovery of oil royalty payments in the sum of $ 988.68. From a judgment in his favor for the sum of $ 824.32, the plaintiff appeals. Modified and affirmed.

DISPOSITION: Judgment affirmed.

CORE TERMS: oil, common source, well-spacing, drilling, reservoir, acre, waste, tract, energy, police power, process of law, regulation, definite, proportion, royalty, pool, acre tract, indefiniteness, correlative, drilled, surface, spacing, block, mineral rights, adjoining, ownership, tendered, mineral, penal, legislative power

HEADNOTES: 1. Constitutional Law -- Oil and Gas-- "Well-Spacing Act" Held Proper Exercise of State's Police Power and not Violative of Provisions of State and Federal Constitutions.

The police power of the state includes the protection of the correlative rights of owners in a common source of oil and gas supply, and this power may be exercised by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply as provided by chapter 59, art. 1, S. L. 1935, without violating either sections 7, 15, or 23 of article 2 of the Oklahoma Constitution, or section 10, article 1, and section 1 of the Fourteenth Amendment to the United States Constitution.

2. Same--"Well-Spacing Act" Held not Unlawful Delegation of Legislative Power to Corporation Commission.

Chapter 59, art. 1, S. L. 1935, does not constitute an unlawful delegation of legislative power to the Corporation Commission in violation of section 1 of article 4 of the Constitution of Oklahoma.

3. Statutes -- Oil and Gas Conservation Measure Known as "Well-Spacing Act" Held not Invalid for Indefiniteness.

Chapter 59, art. 1, S. L. 1935, is not invalid because of indefiniteness and uncertainty.

4. Appeal and Error--Abstract Question as to Nature of Review of Order of

Corporation Commission not Considered Until Order Appealed From.

Until an order of the Corporation Commission is appealed from, the nature of such review remains an abstract question and will not be considered.

COUNSEL: A. S. Norvell, W. M. Haulsee, and R. J. Roberts, for plaintiff in error.

Clay Tallman, Guy H. Woodward, Victor C. Mieher, Joseph A. Gill, Jr., and Ray S. Fellows, for defendants in error.

W. A. Delaney, Jr., W. T. Anglin, R. L. Gordon, Jas. A. Veasey, R. B. F. Hummer, and Robert S. Kerr, amici curiae.

JUDGES: DAVISON, J. OSBORN, C. J., BAYLESS, V. C. J., and RILEY, WELCH, PHELPS, CORN, and HURST, JJ., concur. GIBSON, J., concurs in conclusion.

OPINIONBY: DAVISON

OPINION: [*156] [85]** DAVISON, J. This action questions the constitutionality of chapter 59, art. 1, Session Laws 1935, an oil and gas conservation measure commonly known as the "Well-Spacing Act," whereby in certain proceedings had before the Corporation Commission said commission is authorized to promulgate rules and regulations as to the spacing of oil and **[***2]** gas wells in the different pools of Oklahoma. The present action was commenced in the district court of Tulsa county by the plaintiff in error, a royalty owner, against the defendants in error, colessees, to recover the sum of $ 988.68, allegedly due him as his share of the proceeds from oil produced by said lessees by reason of his ownership of an undivided one-sixteenth interest in the minerals under the tract of land upon which the production was procured.

The parties will hereinafter be referred to as they appeared in the trial court.

The defendants denied that the plaintiff was entitled to the sum he prayed for, but alleged that his share of the proceeds of said well amounted to the sum of only $ 824.32, which they tendered into court. The reasons they assigned for the plaintiff being entitled to this sum rather than the larger one which he sought were that the well from which the production was derived was located in the center of a ten-acre drilling unit, the creation of which was authorized by order of the Corporation Commission issued on June 18, 1936, in accordance with the provisions of chapter 59, S. L. 1935, and that after the issuance of said order the owners of the **[***3]** royalty interests in said drilling unit, other than the plaintiff, were entitled, by the provisions of subdivision (c) of section 3, art. 1, of said well-spacing act, to the difference between the sum they tendered into court and the sum that the plaintiff prayed for.

At the trial no evidence was introduced except the lease of the defendants, the mineral deed of the plaintiff and the various documents filed in the proceedings had before the Corporation Commission in which the above-mentioned well-spacing order was issued. The parties stipulated the physical facts concerning the drilling, location, and production of the well in question.

The trial court rendered judgment for the plaintiff in only the amount which the defendants had tendered, and the plaintiff has appealed.

The land upon which the aforementioned order of the Corporation Commission established ten-acre well-spacing is known as "The North Wellston Area" in Lincoln county, and includes 520 acres as shown on the plat below. The only specific portions of this area necessary to mention herein make up an 80-acre tract described as the N. 1/2 of the S.E. 1/4 of section

35, township 15 N., range 2 east, designated by the shaded [***4] strips on the plat. Of this tract, the north 25 acres and the south 55 acres are under separate ownership and are covered by separate oil and gas leases jointly owned by the defendants. On the plat below, the 25-acre tract is represented by the portion in darker shading marked tract "A", while the [*157] 55-acre tract is represented by the portion in lighter shading and is designated as tract "B". The plaintiff's mineral deed covers tract "A", only. The site upon which the defendants drilled the well in question is in the center of a ten-acre unit in the northeast corner of the 80-acre tract. This unit consists of 6 1/4 acres in tract "A" and 3-3/4 acres in tract "B" and is represented by the small heavily outlined square on the plat. As shown by the large dot representing the location of the well, the same is entirely upon tract "A", in which [**86] the plaintiff's interest lies. The well was completed some months prior to the date of the aforesaid spacing order of the commission.

[SEE FIGURE IN ORIGINAL]

The allegations contained in the plaintiff's reply to the defendant's answer, which pleaded the proceedings of the Corporation Commission out of which the well-spacing [***5] order for the North Wellston Area was issued as the basis for their contention that the plaintiff was entitled only to the sum that they tendered instead of the sum he prayed for, are substantially as follows: That said proceedings of the commission and the statute authorizing same are violative of the following constitutional provisions, to wit: Section 7, article 2, of the Oklahoma Constitution, which prohibits the taking of life, liberty, or property without due process of law, and section 1 of the Fourteenth Amendment to the United States Constitution, which contains the same prohibition and provides for equal protection of law to all citizens: section 23, article 2, of the Oklahoma Constitution, which prohibits the taking of property for private use; section 59, article 5, of the Oklahoma Constitution, which provides for the uniform operation of laws; section 15, article 2, of the Oklahoma Constitution, and section 10, article 1, of the United States Constitution, which prohibits the impairment of contract obligations; and section 1, article 4, of the Oklahoma Constitution, which provides for a distribution of the powers of government.

In this appeal the plaintiff presents essentially [***6] the same contentions that he advanced in the trial court in support of the allegations above named, except that he specifies additional error in the retroactive effect which the judgment of the trial court gave the Corporation Commission's well-spacing order in question. This error has been confessed before this court, and in this connection the defendants have tendered the additional sum of $ 47.68, which represents the proportion claimed by the plaintiff of the proceeds of the oil produced by the well in question from the time that it was completed as a producer to the date of the commission's spacing order. Another departure from the issues joined in the trial [*158] court is the waiver by plaintiff's counsel, upon oral argument, of one of the contentions previously urged to support the allegation that the plaintiff has been denied due process, to wit: that he was not legally summoned to the proceedings in which the well-spacing order was made and entered.

The questions raised herein can be consolidated into two principal ones and stated as follows: (1) Does the state have the power to enact legislation providing [**87] for well-spacing? (2) If it does possess such power, [***7] is the same constitutionally exercised by the enactment of chapter 131, Session Laws 1933, and its amendment, which is chapter 59, art. 1, Session Laws 1935, and by the proceedings therein prescribed?

As to the first question, the plaintiff contends that the well-spacing order in question has the effect of depriving him of property without due process of law in that it authorizes the distribution of the production of the well in question (as well as all others in the North Wellston Area), in accordance with the provisions of subdivision (c) of section 3, art. 1, c. 59, S. L. 1935, which reads as follows:

"In the event a producing well, or wells, is completed upon a unit where there are two or more separately owned tracts, any royalty owner, or group of royalty owners, holding the royalty interest under a separately owned tract, shall share in one-eighth of all of the production from the well or wells drilled within the unit in the proportion that the acreage of their separately owned tract bears to the entire acreage of the unit."

In the present case, the defendants' compliance with the above provision allows the owners of the mineral rights in the 3-3/4 acres of the drilling unit **[***8]** to share with the plaintiff and his co-owners of the mineral rights in the other 6 1/4 acres of the unit, the oil and gas produced from the well on said unit, though said well is located entirely upon the surface of the 6 1/4 acre tract. The plaintiff contends that according to the fundamental rule of oil and gas ownership, the owner of land is entitled to all of such minerals that he is able to reduce to possession thereon and that he (plaintiff) according to said rule is entitled to the portion of all of the oil and gas produced on said 6 1/4 acres that is provided for in his mineral deed and the defendants' lease. His contention is that when such portion is reduced by the distribution of this production among the owners of the adjoining 3-3/4 acres, he is deprived of property without due process of law, and that the same is taken for private use without just compensation, and that the contractual obligations of both the deed and the lease are thereby abrogated.

The plaintiff's counsel impliedly admit, as they must, that if the power to enact laws for the spacing of oil and gas wells comes within the police power of the state, then this power, when reasonably exercised, supersedes **[***9]** individual property and contract rights, but they contend that the police power does not extend to the power assumed by the Legislature in the enactment of the statutes in question.

The contention of the defendants is that the theory of ownership in oil and gas relied upon by the plaintiff is not applicable to oil and gas derived from a source of supply common to adjoining tracts of land and that the production of the well in question is derived from such a common source of supply. This claim as to the character of the source of supply is supported by the finding to that effect that is incorporated in the order of the Corporation Commission herein attacked, and there is no evidence in the record to dispute this finding. Therefore, we must assume that the source of supply of the well in question is common to the land adjoining it and that said pool underlies not only the 6 1/4 acres of land on which the well is located, but that it also extends beneath the 3-3/4-acre tract. Thus we have but to see whether the claims of the owners of the land on which the oil and gas is produced to all of said production shall be defeated by the rights of adjoining owners in said pool. The decision **[***10]** of the United States Supreme Court in the case of Ohio Oil Co. v. State of 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729, was based upon the theory that the right of the owner of land to the oil and gas thereunder is not exclusive but is common to and merely coequal with the rights of other landowners to take from the common source of supply, and therefore that his property rights to said oil and gas are subject to the legislative power to prevent the destruction of the common source of supply. It has already been decided that this police power of the state to prevent the destruction of the common source of supply may be exercised by regulation of the production therefrom. In Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, the principles asserted in the Indiana case, supra, were recognized, and the court said:

"Every person has the right to drill wells on his own land and take from the **[**88]** pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, **but** the right to take and **thus acquire ownership [*159] is subject [***11]** to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool." (Citing many authorities.)

The cases which uphold the power of the state to prevent the depletion of a common source of supply of gas and oil by the regulation of production are numerous. The exercise of such power has also been upheld under the provisions of our own state Constitution. C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841; Wilcox Oil & Gas Co. v. State, 162 Okla. 89, 19 P.2d 347, 86 A. L. R. 421; and Sterling Refining Co. v. Walker, 165 Okla. 45, 25 P.2d 312. It has also been held that such regulation could be lawfully executed by limitations upon the drilling of wells and well-spacing. Marrs v. City of Oxford, 8 Cir. 32 F.2d 134, cert. den, 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625; Oxford Oil Co. v. Atlantic Oil Producing Co., 5 Cir. 22 F.2d 597, **[***12]** cert. den. 277 U.S. 585, 48 S. Ct. 433, 72 L. Ed. 1000; Brown v. Humble Oil & Refining Co. (Tex.) 83 S.W.2d 935; Helmerich & Payne v. Roxana Petroleum Corp. (Kan.) 14 P.2d 663. In Blevins v. Harris, 172 Okla. 90, 44 P.2d 112, this court held that the one-eighth royalty provision of an oil and gas lease was not violated by an order of the board of adjustment authorized by an Oklahoma City ordinance which provided that the owners of various tracts which had been joined together to constitute a drilling block should participate in the one-eighth royalty of all the oil produced from a well to be drilled on said block. In that case we quoted with approval certain portions of the opinion in Marrs v. City of Oxford, supra. In the Marrs Case, the Circuit Court of Appeals upheld as denying none of the rights, privileges, and immunities guaranteed by the federal Constitution, a Kansas City ordinance which provided for a distribution among the owners of portions of a city block, shares of the proceeds from a well drilled in the block in the proportion that the size of their parcels bore to the entire area of said block. In both **[***13]** the Blevins Case and the Marrs case, effect was given to the principle of the correlative rights of adjoining owners announced in the following language of the United States Supreme Court in Ohio Oil Co. v. Indiana, supra:

"But there is a coequal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others, or by waste by one or more to the annihilation of the rights of the remainder. Hence, it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all of the collective owners, by securing a **just distribution** to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

From the foregoing authorities, **[***14]** it is obvious that it is not beyond the police power of the state to restrict the individual owner's taking from the common source of supply, as well as to authorize a "just distribution" among the various owners of mineral rights in land overlying the common source of supply, of that portion of said supply so taken or reduced to possession by the individual owner. The restriction of drilling by the spacing of wells seems to be a much more feasible and effective method of securing a just distribution for such owners than restrictions upon production after same has already commenced, for it tends to eliminate many distinct faults apparent in such regulations. One of these was pointed out by Judge Kennamer when the case of Champlin Refining Co. v. Corporation Commission, supra, was before the federal district court (51 F.2d 823). He said the following of the 1915 conservation law:

[89]** "Acreage is ignored and an operator with two 5,000 barrel-wells on five acres may take out of the common source of supply, under the provisions of section 4, as much oil as an operator with two 5,000 barrel wells on 20 acres in the same field. Proportionate taking per well **[***15]** is wholly inequitable if the Legislature intends to secure 'a just distribution' to arise from the enjoyment. * * * of their privilege to reduce to possession,' because the operator with 20 acres has four times as much privilege as the operator with five

acres in the same field."

The "wasteful necessity of drilling offset wells" is another vice which is minimized by such restrictions on drilling. Helmerich & Payne v. Roxana Petroleum Corp. (Kan.) 14 P.2d 663. One of the essentials to the preservation of the common source of supply or the prevention of its waste is the preservation of the reservoir energy necessary to production therefrom by the natural process **[*160]** of flowing. This has been recognized by the courts, and the power of the state to prevent the waste of said reservoir energy is beyond successful contradiction. People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Bandini Petroleum Co. v. Superior Court of Los Angeles County, Cal., 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103; Champlin Refining Co. v. Corporation Commission, supra, and others. The restriction of drilling limits the number of penetrations in the reservoir **[***16]** and it seems logical that the less the reservoir is punctured, the less the supply of reservoir energy is likely to be depleted.

Thus, in our opinion, it is well established that the police power of the state extends to protecting the correlative rights of owners in a common source of oil and gas supply and this power may be lawfully exercised by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply. As to the charge that such regulations deprive the individual of property without compensation or due process of law, the defendants very convincingly demonstrate that the enforcement of chapter 59, art. 1, S. L. 1935, though it may reduce the plaintiff's immediate or current receipts from the production of the well in question, yet, in protecting the common source of supply from sporadic drilling, it will tend to prolong his receipts so that their total or his ultimate benefit from said pool will be greater than it would be if the number of wells drilled into the pool were not limited. However, be that as it may, since the plaintiff's mineral deed did **[***17]** not grant him the benefit, use, or possession of any definite amount of minerals nor the right to reduce any certain amount of minerals to possession, but only gave him an ownership in the oil and gas that might be captured or reduced to possession, and since the right to capture from a common source of supply may be limited or restricted by the state, it may be said that such a grant can confer no right or title in property that is not already subject to being limited, restricted, or modified by the state's said power. The extent of private contract in such matters being at all times subject to limitation by the inherent police power of the state, any muniment of title is impotent to assume or to convey any property right in the common source of supply superior to or entirely independent of said sovereign power. Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the state or federal Constitution which prohibit the taking of property without just compensation or without due process of law and forbid the impairment **[***18]** of contract obligations. As we view it the property here involved has not been taken or confiscated; its use has merely been restricted and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect. In Brown et al. v. Humble Oil & Refining Company, supra, the following words were quoted with approval from Lombardo v. City of Dallas (Tex.) 73 S.W.2d 475:

"All property is held subject to the valid exercise of the police power, nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion **[**90]** of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law."

The plaintiff's contention that the statute in question does not have a uniform operation and therefore violates **[***19]** section 59 of article 5 of the Oklahoma Constitution is made in

connection with and based upon his assertion that it allows the taking of private property for private use. As we have found the latter contention ineffective, and we perceive of no other respect in which it might seriously be considered contrary to that section of the Constitution, we conclude that section 59, article 5, is not violated by said act.

Next, we come to the consideration of whether or not the statute in question is a lawful exertion of the state's power to regulate the drilling of oil and gas wells. The plaintiff's contention is that, admitting the state possesses such power, still the act in question is an unlawful use of same, because it violates section 1, article 4, of the Oklahoma Constitution, which provides for the distribution of the powers of the state to the legislative, judicial, and executive branches of its government. In support of this contention, plaintiff's counsel assert that the statute complained of undertakes to delegate to the executive department, acting through the Corporation Commission, an administrative board, the legislative power which, they say, can only be exercised by the **[***20]** Legislature itself. Counsel **[*161]** recognize the well-settled rule that the Legislature may enact a law, complete within itself, the object of which is a general purpose, and, for the purpose of carrying the act into operation, may delegate to administrative agencies the power to prescribe details in connection with the administration and enforcement of said law. The claim, however, is that the well-spacing act is not complete within itself, as it prescribes no standard by which the Corporation Commission shall be governed in deciding whether or not an area shall be divided into spacing units and what the character of the units shall be, after evidence such as described in subdivision (b), section 4, of the act has been received, and therefore that said law leaves to the commission more than just the details of its administration and enforcement. This argument assumes that the Corporation Commission is nothing more than an administrative body, and herein lies one of its fallacies. By the Constitution itself, the Corporation Commission was granted powers over transportation and transmission companies which are legislative and judicial as well as executive in their nature, and the **[***21]** extension by legislative enactment of the field over which these powers can be exercised is authorized by section 35, article 9, of the Constitution. Russell v. Walker, 160 Okla. 145, 15 P.2d 114. The enactment of statutes such as the one in question cannot be held to violate section 1, article 4, of the Oklahoma Constitution, for said section is inapplicable to the Corporation Commission. In the Russell Case, supra, we said:

"The subject of the first part of article 4, supra, is powers of government. The subject of the second part is departments of government. While it is provided in the second part of the article that the legislative, executive, and judicial departments of government shall be separate and distinct and that neither shall exercise the powers properly belonging to either of the others, those statements are coupled with an exception, as follows, 'except as provided in this Constitution.' One of the exceptions is the Corporation Commission, which, by the provisions of article 9, supra, was vested with legislative, executive, and judicial authority. The provision that the legislative, executive, and judicial departments of government shall be **[***22]** separate and distinct and that neither shall exercise the powers properly belonging to either of the others, by reason of the exception in article 4, supra, is not applicable to the Corporation Commission."

Because of the character of the Corporation Commission's grant of powers by our state Constitution, we must reiterate, with reference to the authorities cited by plaintiff's counsel in this case, what we said in the Russell Case, as follows:

"For that reason the decisions from other states cited by the petitioners are neither persuasive nor controlling, in the absence of a showing that the Constitutions of the states in which those decisions were rendered contained the broad grant of legislative power which is contained in section 35, supra."

All of the cases cited by the plaintiff as authority for his contention have reference to agencies possessing powers of purely administrative character and lack the extraordinary

powers granted the Corporation [**91] Commission by the Constitution of Oklahoma.

Though we believe in the principle that an act whose enforcement is trusted to any agency of the government should be definite and certain enough to let the agency know what the [***23] Legislature intended to provide for and how the legislative will is to be carried out in the administration and enforcement of the act, still we must also recognize that there are certain subjects of legislation in which the application of this principle is necessarily limited. In our estimation, well-spacing is such a subject. We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil-producing area should be divided into drilling units and what size and shape the units should be. The best manner of well-spacing, or a criterion by which this might be arrived at, could not be anticipated or prescribed in advance of the opening of an oil field because of the difference between the conditions in one field and those in another and the variability of the effect which such conditions have upon the objects to be obtained. The impossibility of fixing a definite standard for the administration and enforcement of oil and gas conservation measures has been given great weight in the judicial determinations of their validity in other jurisdictions. See Brown v. Humble Oil & Refining Co., supra, [***24] and People v. Associated Oil Co., 211 Cal. 93, 294 P. 717. In the latter of these cases, the court was considering the validity of a statute for the prevention of the waste of natural gas. With reference to the contention that the standard set forth in said act was objectionable on account of its vagueness and uncertainty, the court said:

"Therefore, because of the many and varying conditions peculiar to each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion [*162] of gas to the amount of oil produced, it may be said that it would be impossible for the Legislature to frame a measure based on ratios or percentages or definite proportions which would operate without discrimination, and that what is a reasonable proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case."

In our opinion the validity of the statute in question should be tested by the rule stated in volume 25 of Ruling Case Law, at page 810, as follows:

"An act will not be declared inoperative and ineffectual on the ground that it furnishes no [***25] adequate means to secure the purpose for which it was passed, if men of common sense and reason can devise and provide the means, and all the instrumentalities necessary for its execution are within the reach of those intrusted therewith."

The well-spacing sections of the statute in question are obviously designed to prevent waste by limiting the number of wells drilled into the common source of supply to a number which will enable the recovery of the most oil from said supply. It is a matter of common knowledge that the recovery of oil through a well by the natural process of its own flowing depends upon the lifting power exerted by the pressure of natural gas or water or both in and around the common source of supply or oil-bearing portion of the sand penetrated by the well. This lifting power which brings the oil from its reservoir through the well to the surface is generally known as "reservoir energy" by those conversant with the more or less scientific facts of oil production. Therefore, the amount of oil which can be recovered by the natural flowing of wells from any given reservoir depends upon the amount, character, and availability of said reservoir energy. By mathematical [***26] calculation it can be determined to the extent of reasonable certainty just how much pressure is necessary to lift the production of a well to the surface from each particular common source of supply. The amount of reservoir energy, as well as the amount of oil present in a common source of supply, can now be determined to a fair degree of certainty without extensive drilling. Considering these sums together with the amount of energy necessarily expended in bringing said oil to the surface, it can be ascertained how the production should best be regulated to procure the greatest recovery from the common source of supply. Regulation, of course,

includes a determination of the location of the wells and the amount of oil each should be allowed to produce, so that the reservoir **[**92]** energy will not be exhausted before all of the recoverable oil is wrested from the common source of supply. In this determination, there are many physical facts of the particular mineral area which must be taken into consideration, such as the character and extent of the reservoir; the dip, depth, thickness, porosity, and permeability of the producing sand; the nature, character, and location of the reservoir **[***27]** energy, etc. Such information can be obtained in advance of the complete development of a given area by geological calculation and correlation upon data compiled from core drilling and seismographing as well as surface surveys and the discoveries made in neighboring wells. In performing its functions as a fact-finding body, the Corporation Commission is empowered by chapter 131, S. L. 1933, and chapter 59, art. 1, S. L. 1935, to take evidence upon all of these subjects and others found by scientific investigation and research to have a bearing upon securing the greatest possible recovery from the common source of supply, and by application of the principles of physics, chemistry, geology, and mathematics, can determine by certain calculations at what intervals of space wells should be located in order to bring about such recovery and thus prevent waste and also protect the correlative rights of all of the owners of interests therein. Such desirable results have not been obtained and cannot be obtained from sporadic drilling. Therefore, since it is a matter of undisputed fact that the kind of well-spacing unit which will induce the greatest recovery from a particular oil and gas reservoir **[***28]** or common source of supply is a matter which can be determined within the limits of human knowledge and to a fair degree of certainty, and since the Corporation Commission has been granted powers withheld from ordinary administrative agencies, which enable it to function as a legislative as well as a judicial and executive body, it follows that the commission within itself, can determine the character of drilling unit best adapted to preserving the reservoir energy and the correlative rights of the owners in a common source of supply, unlimited by standard except the rules of procedure provided and the objects expressed in the two waste-prevention statutes enacted as chapter 131 of the Oklahoma Session Laws of 1933 and chapter 59, art. 1, of the Oklahoma Session Laws of 1935.

The uncertainty and indefiniteness of said statutes is also advanced as a ground for the contention that they violate the due **[*163]** process, clauses of the Oklahoma and United States Constitutions. Plaintiff's counsel refer to the opinion of the United States Supreme Court in the Champlin Case, supra, as if it were authority for their contention. In that case, the court declined to uphold the **[***29]** validity of section 7962, O. S. 1931, which provided a penalty for the violation of other sections of the 1915 waste-prevention statute, because said statute contained no definition of the term "waste." The rule followed in that instance was quoted from the opinion in Connally v. General Construction Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126, as follows:

"* * * That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In the Champlin opinion, the court further states:

"The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply **[***30]** them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with with committing waste in violation of the act, the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing on or be necessary in determining

whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest **[**93]** in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in sec. 4 (sec. 7957) would require regular gauging of all producing wells in each field, a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the act.

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed **[***31]** for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

With reference to counsel's insistence that we apply to the well-spacing sections of the 1935 Act the same rule with reference to indefiniteness and uncertainty that was applied to the penal section of the 1915 Act in the above-quoted opinion, we cannot help but observe that the United States Supreme Court might have applied the rule to defeat the regulatory provisions of the 1915 law had it found the rule appropriate for such an extensive application. application. It does not appear from the opinion in the Champlin Case whether or not the specific objection was made to the regulatory provisions of the act, but it is certain that it was there contended that these provisions violated the due process clause, which is the basis of the rule as to indefiniteness and uncertainty, and that contention was not upheld.

In reviewing the history of this constitutional limitation of indefiniteness and uncertainty upon the validity of statutes, we find good reason for a studied **[***32]** limitation of its application. 45 Harv. L. Rev. 160; 1 Geo. Wash. L. Rev. 114; 8 Wisconsin L. Rev. 176; 11 Tex. L. Rev. 212. The requirement of definiteness and certainty was first applied to criminal statutes only, and though at first it was not based upon any certain constitutional provision, it developed from the rule of construction that penal statutes are to be construed strictly in favor of the accused. See Lewis' Sutherland, Statutory Construction (2d Ed., 1904) chap. XIV. Later, in seeking constitutional basis for this limitation in criminal cases, the Sixth Amendment to the United States Constitution was relied upon, when it was discovered that the accused was not being "informed of the nature and cause of the accusation." Thereafter, in cases brought to test the validity of statutes, under state Constitutions which contained no provision such as the Sixth Amendment to the federal Constitution, due process clauses were used as a basis for holding such statutes unconstitutional. Among the first of these cases was Louisville & Nashville R. Co. v. R. R. Commissioner of Tennessee, 19 F. 679, in which a Tennessee **[***33]** statute granting the Railroad Commission of that state the power to fix reasonable railroad rates and providing a penalty for the collection of "unreasonable" rates, was declared invalid. The reason given by the court for declaring **[*164]** the act unconstitutional on the ground of uncertainty was that the enforcement thereof would result in the delegation to a jury of the power of deciding in a prosecution under the act the unreasonableness of a given rate without any standard having been set forth by the Legislature by which a verdict was to be reached. The rule of uncertainty has also been applied by the United States Supreme Court in the wage scale cases, the most notable of which is Connally v. General Construction Co., supra. However, the application of this rule to such cases has not been universal. See Ruark v. International Union of Operating Engineers, 157 Md. 576, 582, 146 A. 797, 799; Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628, 50 A. L. R. 1473; State v. Tibbetts, 21 Okla. Crim. 168, 205 P. 776. In cases where it would be very difficult to prescribe by a statute a definite standard for its administration, **[***34]** the United standard for its administration, the United States Supreme Court has refused to apply the rule. Examples of this are found in Buttfield v. Stranahan, 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525, and Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230, 35 S. Ct. 387, 59 L. Ed. 552. In the Buttfield Case, the court had before it for consideration the constitutionality of a congressional act designed to prevent the importation

of impure and unwholesome tea. The act made it unlawful to import to the United States tea which was inferior in purity, quality, and fitness for consumption to the standards fixed by the Secretary of the Treasury. In urging the unconstitutionality of said **[**94]** act, it was argued that this delegation of power to the Secretary of the Treasury was an unconstitutional delegation of legislative power to an administrative official, for it set forth no criterion by which the secretary should be guided in fixing the standards of purity, quality, and fitness by which the tea importations were to be judged. In deciding that this act was not an unlawful delegation of legislative power, the court followed the rule **[***35]** stated in Marshall Field & Co. v. Clark, 143 U.S. 649, 36 L. Ed. 294, 12 S. Ct. 495, and spoke the following:

"We may say of the legislation in this case, as was said of the legislation considered in Marshall Field & Co. v. Clark, that it does not in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject **as far as was reasonably practicable,** and from the necessities of the case was compelled to leave to executive officials the the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The above quotation is sufficient to reveal that the courts recognize a very real and practical limit to the degree of definiteness and certainty which can be attained in legislation upon some subjects, and we believe that the matter of well-spacing is one of those subjects.

In the Mutual Film Corporation Case, supra, there was before the court for consideration an Ohio statute, 103 Ohio Laws, p. 399, creating, under **[***36]** the authority and superintendence of the Industrial Commission of that state, a board of censors for motion picture films and providing for the imposition of a penalty for each exhibition of films without the approval of the board, and providing that "only such films as are, in the judgment and discretion of the board of censors, of a moral, educational, or amusing and harmless character shall be passed and approved by such board."

In that case, the court said:

"The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views, which might be entertained of the effect of the pictures, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film', while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, **get precision from the sense and experience of men,** and become certain and useful guides in reasoning and conduct. **The exact specification [***37] of the instances of their application would be as impossible as the attempt would be futile.** Upon such sense, and experience, therefore, the law properly relies. This has many analogies and direct examples in the cases, and we may cite Gundling v. Chicago, 177 U.S. 183, 44 L. Ed. 725, 20 S. Ct. 633; Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U.S. 380, 56 L. Ed. 240, 32 S. Ct. 152; Monongahela Bridge Co. v. United States, 216 U.S. 177, 54 L. Ed. 435, 30 S. Ct. 356; Buttfield v. Stranahan, 192 U.S. 470, 48 L. Ed. 525, 24 S. Ct. 349. See, also, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 53 L. Ed. 417, 29 S. Ct. 220. If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible."

From our review of the decisions of all courts in cases involving statutes alleged to **[*165]** be too indefinite and uncertain to be valid, we have reached the conclusion that there is irreconcilable conflict of opinion and grave doubt and uncertainty **[***38]** as to the application of the doctrine. To us it seems that the exigencies of the particular case, in the

final analysis, has been the controlling factor in such decisions. One thing of which we are certain, however, is that the reason which brought about the original application of the rule with reference to definiteness and certainty in criminal statutes does not exist in the present case. Here, the liberty or freedom of the person of no one is involved. This case does not invoke a consideration by us of the doctrine of uncertainty as it would be applied to penal statutes as did the Champlin Case, supra, in view of the fact that plaintiff is not being proceeded against under the penal provisions of the 1933 Act. This case merely involves the use of certain alleged property rights of the plaintiff, and in the Well-Spacing Act we believe that the Legislature has gone as far toward fixing a **[**95]** standard for the regulation of these rights as could be done, considering the nature of the things sought to be regulated and the number and variability of conditions and circumstances which have a bearing upon attaining the expressed objects of the act. It would be impossible **[***39]** for the Legislature to formulate a standard which would justly and equitably measure the application of the principles of well-spacing to every common source of supply, because of the wide variety of factors to be considered, as hereinbefore noted.

Another ground upon which the plaintiff urges that the act violates the due process clauses of our state and federal Constitutions is that no provision is made therein for judicial review of the orders of the commission. The provisions of said law which provide for appeal from the orders of the commission with reference to well-spacing are section 3, chapter 59, art. 1, S. L. 1935, and sections 28, 29, and 30 of chapter 131, S. L. 1933. It is argued that the review provided for in these sections is legislative rather than judicial, and that therefore no judicial review is provided. However, this question, like that of the validity of the penal sections of chapter 131, supra, is not properly before the court at this time. A principle of long standing in constitutional law is that "a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in **[***40]** defeating it." See Cooley, Constitutional Limitations (6th Ed.) 196; 11 American Jurisprudence, 748; 12 C. J 780; Sarlls v. State ex rel. Trimble (Ind.) 166 N.E. 270, 67 A. L. R. 718, 727; State of Minnesota ex rel. Clinton Falls Nursery Co. v. Steele County Board of County Comm'rs (Minn.) 232 N.W. 737, 71 A. L. R. 1190; People of State of California v. Irwin L. Perry (Cal.) 298 P. 19, 76 A. L. R. 1331, 1336. This principle is applicable to objections to separable portions of an act as well as those to the entire act. See Stine v. Lewis, 33 Okla. 609, 127 P. 396, in which this rule was observed. Constitutional questions are not dealt with abstractly. Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103. In Aikins v. Kingsbury, 247 U.S. 484, 38 S. Ct. 558, 62 L. Ed. 1226, the Supreme Court of the United States said:

"He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right."

There it was held:

"A purchaser of public land who offers no excuse for his confessed default **[***41]** is not in a position to challenge the validity of a forfeiture statute on the ground that the omission to provide for a judicial review of the default renders the statute invalid as taking his property without due process of law, since such omission does not injure him, and if supplied would not benefit him."

A consideration by us of the nature of the review provided by the statute in question upon the appeal of orders of the Corporation Commission would have no bearing on the rights of the plaintiff in this action, for no appeal has been taken from the order complained of. Since no attempt has been made to secure an appellate review of said order, it is of no consequence, with reference to the subject matter of this action, whether such review, if invoked, would have been legislative or judicial in its nature. Finding this question purely an abstract one in this case, we decline to consider it here.

As we have found the so-called "Well-Spacing Act," or chapter 131, Session Laws of Oklahoma 1933, as amended by chapter 59, art. 1, Session Laws of Oklahoma 1935, valid in all of the respects that its validity is properly questioned in this case, it is our opinion that the judgment of **[***42]** the trial court should be affirmed, but that the amount thereof should be increased to $ 872 in conformity with the confession of error filed in this court by the defendants; and it is hereby so ordered.

OSBORN, C. J., BAYLESS, V. C. J., and **[*166]** RILEY, WELCH, PHELPS, CORN, and HURST, JJ., concur. GIBSON, J., concurs in conclusion.

STATE OF NEW MEXICO
DEPARTMENT OF ENERGY AND MINERALS
OIL CONSERVATION DIVISION

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OIL CONSERVATION DIVISION

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

IN THE MATTER OF THE APPLICATION OF CAULKINS OIL COMPANY, FOR COMPULSORY POOLING, RIO ARRIBA COUNTY, NEW MEXICO.

Case No. 8640
Order No._____

PROPOSED ORDER OF THE DIVISION

BY THE DIVISION:

This matter came on for hearing at 8:00 a.m. on July 2, 1985 at Santa Fe, New Mexico before, Examiner Gilbert Quintana.

NOW, on this _____ day of July, 1985, the Division Director, having considered the testimony, the record, the recomendations of the Examiner, and being fully advised in the premises,

FINDS:

1. That due public notice having been given as required by law the Division has jurisdiction of this cause and the subject matter thereof.

2. That the Applicant, Caulkins Oil Company, seeks an order pooling all mineral interests in the Dakota, Blanco Mesa Verde, Pictured Cliffs and Chacra formations underlying the N/2 of Section 20, T26N, R6W, approval of dual completion of the Kaime #1 R, and downhole commingling of the Blanco Mesa Verde and Dakota formations, and the Pictured Cliffs and Chacra formations.

3. That the N/2 of Section 20, T26N, R6W is a standard 320 acre spacing unit for the Blanco Mesa Verde and Dakota formations and the NE/4 of Section 20, T26N, R6W, is a standard 160 acre spacing unit for the Pictured Cliffs and Chacra formations.

4. That there is an interest owner in the proposed proration unit, El Paso Natural Gas Company/Meridian Oil, Inc., who has not agreed to pool its interest.

5. That to avoid the drilling of unnecessary wells, to prevent waste and to protect correlative rights and to 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 gas in any pool thereunder, the subject application should be approved by pooling all mineral interests, whatever they may be, within said unit in the Dakota, Blanco Mesa Verde, Pictured Cliffs and Chacra formations.

6. That the Applicant, Caulkins Oil Company should be designated the operator of the subject well and unit.

7. That the uncontroverted evidence established that 120/320 of the acreage in the proposed spacing unit is under lease to Meridian Oil, Inc. and/or El Paso Natural Gas Company, and that El Paso Natural Gas Company, predecessor in interest to Meridian Oil, Inc. created overriding royalty burdens on that 120/320 of $3.96 and $3.73 per mcf.

8. That those overriding royalty burdens are in excess of a reasonable overriding royalty.

9. That the uncontroverted evidence established that for each $858.37 of income attributable to Meridian's interest in the well per day, Meridian Oil must pay out $1,508.76 per day, leaving Meridian with a negative daily working interest of $650.39.

10. That if Meridian Oil proved to be a non-consenting participant in the proposed well, payout

for its interest would never occur.

11. That it would not be just and reasonable to require owners of participating interests in the proposed spacing unit to bear the cost and risk associated with a one-half interest in the well which would never pay out.

12. That compulsory pooling of the proposed proration unit under such conditions would not be just or reasonable.

13. That to compulsorily pool the entire N/2 of said Section 20 in the Blanco Mesa Verde and Dakota formations would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said overriding royalty.

14. That in order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the N/2 NW/4 and the SW/4 NW/4 to a reasonable figure, within a reasonable time, or for the pooling of the N/2 of said Section 20 exclusive of the N/2 NW/4 and the SW/4 NW/4 for the Blanco Mesa Verde and Dakota formations.

15. That, subject to conditions contained in Finding No. 14 above, to avoid the drilling of unnecessary wells, to protect correlative rights, and to afford to the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the gas in the Blanco Mesa Verde and Dakota formations lying under the proposed spacing unit, the subject application should be approved by pooling all mineral interests, whatever they may be, within said unit.

16. That Applicant should be permitted to recover from the non-consenting working interest owner its proportionate share of the costs of drilling and completing the Kaime 1-R.

17. That any non-consenting working interest owner should be afforded the opportunity to pay his share of estimated and actual well costs to the operator in lieu of paying his share of reasonable well costs out of production.

18. That any non-consenting working interest owner who does not pay his share of estimated well costs should have withheld from production his share of the reasonable well costs plus an additional 200% thereof as a reasonable charge for the risk involved in drilling and completing the subject well.

19. That substantial evidence supports a 200% risk factor, including, but limited to the fact that the cumulative production map introduced as Exhibit 3 shows that the proposed location is outside or on the edge of established production for the four formations, there are mechanical risks involved in the completion of the well in four zones and there are substantial risks of obtaining commercial production in any formation.

20. That any non-consenting working interest owner should be afforded the opportunity to object to the actual well costs, but that actual well costs should be adopted as the reasonable well costs in the absence of such objection.

21. That 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 estimated well costs reasonably paid exceed reasonable well costs.

22. That $3,000.00 per month should be fixed as a reasonable charge for supervision (combined fixed rates) while drilling and completing the Kaime #1 R and that $400.00 per month should be fixed as a reasonable charge for supervision while producing; that this charge should be adjusted annually based upon the percentage increase or decrease in the average weekly earnings.

23. That 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.

24. That upon failure of the operator of said pooled unit to commence drilling of the well to which said unit is dedicated on or before the expiration of 120 days from the effective date of this order, the order pooling said unit should become null and void and of no effect whatsoever, unless, for good cause, the Division Director shall extend said time limit.

25. That approval of the subject application will afford the Applicant the opportunity to produce its just and equitable share of the gas in the affected pool, will prevent economic loss caused by the drilling of unnecessary wells, avoid the augmentation of risk arising from the drilling of an excessive number of wells, and will otherwise prevent waste and protect correlative rights.

26. That in the event commercial production is achieved in the Dakota, Blanco Mesa Verde, Pictured Cliffs and Chacra formations dually producing and commingling production from the Kaime #1-R from the Dakota and Blanco Mesa Verde formations and the Pictured Cliffs and Chacra formations constitutes reasonable, prudent and economical operation of the well.

IT IS THEREFORE ORDERED:

1. That all mineral interests whatever they may be in the Blanco Mesa Verde and Dakota formations underlying the N/2 of Section 20, T26N, R6W, are hereby pooled to form a standard 320-acre spacing unit in the Blanco Mesa Verde and Dakota formations dedicated to the Kaime #1-R Well and that all mineral interests whatever they may be in the Pictured Cliffs and Chacra formations underlying the NE/4 of Section 20, T26N, R6W are hereby pooled to form a standard 160 acre spacing unit in the Pictured Cliffs and Chacra formations dedicated to the

Kaime #1-R Well.

PROVIDED HOWEVER that the operator of said unit shall commence drilling on or before the expiration of 120 days after the effective date of this order, and shall thereafter continue the completion of said well with due diligence.

PROVIDED FURTHER, that in the event said operator does not commence the drilling of said well on or before the expiration of 120 days after the effective date of this order; Order (1) 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 said well not be completed, within 120 days after commencement thereof, said operator shall appear before the Division Director and show cause why Order (1) of this order should not be rescinded.

(2) That Caulkins Oil Company is hereby designated the operator of the subject well and unit.

(3) That within 30 days from the date the schedule of estimated well costs is furnished to Meridian Oil, Inc., it shall make an election to voluntarily reduce overriding royalty not in excess of a total 12.5 percent for its 120 acre lease, and in the event it does not make that election, the N/2 NW/4 and the SW/4 NW/4 of said Section 20 shall be excluded from the proration and spacing unit and the Division shall automatically approve the unit as a non-standard proration and spacing unit consisting of all of the N/2 of Section 20 except the N/2 NW/4 and the SW/4 NW/4.

(4) That the operator shall notify the Division of the decision of Meridian Oil, Inc., requesting approval of the non-standard proration unit if said party choses to not amend its overriding royalty interest.

(5) That 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.

(6) That within 30 days from the date the schedule of estimated well costs is furnished to them, 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 that 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.

(7) That 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; that 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, that 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.

(8) That 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.

(9) That the operator is hereby authorized to withhold the following costs and charges from production.

(a) The pro rata share of reasonable well costs as set forth in Paragraphs 9 and 10 above, 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 them.

(b) As a charge for the risk involved in the drilling of the well, 200% 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 them.

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

(11) That $3,000.00 per month is hereby fixed as a reasonable charge for supervision (combined fixed rates) while drilling, and that $400.00 per month is hereby fixed as a reasonable charge for supervision while producing; that this charge should be adjusted annually based upon the percentage increase or decrease in the average weekly earnings; that the charges are in addition to those previously approved for the Dakota, Blanco Mesa Verde, Pictured Cliffs and Chacra formations.

(12) That any unsevered mineral interest shall be considered a seven-eights (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.

(13) That 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.

(14) That all proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Rio Arriba County, New Mexico, to be paid to the true owner thereof upon demand and proof of ownerhsip; that 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.

(15) That the Applicant, Caulkins Oil Company is hereby authorized to dually complete the Kaime #1-R located 911 feet from the North line and 1,158 feet from the East line, Section 20, T26N, R6W.

(16) That the Applicant, Caulkins Oil Company is hereby authorized to downhole commingle production from the Blanco Mesa Verde and Dakota, and the Pictured Cliffs and Chacra formations.

(17) That 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

RICHARD L. STAMETS
DIRECTOR

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 7922
Order No. R-7335

APPLICATION OF RIO PECOS CORPORATION INC. FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 9 a.m. on July 20, 1983, at Santa Fe, New Mexico, before Examiner Richard L. Stamets.

NOW, on this 22nd day of August, 1983, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner, and being fully advised in the premises,

FINDS:

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

(2) That the applicant, Rio Pecos Corporation, Inc., seeks an order pooling all mineral interests in the Wolfcamp and Pennsylvanian formations underlying the N/2 of Section 2, Township 18 South, Range 28 East, NMPM, Eddy County, New Mexico.

(3) That the applicant has the right to drill and proposes to drill a well at a standard location thereon.

(4) That there are interest owners in the proposed proration unit who have not agreed to pool their interests.

(5) That the evidence establishes that after receiving notice of the subject compulsory pooling application, Ralph Nix and Loneta Curtis created a 50 percent overriding royalties burden on their interest to Ralph Nix, Jr. and Sarah Garretson, their son and daughter, respectively, in the NE/4 NW/4 of said Section 2.

(6) That the evidence presented established that all other working interest owners in the N/2 of said Section 2 had voluntarily agreed to a 6.25 percent overriding royalty interest.

(7) That the evidence established that a reasonable overriding royalty interest in this proration and spacing unit would be not in excess of 12.5 percent.

(8) That for each $800.00 of income attributable to a well which might be drilled and completed on the N/2 of said Section 2 under terms of this order, the operator would receive, exclusive of expenses and taxes, $37.50 attributable to the NE/4 NW/4.

(9) That as to any comparable 40-acre tract comprising the N/2 of said Section 2, the operator would receive $81.25.

(10) That if the owners in the NE/4 NW/4 of said Section 2 proved to be non-consenting participants in the proposed well, the payout period for their interest in well costs would be 76 percent longer than for comparable interests in other tracts in the N/2 of said section.

(11) That it would not be just and reasonable to require the owners of participating interests in the proposed proration and spacing unit to bear extra costs and risks associated with well cost payout requiring 76 percent more time than others in the unit.

(12) That the smaller share of operating income attributable to the NE/4 NW/4 of said Section 2 could result in operating expenses exceeding operating income as to said tract while the rest of the unit was being operated profitably.

(13) That compulsorily pooling the proposed proration unit under such conditions would not be just or reasonable.

(14) That to compulsorily pool the entire N/2 of said Section 2 would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said 50 percent overriding royalty.

(15) That in order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the NE/4 NW/4 to a reasonable figure,

within a reasonable time, or for the pooling of the N/2 of said Section 2 exclusive of the NE/4 NW/4.

(16) That, subject to conditions contained in Finding No. (15) above, to avoid the drilling of unnecessary wells, to protect correlative rights, and to afford to the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the gas in any Wolfcamp or Pennsylvanian Pool lying under the proposed proration unit, the subject application should be approved by pooling all mineral interests, whatever they may be, within said unit.

(17) That as requested by the applicant, Costa Resources, Inc., should be designated the operator of the subject well and unit.

(18) That 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.

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

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

(21) That 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.

(22) That $4,000.00 per month while drilling and $400.00 per month while producing should be fixed as reasonable charges for supervision (combined fixed rates); that 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.

(23) That 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.

(24) That 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 December 1, 1983, the order pooling said unit should become null and void and of no effect whatsoever.

IT IS THEREFORE ORDERED:

(1) That all mineral interests, whatever they may be, in the Wolfcamp and Pennsylvanian formations underlying the N/2 of Section 2, Township 18 South, Range 28 East, NMPM, Eddy County, New Mexico, are hereby pooled to form a standard 320-acre gas spacing and proration unit to be dedicated to a well to be drilled at a standard location thereon.

PROVIDED HOWEVER, that the operator of said unit shall commence the drilling of said well on or before the 1st day of December, 1983, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Wolfcamp and Pennsylvanian formations;

PROVIDED FURTHER, that in the event said operator does not commence the drilling of said well on or before the 1st day of December, 1983, Order (1) 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 Order (1) of this order should not be rescinded.

(2) That Costa Resources Inc. is hereby designated the operator of the subject well and unit.

(3) That after the effective date of this order and within 90 days prior to commencing said well, the operator shall furnish to the Division; Ralph Nix, Loneta Curtis, Ralph Nix, Jr., and Sarah Garretson, and any other known working interest owner an itemized schedule of estimated well costs.

(4) That within 30 days from the date the schedule of estimated well costs is furnished to Ralph Nix, Jr. and Sarah Garretson, each shall make an election to voluntarily reduce their share of the 50 percent overriding royalty to an overriding royalty not in excess of a total 12.5 percent for their 40 acre lease and that in the event they do not make that election, the NE/4 NW/4 of said Section 2 shall be excluded from the proration and spacing unit and the Division shall automatically approve the unit as a non-standard proration and spacing unit consisting of all of the N/2 of Section 2 except the NE/4 NW/4.

(5) That the operator shall notify the Division of the decision of Ralph Nix, Jr. and Sarah Garretson requesting approval of the non-standard proration unit if said parties chose to not amend their overriding royalty interest.

(6) That within 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting working interest owner participating in the well under terms of this order 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 that 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.

(7) That 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; that 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, that 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.

(8) That 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.

(9) That 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.

(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.

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

(11) That $4,000.00 per month while drilling and $400.00 per month while producing are hereby fixed as reasonable charges for supervision (combined fixed rates); that 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.

(12) That any unsevered 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.

(13) That 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.

(14) That all proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Eddy County, New Mexico, to be paid to the true owner thereof upon demand and proof of ownership; that 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.

(15) That 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

JOE D. RAMEY,
Director

S E A L

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8640
Order No. R-7998

APPLICATION OF CAULKINS OIL COMPANY FOR COMPULSORY POOLING, RIO ARRIBA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8 a.m. on July 2, 1985, at Santa Fe, New Mexico, before Examiner Gilbert P. Quintana.

NOW, on this 8th day of August, 1985, 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, Caulkins Oil Company, seeks an order pooling all mineral interests in the Basin-Dakota and Blanco-Mesaverde Pools underlying the N/2 of Section 20, Township 26 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, to form a standard 320-acre gas spacing and proration unit in both pools, and an order pooling all mineral interests in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20, to form a standard 160-acre gas spacing and proration unit in both formations, to be dedicated to a well to be drilled at a standard location thereon.

(3) The applicant further seeks approval to downhole commingle Blanco-Mesaverde and Basin-Dakota production, to downhole commingle Pictured Cliffs and Chacra production, and finally to dually complete through parallel strings of tubing both commingled production streams in the subject well.

(4) The applicant has the right to drill and proposes to drill a well at a standard location in the NE/4 of Section 20.

(5) There is an interest owner in the proposed proration unit, El Paso Natural Gas Company/Meridian Oil, Inc., who has not agreed to pool its interest.

(6) The N/2 of said Section 20 is a standard 320-acre spacing and proration unit for the Blanco-Mesaverde and Basin-Dakota Pools and the NE/4 of the same section is a standard 160-acre spacing and proration unit for the Pictured Cliffs and Chacra formations.

(7) Evidence was presented establishing that 120 acres of the proposed 320-acre spacing unit, being the N/2 NW/4 and SW/4 NW/4 of said Section 20, is under lease to Meridian Oil, Inc. and/or El Paso Natural Gas Company, and that El Paso Natural Gas Company, predecessor in interest to Meridian Oil, Inc., hereafter referred to as "Meridian", created overriding royalty burdens on said 120 acres of $3.96 and $3.73 per mcf of gas.

(8) Evidence was also presented that for each $858.37 of income per day attributable to Meridian's interest in said well, Meridian must pay out $1,508.76 per day, leaving Meridian with a negative daily working interest of $650.39.

(9) If Meridian proved to be a non-consenting participant in the proposed well, payout for its interest would never occur.

(10) Participating working interest owners in the proposed spacing unit will be required to bear the cost and risk of drilling the well in which one-half interest of the well will never pay out.

(11) Said overriding royalty burden placed on Meridian's acreage is in excess of reasonable overriding royalties based on current economic and marketing conditions.

(12) Compulsory pooling of the proposed proration unit under such conditions would not be just or reasonable.

(13) To compulsorily pool the entire N/2 of said Section 20 in the Blanco-Mesaverde and Dakota formations would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said overriding royalty.

(14) In order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the N/2 NW/4 and the SW/4 NW/4 of said Section 20 to a reasonable figure, within a reasonable time, or for the pooling of the N/2 of said Section 20 exclusive of the N/2 NW/4 and the SW/4 NW/4.

(15) Subject to the conditions contained in Finding No. (14) above, to avoid the drilling of unnecessary wells, to prevent waste and to protect correlative rights and to 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 gas in any pool thereunder, the subject application should be approved by pooling all mineral interests, whatever they may be, within said units in the Basin-Dakota and Blanco-Mesaverde Pools and the Pictured Cliffs and Chacra formations.

(16) The applicant, Caulkins Oil Company, should be designated the operator of the subject well and unit.

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

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

(19) Any non-consenting working 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.

(20) 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 estimated well costs reasonably paid exceed reasonable well costs.

(21) A cost of $3,000.00 per month while drilling and $400.00 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.

(22) 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.

(23) Upon failure of the operator of said pooled units to commence drilling of the well to which said units are dedicated on or before November 1, 1985, the order pooling said unit should become null and void and of no effect whatsoever.

(24) The applicant's request to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, and the Pictured Cliffs and Chacra formations, and to dually complete the respective commingled streams with parallel strings of tubing will not result in reservoir damage, waste, or the violation of any correlative rights.

(25) The applicant's request to complete the subject well as described in Finding No. (24) above should be granted provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(26) The applicant should consult with the supervisor of the Division's Aztec District Office to formulate a reasonable allocation of production from each respective producing zone and an assignment of an allowable to the well.

(27) The results of the allocation determination should be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(28) Approval of the subject application will afford the applicant the opportunity to produce its just and equitable share of the gas in the affected pool, will prevent economic loss caused by the drilling of unnecessary wells, avoid the augmentation of risk arising from the drilling of an excessive number of wells, and will otherwise prevent waste and protect correlative rights.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, in the Blanco-Mesaverde and Basin-Dakota Pools underlying the N/2 of Section 20, Township 20 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, are hereby pooled to form a standard 320-acre spacing and proration unit and all mineral interests, whatever they may be, in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20 are hereby pooled to form a standard 160-acre spacing and proration unit to be dedicated to a well to be drilled at a standard location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence drilling of said well on or before November 1, 1985, and shall thereafter continue the completion of said well with due diligence.

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before November 1, 1985, Order (1) of this order shall be null and void and of no effect whatsoever.

PROVIDED FURTHER THAT, should said well not be completed within 120 days after commencement thereof, said operator shall appear before the Division Director and show cause why Order (1) of this order should not be rescinded.

(2) Caulkins Oil Company is hereby designated the operator of the subject well and unit.

(3) Within 30 days from the date the schedule of estimated well costs is furnished to Meridian Oil, Inc., it shall make an election to voluntarily reduce overriding royalty not in excess of a total 12.5 percent for its 120-acre lease, and in the event it does not make that election, the N/2 NW/4 and the SW/4 NW/4 of said Section 20 shall be excluded from the proration and spacing unit and the Division shall upon written request automatically

approve the unit as a non-standard proration and spacing unit consisting of that portion of the N/2 of said Section 20 excluding the N/2 NW/4 and the SW/4 NW/4.

(4) The operator shall notify the Division of the decision of Meridian Oil, Inc., requesting approval of the non-standard proration unit if said party chooses not to or is unable to amend its overriding royalty interest.

(5) 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 units an itemized schedule of estimated well costs.

(6) 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.

(7) 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, that 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.

(8) 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.

(9) 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.

(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.

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

(11) $3,000.00 per month while drilling and $400.00 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.

(12) Any unsevered 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.

(13) 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.

(14) All proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Rio Arriba 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.

(15) The applicant, Caulkins Oil Company, is hereby authorized to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, downhole commingle the Pictured Cliffs and Chacra formations, and dually complete the respective commingled streams with parallel strings of tubing provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(16) The applicant shall consult the supervisor of said district office to formulate a reasonable allocation of production from each respective producing zone and an assignment of allowable to the well.

(17) The determined production allocation factors for each producing zone shall be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(18) 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

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8640 DE NOVO
Order No. R-7998-A

APPLICATION OF CAULKINS OIL COMPANY
FOR COMPULSORY POOLING, DOWNHOLE
COMMINGLING, AND DUAL COMPLETION,
RIO ARRIBA COUNTY, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 8:15 a.m. on August 7, 1986, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 21st day of August, 1986, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

On August 7, 1986, an unopposed request for dismissal of this case de novo was received and such request should be granted.

IT IS THEREFORE ORDERED THAT:

Case 8640 de novo is hereby dismissed and Order No. R-7998 is hereby continued 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

JIM BACA, Member

ED KELLEY, Member

R. L. STAMETS, Chairman and
Secretary

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8640
Order No. R-7998

APPLICATION OF CAULKINS OIL COMPANY FOR COMPULSORY POOLING, RIO ARRIBA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8 a.m. on July 2, 1985, at Santa Fe, New Mexico, before Examiner Gilbert P. Quintana.

NOW, on this 8th day of August, 1985, 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, Caulkins Oil Company, seeks an order pooling all mineral interests in the Basin-Dakota and Blanco-Mesaverde Pools underlying the N/2 of Section 20, Township 26 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, to form a standard 320-acre gas spacing and proration unit in both pools, and an order pooling all mineral interests in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20, to form a standard 160-acre gas spacing and proration unit in both formations, to be dedicated to a well to be drilled at a standard location thereon.

(3) The applicant further seeks approval to downhole commingle Blanco-Mesaverde and Basin-Dakota production, to downhole commingle Pictured Cliffs and Chacra production, and finally to dually complete through parallel strings of tubing both commingled production streams in the subject well.

(4) The applicant has the right to drill and proposes to drill a well at a standard location in the NE/4 of Section 20.

(5) There is an interest owner in the proposed proration unit, El Paso Natural Gas Company/Meridian Oil, Inc., who has not agreed to pool its interest.

(6) The N/2 of said Section 20 is a standard 320-acre spacing and proration unit for the Blanco-Mesaverde and Basin-Dakota Pools and the NE/4 of the same section is a standard 160-acre spacing and proration unit for the Pictured Cliffs and Chacra formations.

(7) Evidence was presented establishing that 120 acres of the proposed 320-acre spacing unit, being the N/2 NW/4 and SW/4 NW/4 of said Section 20, is under lease to Meridian Oil, Inc. and/or El Paso Natural Gas Company, and that El Paso Natural Gas Company, predecessor in interest to Meridian Oil, Inc., hereafter referred to as "Meridian", created overriding royalty burdens on said 120 acres of $3.96 and $3.73 per mcf of gas.

(8) Evidence was also presented that for each $858.37 of income per day attributable to Meridian's interest in said well, Meridian must pay out $1,508.76 per day, leaving Meridian with a negative daily working interest of $650.39.

(9) If Meridian proved to be a non-consenting participant in the proposed well, payout for its interest would never occur.

(10) Participating working interest owners in the proposed spacing unit will be required to bear the cost and risk of drilling the well in which one-half interest of the well will never pay out.

(11) Said overriding royalty burden placed on Meridian's acreage is in excess of reasonable overriding royalties based on current economic and marketing conditions.

(12) Compulsory pooling of the proposed proration unit under such conditions would not be just or reasonable.

(13) To compulsorily pool the entire N/2 of said Section 20 in the Blanco-Mesaverde and Dakota formations would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said overriding royalty.

(14) In order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the N/2 NW/4 and the SW/4 NW/4 of said Section 20 to a reasonable figure, within a reasonable time, or for the pooling of the N/2 of said Section 20 exclusive of the N/2 NW/4 and the SW/4 NW/4.

(15) Subject to the conditions contained in Finding No. (14) above, to avoid the drilling of unnecessary wells, to prevent waste and to protect correlative rights and to 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 gas in any pool thereunder, the subject application should be approved by pooling all mineral interests, whatever they may be, within said units in the Basin-Dakota and Blanco-Mesaverde Pools and the Pictured Cliffs and Chacra formations.

(16) The applicant, Caulkins Oil Company, should be designated the operator of the subject well and unit.

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

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

(19) Any non-consenting working 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.

(20) 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 estimated well costs reasonably paid exceed reasonable well costs.

(21) A cost of $3,000.00 per month while drilling and $400.00 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.

(22) 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.

(23) Upon failure of the operator of said pooled units to commence drilling of the well to which said units are dedicated on or before November 1, 1985, the order pooling said unit should become null and void and of no effect whatsoever.

(24) The applicant's request to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, and the Pictured Cliffs and Chacra formations, and to dually complete the respective commingled streams with parallel strings of tubing will not result in reservoir damage, waste, or the violation of any correlative rights.

(25) The applicant's request to complete the subject well as described in Finding No. (24) above should be granted provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(26) The applicant should consult with the supervisor of the Division's Aztec District Office to formulate a reasonable allocation of production from each respective producing zone and an assignment of an allowable to the well.

(27) The results of the allocation determination should be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(28) Approval of the subject application will afford the applicant the opportunity to produce its just and equitable share of the gas in the affected pool, will prevent economic loss caused by the drilling of unnecessary wells, avoid the augmentation of risk arising from the drilling of an excessive number of wells, and will otherwise prevent waste and protect correlative rights.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, in the Blanco-Mesaverde and Basin-Dakota Pools underlying the N/2 of Section 20, Township 20 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, are hereby pooled to form a standard 320-acre spacing and proration unit and all mineral interests, whatever they may be, in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20 are hereby pooled to form a standard 160-acre spacing and proration unit to be dedicated to a well to be drilled at a standard location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence drilling of said well on or before November 1, 1985, and shall thereafter continue the completion of said well with due diligence.

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before November 1, 1985, Order (1) of this order shall be null and void and of no effect whatsoever.

PROVIDED FURTHER THAT, should said well not be completed within 120 days after commencement thereof, said operator shall appear before the Division Director and show cause why Order (1) of this order should not be rescinded.

(2) Caulkins Oil Company is hereby designated the operator of the subject well and unit.

(3) Within 30 days from the date the schedule of estimated well costs is furnished to Meridian Oil, Inc., it shall make an election to voluntarily reduce overriding royalty not in excess of a total 12.5 percent for its 120-acre lease, and in the event it does not make that election, the N/2 NW/4 and the SW/4 NW/4 of said Section 20 shall be excluded from the proration and spacing unit and the Division shall upon written request automatically

approve the unit as a non-standard proration and spacing unit consisting of that portion of the N/2 of said Section 20 excluding the N/2 NW/4 and the SW/4 NW/4.

(4) The operator shall notify the Division of the decision of Meridian Oil, Inc., requesting approval of the non-standard proration unit if said party chooses not to or is unable to amend its overriding royalty interest.

(5) 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 units an itemized schedule of estimated well costs.

(6) 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.

(7) 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, that 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.

(8) 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.

(9) 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.

(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.

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

(11) $3,000.00 per month while drilling and $400.00 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.

(12) Any unsevered 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.

(13) 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.

(14) All proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Rio Arriba 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.

(15) The applicant, Caulkins Oil Company, is hereby authorized to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, downhole commingle the Pictured Cliffs and Chacra formations, and dually complete the respective commingled streams with parallel strings of tubing provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(16) The applicant shall consult the supervisor of said district office to formulate a reasonable allocation of production from each respective producing zone and an assignment of allowable to the well.

(17) The determined production allocation factors for each producing zone shall be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(18) 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

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8859
Order No. R-8047-A

APPLICATION OF ROBERT E. CHANDLER
CORPORATION FOR AN AMENDMENT TO
DIVISION ORDER NO. R-8047, LEA
COUNTY, NEW MEXICO

See Also Order
No. R-8047
R-8047-B
R-8047-C

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on March 19, 1986, at Santa Fe, New Mexico, before Examiner David R. Catanach.

NOW, on this 9th day of May, 1986, 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, Robert E. Chandler Corporation, seeks amendment of Order No. R-8047 entered October 3, 1985 which pooled the NE/4 SW/4 of Section 7, Township 23 South, Range 38 East, NMPM, Lea County, New Mexico, to extend the effective date thereof including the commencement date of the well to be drilled, and to clarify the treatment of various interests subject to the forced pooling for purposes of allocation of costs and application of the penalty provisions.

(3) Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation and Ronnie H. Westbrook appeared in opposition to the application.

(4) Testimony at the hearing on this matter indicates that at some time after granting of the leases covering the properties involved in this case, the leases were conveyed and certain production payments retained by the conveyor. In turn,

interests in the production payments have been reconveyed for valuable consideration.

(5) The interest that is the subject of the instant proceeding was created by a document dated April 1, 1966 and titled "Conveyance of PARAMOUNT PRODUCTION PAYMENT and RESERVATION of RESERVED PRODUCTION PAYMENT and CONVEYANCE of NET PROFITS OVERRIDING ROYALTY," between the Prudential Insurance Company of America and Joseph E. Seagram and Sons, Inc.

(6) The applicant alleges that the "Net Profits Overriding Royalty" referred to in the above document is properly denominated as a Net Profits Interest and that the drilling of the well authorized by Order No. R-8047 is not economical if the interest is construed as an overriding royalty, insofar as the applicant would be required to absorb all of the costs of drilling and operating the well.

(7) The parties that appeared in opposition to the application in this matter have succeeded to an interest in the subject property and assert that the interest is properly delineated as an overriding royalty, which requires that they be paid their share of production free of all costs. Moreover, they challenge the jurisdiction of the Division to hear this matter.

(8) Testimony and evidence indicate that the interest in question is ambiguous insofar as it is referred to as a "net profits overriding royalty", but that the terms and conditions of the Agreement of April 1, 1966, including provisions stating that the interest is "exclusively an interest in net profits", demonstrate that the interest is not an overriding royalty as it is commonly known in the industry.

(9) Testimony and evidence presented at the hearing indicate that because of the controversy involving the question of the nature of the interest conveyed by the agreement of April 1, 1966, and the uneconomical nature of the proposed well if the interest is an overriding royalty, an extension of time in which to begin drilling a well pursuant to Order No. R-8047 is needed.

IT IS THEREFORE ORDERED THAT:

(1) Ordering Paragraph No. (1) of Division Order No. R-8047 is hereby amended to read as follows:

"(1) All mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation

underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 31st day of August, 1986, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Granite Wash formation;

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 31st day of August, 1986, Ordering Paragraph No. (1) 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 Ordering Paragraph No. (1) of this order should not be rescinded."

(2) The interest created by the Agreement of April 1, 1966, and referred to therein as a "Net Profits Overriding Royalty" is to be treated as a Net Profits interest under the terms of the compulsory pooling order entered by the Division on October 3, 1985, and should bear its appropriate share of the costs of drilling and operation.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

R. L. STAMETS,
Director

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ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

See also Orders Nos.
R-8047
R-8047-A
R-8047-C

IN THE MATTER OF THE APPLICATION OF ROBERT E. CHANDLER CORPORATION FOR AN AMENDMENT TO DIVISION ORDER NO. R-8047, LEA COUNTY, NEW MEXICO.

CASE NO. 8859
Order No. R-8047-B

ORDER OF THE DIVISION
STAYING ORDER NO. R-8047 AND ORDER NO. R-8047-A

BY THE DIVISION:

This matter having come before the Division upon the request of Protestants Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation, and Ronnie H. Westbrook (hereinafter "Protestants") for a Stay of Division Order No. R-8047 and Order No. R-8047-A and the Division Director having considered the request and being fully advised in the premises,

NOW, on this 13th day of June, 1986, the Division Director:

FINDS THAT:

(1) Division Order No. R-8047-A was entered on May 9, 1986 upon the application of Robert E. Chandler Corporation for an amendment to Order No. R-8047, Lea County, New Mexico.

(2) On June 2, 1986, Protestants filed with the Division a request for a de novo hearing in this case which is now set for hearing by the Commission on August 7, 1986.

(3) Protestants have complied with the provision of Division Memorandum 3-85 and have filed their request for a stay on June 2, 1986.

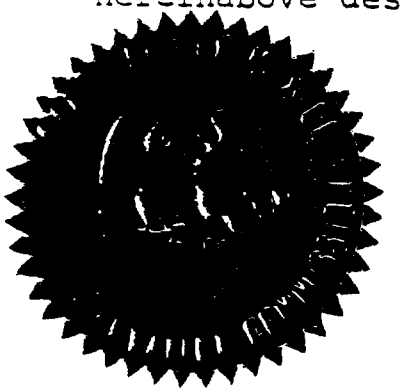
IT IS THEREFORE ORDERED THAT:

(1) Division Order No. R-8047 and Order No. R-8047-A are hereby stayed in their entirety.

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

Case No. 8859
Order No. R-8047-B

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



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STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8859 DE NOVO
Order No. R-8047-C

APPLICATION OF ROBERT E. CHANDLER CORPORATION FOR AN AMENDMENT TO DIVISION ORDER NO. R-8047, LEA COUNTY, NEW MEXICO.

See Also Order Nos.
R-8047
R-8047-A
R-8047-B

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 a.m. on August 7, 1986, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 22nd day of August, 1986, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

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

(2) By Order No. R-8047, entered on October 3, 1985, all mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, were pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

(3) Robert E. Chandler was designated the operator of said well and unit.

(4) Said order further provided in decretory paragraph (7) that:

"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.

(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."

(5) On March 10, 1986, Robert E. Chandler made application seeking amendment of said Order No. R-8047 to extend the effective date thereof including the commencement date of the well to be drilled, and to clarify the treatment of various interests subject to the forced pooling for purposes of allocation of costs and application of the penalty provisions.

(6) The matter came on for hearing at 8:15 a.m. on March 19, 1986, at Santa Fe, New Mexico, before Oil Conservation Division Examiner David R. Catanach and, pursuant to his hearing, Order No. R-8047-A was issued on May 9, 1986.

(7) On June 2, 1986, application for Hearing De Novo was made by Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation, and Ronnie Westbrook and Order No. R-8047-A was stayed by Order No. R-8047-B.

(8) The matter came on for hearing de novo before the Commission on August 7, 1986.

(9) The Findings in Order No. R-8047-A should be incorporated by reference into this order.

(10) De Novo applicants, Klein et al, are owners of a net profits interest in the pooled unit as referred to in Finding No. (5) in said Order No. R-8047-A.

(11) De Novo applicants contend that the 200 percent risk charge imposed under the terms of Order No. R-8047 is not a well cost for determining when well costs have been paid and for determining when they should begin to receive income from the subject well and unit under their net profits overriding royalty referenced in Finding No. 5 of said Order No. R-8047-A.

(12) The compulsory pooling of the subject acreage was ordered under provisions of Section 70-2-17(c) (NMSA 1978).

(13) That Section of the Oil and Gas Act provides in part that:

"All orders effecting 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 prorata 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 two hundred percent of the nonconsenting working interest owner's or owners' prorata share of the cost of drilling and completing the well."

(14) It appears clear that the statutes intend for the risk charge to be considered a well cost chargeable to the interest of any owner who elects not to pay his share in advance and as such must be factored in when determining when and if such interest has paid out and when profits begin to accrue thereto.

(15) Under the terms of Order No. R-8047, as amended, any well costs, attributable to any non-consenting owner, including risk charges and reasonable charges for well operations, should be recovered before profits accrue for which any associated net profits interest would be eligible.

(16) The terms of Finding No. (15) above should not apply to any royalty interest.

(17) Because of the delay resulting from the De Novo hearing in this case, the date for beginning drilling operations on the subject well and unit should be further extended to December 1, 1986.

(18) Order No. R-8047-A and Order No. R-8047-B should be rescinded.

IT IS THEREFORE ORDERED THAT:

(1) Ordering Paragraph No. (1) of Division Order No. R-8047 is hereby amended to read as follows:

"(1) All mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 1st day of December, 1986, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Granite Wash formation;

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 1st day December, 1986, Ordering Paragraph No. (1) 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 Ordering Paragraph No. (1) of this order should not be rescinded."

(2) The findings contained in Order No. R-8047-A are hereby adopted by the Commission.

(3) Except as provided in decretory Paragraph (2) above, Order No. R-8047-A is hereby rescinded.

(4) Order No. R-8047-B is hereby rescinded.

(5) Distribution of proceeds to the Klein et al net profits interest shall be made in accordance with Findings Nos. (14) and (15) of this order and appropriate terms and conditions of Order No. R-8047 as amended.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JIM BACA, Member

ED KELLEY, Member

R. L. STAMETS, Chairman and Secretary

S E A L

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

S E A L

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

S E A L

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

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

CASE NO. 10656 (DE NOVO)
Order No. R-9845-A

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 o'clock a.m. on April 29, 1993, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 10th day of May, 1993, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

Strata Production Company, as applicant for hearing De Novo in this case, has withdrawn its request for a hearing De Novo and this De Novo case should be dismissed.

IT IS THEREFORE ORDERED THAT:

Case 10656 De Novo is hereby dismissed and Division Order No. R-9845 is hereby continued in full force and effect until further notice.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

GARY CARLSON, Member

WILLIAM W. WEISS, Member

WILLIAM J. LEMAY, Chairman

S E A L

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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. 12087
ORDER NO. R-11109

APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on November 19, 1998, at Santa Fe, New Mexico, before Examiner Mark W. Ashley.

NOW, on this 11th day of December, 1998, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given and the Division has jurisdiction of this case and its subject matter.

(2) The applicant, Nearburg Exploration Company, L.L.C. ("Nearburg"), seeks an order pooling all mineral interests from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(3) The units are to be dedicated to the applicant's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

(4) All of Section 3 consists of a single federal oil and gas lease with the N/2 of this section being within a "measured potash" area where the Bureau of Land Management will not allow a well to be drilled vertically but will allow the well to be located and drilled directionally as proposed by Nearburg.

(5) The applicant has the right to drill its Viper "3" Federal Well No. 1 in the proposed spacing and proration units.

(6) The interest owners in the proposed spacing and proration units who have not agreed to pool their interests did not appear at the hearing.

(7) Nearburg testified that Merit Energy Company ("Merit") had an internal "net profits interest" the details of which had not been disclosed to Nearburg which might be an unnecessary burden on Merit's working interest.

(8) Nearburg requested that Merit's working interest, including its "net profits interest," be subject to the risk factor penalty.

(9) Merit's working interest, including any "net profits interest," carved out of its working interest, should be liable for its share of drilling and completion costs and be subject to the risk factor penalty.

(10) To avoid the drilling of unnecessary wells, to protect correlative rights, to avoid waste, and to afford to the owner of each interest in the units the opportunity to recover or receive without unnecessary expense its just and fair share of the production in any pool completion resulting from this order, this application should be approved by pooling all mineral interests, whatever they may be, within the units.

(11) Nearburg should be designated the operator of the well and units.

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

(13) Any non-consenting working interest owner who does not pay its share of estimated well costs should have withheld from production its 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.

(14) Any non-consenting working 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.

(15) Following determination of reasonable well costs, any non-consenting working interest owner who has paid its 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.

(16) Reasonable charges for supervision (combined fixed rates) should be fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator should be authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(17) All proceeds from production from the well that 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.

(18) If the operator of the pooled units fails to commence drilling the well to which the units are dedicated on or before March 15, 1999, or if all the parties to this forced pooling reach voluntary agreement subsequent to entry of this order, this order should become of no effect.

(19) The operator of the well and units should notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, are hereby pooled in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas

Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a standard 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(2) The units are to be dedicated to the Nearburg's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

PROVIDED HOWEVER THAT, the operator of the units shall commence drilling the well on or before March 15, 1999, and shall thereafter continue drilling the well with due diligence to a depth sufficient to test the Morrow formation.

PROVIDED FURTHER THAT, in the event the operator does not commence drilling the well on or before March 15, 1999, Ordering Paragraph (1) shall be of no effect, unless the operator obtains a time extension from the Division Director for good cause shown.

PROVIDED FURTHER THAT, should the well not be drilled to completion or abandoned within 120 days after commencement thereof, the operator shall appear before the Division Director and show cause why Ordering Paragraph (1) should not be rescinded.

(3) Nearburg is hereby designated the operator of the well and units.

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

(5) Within 30 days from the date the schedule of estimated well costs is furnished, any non-consenting working interest owner shall have the right to pay its share of estimated well costs to the operator in lieu of paying its share of reasonable well costs out of production, and any such owner who pays its 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 the schedule, the actual well costs shall be the reasonable well costs; provided, however, that if there is an objection to actual well costs within the 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 its share of estimated well costs in advance as provided above shall pay to the operator its share of the amount that reasonable well costs exceed estimated well costs and shall receive from the operator its 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 proportionate share of reasonable well costs attributable to each non-consenting working interest owner, including any "net profits interests" carved out of that working interest, who has not paid its share of estimated well costs within 30 days from the date the schedule of estimated well costs is furnished; and

(b) as a charge for the risk involved in drilling the well, 200 percent of the above costs.

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

(10) Reasonable charges for supervision (combined fixed rates) are hereby fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator is hereby authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(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 this order.

(12) Any well costs or charges that 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 well that are not disbursed for any

reason shall immediately 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 the escrow agent within 30 days from the date of first deposit with the escrow agent.

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

(15) The operator of the well and units shall notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

(16) Jurisdiction is hereby 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.

S E A L

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director

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. 12087
ORDER NO. R-11109

APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on November 19, 1998, at Santa Fe, New Mexico, before Examiner Mark W. Ashley.

NOW, on this 11th day of December, 1998, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given and the Division has jurisdiction of this case and its subject matter.

(2) The applicant, Nearburg Exploration Company, L.L.C. ("Nearburg"), seeks an order pooling all mineral interests from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a standard 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(3) The units are to be dedicated to the applicant's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

(4) All of Section 3 consists of a single federal oil and gas lease with the N/2 of this section being within a "measured potash" area where the Bureau of Land Management will not allow a well to be drilled vertically but will allow the well to be located and drilled directionally as proposed by Nearburg.

(5) The applicant has the right to drill its Viper "3" Federal Well No. 1 in the proposed spacing and proration units.

(6) The interest owners in the proposed spacing and proration units who have not agreed to pool their interests did not appear at the hearing.

(7) Nearburg testified that Merit Energy Company ("Merit") had an internal "net profits interest" the details of which had not been disclosed to Nearburg which might be an unnecessary burden on Merit's working interest.

(8) Nearburg requested that Merit's working interest, including its "net profits interest," be subject to the risk factor penalty.

(9) Merit's working interest, including any "net profits interest," carved out of its working interest, should be liable for its share of drilling and completion costs and be subject to the risk factor penalty.

(10) To avoid the drilling of unnecessary wells, to protect correlative rights, to avoid waste, and to afford to the owner of each interest in the units the opportunity to recover or receive without unnecessary expense its just and fair share of the production in any pool completion resulting from this order, this application should be approved by pooling all mineral interests, whatever they may be, within the units.

(11) Nearburg should be designated the operator of the well and units.

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

(13) Any non-consenting working interest owner who does not pay its share of estimated well costs should have withheld from production its 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.

(14) Any non-consenting working 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.

(15) Following determination of reasonable well costs, any non-consenting working interest owner who has paid its 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.

(16) Reasonable charges for supervision (combined fixed rates) should be fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator should be authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(17) All proceeds from production from the well that 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.

(18) If the operator of the pooled units fails to commence drilling the well to which the units are dedicated on or before March 15, 1999, or if all the parties to this forced pooling reach voluntary agreement subsequent to entry of this order, this order should become of no effect.

(19) The operator of the well and units should notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, are hereby pooled in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas

Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a standard 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(2) The units are to be dedicated to the Nearburg's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

PROVIDED HOWEVER THAT, the operator of the units shall commence drilling the well on or before March 15, 1999, and shall thereafter continue drilling the well with due diligence to a depth sufficient to test the Morrow formation.

PROVIDED FURTHER THAT, in the event the operator does not commence drilling the well on or before March 15, 1999, Ordering Paragraph (1) shall be of no effect, unless the operator obtains a time extension from the Division Director for good cause shown.

PROVIDED FURTHER THAT, should the well not be drilled to completion or abandoned within 120 days after commencement thereof, the operator shall appear before the Division Director and show cause why Ordering Paragraph (1) should not be rescinded.

(3) Nearburg is hereby designated the operator of the well and units.

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

(5) Within 30 days from the date the schedule of estimated well costs is furnished, any non-consenting working interest owner shall have the right to pay its share of estimated well costs to the operator in lieu of paying its share of reasonable well costs out of production, and any such owner who pays its 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 the schedule, the actual well costs shall be the reasonable well costs; provided, however, that if there is an objection to actual well costs within the 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 its share of estimated well costs in advance as provided above shall pay to the operator its share of the amount that reasonable well costs exceed estimated well costs and shall receive from the operator its 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 proportionate share of reasonable well costs attributable to each non-consenting working interest owner, including any "net profits interests" carved out of that working interest, who has not paid its share of estimated well costs within 30 days from the date the schedule of estimated well costs is furnished; and

(b) as a charge for the risk involved in drilling the well, 200 percent of the above costs.

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

(10) Reasonable charges for supervision (combined fixed rates) are hereby fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator is hereby authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(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 this order.

(12) Any well costs or charges that 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 well that are not disbursed for any

reason shall immediately 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 the escrow agent within 30 days from the date of first deposit with the escrow agent.

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

(15) The operator of the well and units shall notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

(16) Jurisdiction is hereby 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

LORI WROTENBERY
Director

S E A L

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. 12087
ORDER NO. R-11109

APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on November 19, 1998, at Santa Fe, New Mexico, before Examiner Mark W. Ashley.

NOW, on this 11th day of December, 1998, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given and the Division has jurisdiction of this case and its subject matter.

(2) The applicant, Nearburg Exploration Company, L.L.C. ("Nearburg"), seeks an order pooling all mineral interests from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a standard 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(3) The units are to be dedicated to the applicant's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

(4) All of Section 3 consists of a single federal oil and gas lease with the N/2 of this section being within a "measured potash" area where the Bureau of Land Management will not allow a well to be drilled vertically but will allow the well to be located and drilled directionally as proposed by Nearburg.

(5) The applicant has the right to drill its Viper "3" Federal Well No. 1 in the proposed spacing and proration units.

(6) The interest owners in the proposed spacing and proration units who have not agreed to pool their interests did not appear at the hearing.

(7) Nearburg testified that Merit Energy Company ("Merit") had an internal "net profits interest" the details of which had not been disclosed to Nearburg which might be an unnecessary burden on Merit's working interest.

(8) Nearburg requested that Merit's working interest, including its "net profits interest," be subject to the risk factor penalty.

(9) Merit's working interest, including any "net profits interest," carved out of its working interest, should be liable for its share of drilling and completion costs and be subject to the risk factor penalty.

(10) To avoid the drilling of unnecessary wells, to protect correlative rights, to avoid waste, and to afford to the owner of each interest in the units the opportunity to recover or receive without unnecessary expense its just and fair share of the production in any pool completion resulting from this order, this application should be approved by pooling all mineral interests, whatever they may be, within the units.

(11) Nearburg should be designated the operator of the well and units.

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

(13) Any non-consenting working interest owner who does not pay its share of estimated well costs should have withheld from production its 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.

(14) Any non-consenting working 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.

(15) Following determination of reasonable well costs, any non-consenting working interest owner who has paid its 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.

(16) Reasonable charges for supervision (combined fixed rates) should be fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator should be authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(17) All proceeds from production from the well that 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.

(18) If the operator of the pooled units fails to commence drilling the well to which the units are dedicated on or before March 15, 1999, or if all the parties to this forced pooling reach voluntary agreement subsequent to entry of this order, this order should become of no effect.

(19) The operator of the well and units should notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, from the surface to the base of the Morrow formation underlying Section 3, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico, are hereby pooled in the following manner:

(a) Lots 1 through 4, and the S/2 N/2 (N/2 equivalent) to form a standard 319.96-acre gas spacing and proration unit for any formations and/or pools developed on 320-acre spacing within that vertical extent, which presently include the Undesignated East Gem-Morrow Gas Pool, Undesignated West Teas-Morrow Gas

Pool, and Undesignated Teas-Pennsylvanian Gas Pool;

(b) Lots 1 and 2, and the S/2 NE/4 (NE/4 equivalent) to form a standard 159.81-acre gas spacing and proration unit for any formations and/or pools developed on 160-acre spacing within that vertical extent; and

(c) the SW/4 NE/4 to form a standard 40-acre oil spacing and proration unit for any formations and/or pools developed on 40- acre spacing within that vertical extent, which presently include the Undesignated Gem-Bone Spring Pool and the Undesignated Teas-Bone Spring Pool.

(2) The units are to be dedicated to the Nearburg's proposed Viper "3" Federal Well No. 1 to be drilled and completed in accordance with Division Rule 111 (directional wellbore) from a surface location 2200 feet from the South line and 1600 feet from the East line to a standard subsurface location 1650 feet from the North line and 1650 feet from the East line.

PROVIDED HOWEVER THAT, the operator of the units shall commence drilling the well on or before March 15, 1999, and shall thereafter continue drilling the well with due diligence to a depth sufficient to test the Morrow formation.

PROVIDED FURTHER THAT, in the event the operator does not commence drilling the well on or before March 15, 1999, Ordering Paragraph (1) shall be of no effect, unless the operator obtains a time extension from the Division Director for good cause shown.

PROVIDED FURTHER THAT, should the well not be drilled to completion or abandoned within 120 days after commencement thereof, the operator shall appear before the Division Director and show cause why Ordering Paragraph (1) should not be rescinded.

(3) Nearburg is hereby designated the operator of the well and units.

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

(5) Within 30 days from the date the schedule of estimated well costs is furnished, any non-consenting working interest owner shall have the right to pay its share of estimated well costs to the operator in lieu of paying its share of reasonable well costs out of production, and any such owner who pays its 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 the schedule, the actual well costs shall be the reasonable well costs; provided, however, that if there is an objection to actual well costs within the 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 its share of estimated well costs in advance as provided above shall pay to the operator its share of the amount that reasonable well costs exceed estimated well costs and shall receive from the operator its 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 proportionate share of reasonable well costs attributable to each non-consenting working interest owner, including any "net profits interests" carved out of that working interest, who has not paid its share of estimated well costs within 30 days from the date the schedule of estimated well costs is furnished; and

(b) as a charge for the risk involved in drilling the well, 200 percent of the above costs.

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

(10) Reasonable charges for supervision (combined fixed rates) are hereby fixed at $6,000.00 per month while drilling and $600.00 per month while producing. The operator is hereby authorized to withhold from production the proportionate share of both the supervision charges and the actual expenditures required for operating the well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(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 this order.

(12) Any well costs or charges that 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 well that are not disbursed for any

reason shall immediately 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 the escrow agent within 30 days from the date of first deposit with the escrow agent.

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

(15) The operator of the well and units shall notify the Division in writing of the subsequent voluntary agreement of all parties subject to the forced pooling provisions of this order.

(16) Jurisdiction is hereby 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

LORI WROTENBERY
Director

S E A L

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,

FINDS THAT:

A. Summary of Proceedings

The procedural history of this case is long and complicated so that a summary of the proceedings to date is necessary:

1) On December 8, 1992, Mitchell filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location **(1992 Application)** with the OCD pursuant to NMSA 1978, Section 70-2-17 and requested a hearing before a hearing examiner. The OCD assigned Case No. 10656 to this matter.

2) The 1992 Application was originally set for hearing by the OCD on January 7, 1993, and at Mitchell's request, the hearing was continued until January 21, 1993.

3) A hearing was held before Michael E. Stogner, an OCD hearing examiner, on January 21, 1993 **(1993 Hearing)**. Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company, a New Mexico corporation **(Strata)**, appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A.

4) On February 15, 1993, the OCD Division Director entered Order No. R-9845 in Case No. 10656 which pooled all the 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 to form a proration unit to be dedicated to its Tomahawk "28" Federal Com Well No. 1 **(Tomahawk 28 Well)**.

5) By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, Section 70-2-13.

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

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.

e) Branko's interests were made known to Mitchell by a letter dated January 13, 1993, and Mitchell otherwise had actual knowledge of Branko's interests.

f) Mitchell failed to comply with NMSA 1978, Section 70-2-17 (1995 Repl.)

g) OCD Order No. R-9845 in Case No. 10656 is void as to Branko as the OCD did not have jurisdiction over Branko because of Mitchell's failure to provide notice of the 1992 Application and notice of the 1993 Hearing.

Branko requests that the Commission:

a) reopen Case No. 10656 or, in the alternative grant Branko a hearing *de novo*; and

b) enjoin Mitchell from any operation on the Tomahawk 28 Well, including any workover, plug back or recompletion attempt which may adversely affect the interests of Branko in the well.

2) Mitchell's claims as alleged in its Reply:

a) Branko is not a party of record to OCD Case No. 10656, and Branko is not entitled to file for a *de novo* hearing in this case.

b) Branko's Motion to reopen OCD Case No. 10656 is a collateral attack on Order R-9845 and must be denied.

c) All the interests in the Lease have been pooled by Order R-9845 entered on February 15, 1993, and the time to appeal that order has run.

d) Branko did not have a protected property right in the Lease.

e) Branko is bound through Strata by OCD Order No. R-9845.

f) Mitchell requests the Commission deny Branko's Motion.

C. Findings of Fact from the January 16, 1997 hearing

1) Due public notice of this hearing was provided as required by law.

2) A quorum of the Commission was present for the hearing and has reviewed the evidence presented at the hearing.

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

to gather up --we'd have to gather up 15 assignments into Mitchell or to whomever." (1993 Hearing Tr. p. 130). Murphy 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. p. 141).

Murphy also acknowledged on cross-examination that as of the date of the title opinion Strata was the record title or leasehold holder and continued to be the owner of the federal lease record title and operating rights on the date of the January 1993 hearing. (1993 Hearing Tr. pp. 141, 142). However, Murphy testified that he never used the term "silent partners" in conversation with Mitchell; instead he recalled telling Mitchell that Strata had "partners in this lease." (1993 Hearing Tr. p. 142)

c) George L. Scott, Jr. testified that he owned some of the stock in Strata. He also stated that his organization, Scott Exploration, was "...involved with Strata in the sense that we (Scott Exploration) try to originate prospects, and Strata operates them." (1993 Hearing Tr. p. 153). Scott Exploration Inc., a New Mexico corporation, is one of the Branko group. Testimony from the 1993 Hearing does not reveal whether Scott meant that he, as an individual, owned shares of stock in Strata or whether his organization, Scott Exploration, owned the shares of stock in Strata.

8) The testimony from the 1996 Hearing as to the ownership interests of Branko contained the following:

a) On direct examination Mark Murphy stated that he called Mitchell's landman, Smith, and "...informed him that Strata would recommend to its partners that we sell...to Mitchell." (1996 Hearing Tr. p. 19) In responding to the question of what he meant by the word "partner," Murphy said, "...they're a leasehold owner, they own operating rights." (1996 Hearing Tr. p. 20) However, when asked whether Smith ever inquired as to who the partners were, Murphy said: "I think generically he did during the course of conversations, and I've described them as long-term investors of Strata's or people that we've been involved in." (1996 Hearing Tr. p. 23). Murphy stated that Strata was a New Mexico corporation. (1996 Hearing Tr. p. 27) Murphy testified that the arrangement between Strata and the partners was not a formal agreement, and there was no partnership agreement. (1996 Hearing Tr. p. 29) Murphy on several occasions testified that he felt comfortable negotiating for some of the partners without their specific approval. (1996 Hearing Tr. pp. 37 & 38, 57 & 58)

9) The documentary evidence from the hearings revealed the following regarding the property interest held by Branko:

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.

D. Conclusions of Law

1) The Commission has jurisdiction over the parties and the subject matter.

2) NMSA 1978, Section 70-2-13 provides, in part, that "[t]he division [OCD] shall promulgate rules and regulations with regard to hearings to be conducted before examiners,...." This section also states that "[i]n the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing." The section concludes with the statement: "When any matter or proceeding is referred to an examiner and a decision is rendered thereon, **any party of record** adversely affected shall have the right to have the matter heard *de novo* before the commission **upon application filed with the division within thirty days from the time any such decision is rendered."** (Emphasis added.)

Rule 1220 of the OCD Rules and Regulations states: "When any order has been entered by the Division pursuant to any hearing held by an Examiner, **any party of record** adversely affected by such order shall have the right to have such matter or proceeding heard *de novo* before the Commission." (Emphasis added.)

NMSA 1978, Section 70-2-25 states, in part: "Within twenty days after entry of any order or decision of the commission, **any party of record** adversely affected thereby may file with the commission an application for rehearing...." (Emphasis added.)

Branko was not a party of record in Case No. 10656 and did not have standing to request the OCD reopen the case or to request the Commission grant Branko a *de novo* hearing pursuant to NMSA 1978, Section 70-2-13 or 70-2-25 or Rule 1220.

However, Rule 1203 of the OCD Rules and Regulations, provides, in part: **"The Division upon its own motion,** the Attorney General on behalf of the State, and any operator or producer, **or any other person having a property interest may institute proceedings for a hearing."** (Emphasis added.) The Commission concludes that the OCD provided Branko a hearing on May 2, 1996, pursuant to Rule 1203 to determine whether Branko had a property interest affected by Case No. 10656 and Order No. R-9845.

3) NMSA 1978, Section 70-1-1 states: "That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any land 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."

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

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. 11510
Order No. R-10672

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 DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on May 2, 1996, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 2nd day of October, 1996, the Division Director, having considered the record and 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 thereof.

(2) On December 7, 1992, Mitchell Energy Corporation (Mitchell) filed its application for compulsory pooling and an unorthodox gas well location. Case No. 10656 was heard on January 21, 1993, after which Order No. R-9845 was issued on February 15, 1993.

(3) Strata Production Company ("Strata") was served with the application on December 9, 1992, and appeared at that hearing in opposition to the granting of Mitchell Energy Corporation's (Mitchell) application, particularly Mitchell's proposed W/2 orientation of the 320-acre spacing unit, the well location, and the overhead charges. In addition, Strata contended that Mitchell failed to provide notification to Strata's "undisclosed partners" as identified on Mitchell Exhibit No. 17 in that case.

(4) Strata was the owner of record of a federal lease covering 80 acres (25%) of the 320 acres sought to be pooled by Mitchell (the "Strata lease").

(5) Evidence was introduced by applicants in this case, Branko, Inc. et al., (the "undisclosed partners" hereafter referred to just as "partners") purporting to show that they owned working interests in the acreage being force pooled by Mitchell (a total of 81.5% of the Strata lease with Strata owning the remaining 18.5%) at the times the application in Case No. 10656 was filed, the case was heard and the order was issued. Evidence was also introduced by applicants Branko et al. indicating they were not provided notice by Mitchell pursuant to Division Rule 1207.

(6) Up until a January 12, 1996, letter from Mark Murphy (Murphy), President of Strata, to Mitchell, Strata represented to Mitchell that Strata could act for and bind its "partners" in selling the Strata lease to Mitchell and that "Strata would defend itself and it's [sic] partners rights during any proceeding including a forced pooling hearing." The January 12, 1993, letter from Strata to Mitchell was the first written communication to Mitchell from Strata that the Strata "partners" should be notified directly.

(7) The nature of the interests owned by Strata's "partners" is not disclosed in writing until the January 13, 1993 letter from Strata to Mitchell. Whether in fact there was a formal limited or general partnership (with a written partnership agreement) or another type of business relationship whether formalized (e.g., stockholders in Strata) or informal (e.g., these "partners" were mere investors with the option to participate in Strata's activities) is unclear up to that point. The Division is aware in a general business sense of the term "silent partner" which term indicates that the principal does have a partner/investor but that partner/investor desires not to have its identity disclosed.

(8) The record shows that Mitchell provided only Strata, and not the previously "undisclosed" partners of Strata, with the election to participate in the subject well pursuant to the pooling order by letter dated February 17, 1993.

(9) The duty of Mitchell to inquire as to the nature of these "partners'" interests and to notify these "partners" of the force pooling case is unclear when Strata (I) is the only owner of public record, (ii) does not disclose the nature of these "partners'" interests and (iii) Strata represents that it can bind its "partners" in the sale of the lease and that it will "defend itself and it's [sic] partners rights during any proceeding including a forced pooling proceeding". Strata did in fact appear at the hearing and did defend its rights. Presumably, Strata's positions in the hearing regarding its 18.5% interest in the Strata lease would equally apply to those of its "partners'" 81.5% interest.

(10) It would circumvent the purposes of the New Mexico Oil and Gas Act to 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 their 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.

Finding

(11) A cutoff date for notification of affected interest owners is necessary. If not, an applicant seeking to pool interests in a drilling and spacing unit would be required to daily check county records and verify with record owners that no other owners exist from the day of application until the pooling order is issued. This was never the intent of the pooling statute. Absence of a cutoff date would also permit adverse parties to the pooling application to defeat it by transferring their property to another at or about the time the pooling hearing was held and/or to stand by and, if the well be a producer, elect to participate.

(12) A party seeking a compulsory pooling order from the Division is required to attempt to obtain voluntary joinder of all owners of interests in that unit prior to filing a compulsory pooling application. It is incumbent upon any record owner of interest in that unit to disclose to the party seeking commitment of that interest to that unit the nature and extent of interests not of public record which have been obtained through that record owner in order that a party may attempt to obtain voluntary commitment of those interests to the unit or to notify those owners of a compulsory pooling action. Otherwise, the party seeking compulsory pooling has no notice that these owners exist.

(13) To require the party seeking compulsory pooling to obtain an affidavit from each owner of record certifying that there are no other owners not of record who obtained their title through him or listing all such owners is unduly burdensome and the Division will not impose such a burden. Presumably, if any such owner was listed, then affidavits would need to be obtained from that owner and so on and so on. The record owner may also not be forthcoming with that information. Any such owner can readily protect his interest by filing it of record, which is the purpose of filing a record of ownership.

(14) There are a number of peculiarities in this proceeding that are troubling to the Division and are worth noting:

(A) The geology witness for Strata at the hearing in this case was a Mr. George L. Scott, Jr. who testified that he owned some of the stock of Strata and that Scott Exploration was his organization. He and Scott Exploration were thus on actual notice of the

pooling proceeding. Affidavits have been received from Scott Exploration, Inc., signed by Charles Warren Scott; George L. Scott III and Lori Scott Worrall, who both list the same address as Scott Exploration and which address is in the same building as Strata; and Susan Scott Murphy for Winn Investments, Inc. These affidavits state that until November 1995, they were unaware of the subject well and the compulsory pooling case. Stephen T. Mitchell, with the same address and owning the same overriding royalty interest as George L. Scott III and Scott Exploration, Inc., states in his affidavit that he became aware of the subject well in May, 1993 and of the pooling case in May, 1993, so he somehow had actual notice of the pooling proceeding also. The extent of the stock ownership in Strata and in Scott Exploration, Inc. of the above named persons as well as Mark Murphy and the other partners may need to be examined as well as the personal relationships among all these parties in determining whether actual notice was received.

(B) Two of the "partners", Arrowhead Oil Corporation of Artesia, NM and Warren, Inc. of Albuquerque, NM, failed to join the applicants in this action to reopen this case, although John M. Warren signed an affidavit on behalf of Warren, Inc. stating that he first became aware of the subject well and pooling case on November 6, 1995. Why two of the "partners" (owning 6.25% and 5.0% of the Strata lease and according to Strata's November 6, 1995 letter to the "partners" would be entitled to $45,500 and $37,500 risk free) would not join in an action to reopen a case and be allowed, after the risk has passed, to avoid a risk penalty on a successful well is bewildering. The Division is open to subpoenaing these witnesses to learn the extent of their knowledge of what transpired.

(C) The Division notes the possibility of a conflict of interest on the part of counsel for applicants in this case based upon counsel's representation of Strata during the years in issue here, 1992 and 1993, where Strata failed to advise its "partners" of the compulsory pooling proceeding even though Strata was acting as agent (the extent of such agency is undetermined) for these "partners" during negotiations with Mitchell regarding the acreage that was pooled, and then counsel's subsequent representation of applicants in this case where their claim is based upon not being notified of that same compulsory pooling proceeding.

(D) One of the partners, S.H. Cavin of Roswell, NM, is the father of counsel for the applicants.

(E) In his January 13, 1996, correspondence to Mitchell, Murphy of Strata stated that "Strata has or is in the process of making a direct assignment of each partners [sic] proportionate ownership". In fact, the transfers were not carried out until November, 1995 (which was after the well proved profitable), which occurred in conjunction with the notification to the "partners" by Strata that the "partners" may have a good claim against Mitchell for recoupment of their 200% risk penalty.

(F) Strata takes the position that it was under no duty to its "partners" to inform them of the compulsory pooling case which would allow Mitchell to pool their leasehold interests to drill the subject well. Yet Strata apparently felt it had a duty to them to provide their names to Mitchell in early 1993 so Mitchell could notify them of the hearing. The distinction drawn is very fine. Strata also felt it had a duty to keep them informed as to the sale of their leasehold interests to Mitchell so Mitchell could drill the well. Murphy had numerous discussions with Strata's "partners" during the time period from October 1992 and May 1993 regarding their leasehold interests and Mitchell's desire to drill a well which included their interests. With the apparently large discretion given Strata to negotiate and sell the Strata lease to Mitchell by the "partners", it seems unlikely to the Division that the agency granted to Strata by the "partners" would not encompass the duty to inform the principals ("partners") of any action taken by Mitchell regarding their acreage interests in attempting to drill its well. The Division is curious as to what reports or other communications were made to the "partners" by Strata both before and after the negotiations with Mitchell for sale of the Strata lease had failed.

(G) The duty to inform Strata's "partners" of the pooling case and the subject well, apparently sprang into being in November, 1995 when Strata wrote its partners informing them of the pooling order, the status of the well and that they "may have the right to join in the Mitchell well without application of the 200% risk penalty". Long before then, Strata had dismissed its De Novo appeal of the pooling order in which appeal it could have contested the "all or none" election option given Strata by Mitchell as to payment for well costs for the entire 25% interest represented by the Strata lease. Strata had also acknowledged that "Strata's 18.5% interest is subject to the Order" in a May 11, 1993 letter from its attorney to the attorney for Mitchell. By such actions, Strata apparently waived its rights to assert that it too could join in the Mitchell well without a risk penalty. Nevertheless, Strata apparently felt a "compulsion" in November 1995 to finally inform its "partners" of the pooling order, the Mitchell well, and their rights as to joining in the well risk free as well as aid the "partners" in this proceeding by providing testimony.

(H) No evidence, in the form of written instruments, canceled checks, or otherwise, has shown exactly how and when the "partners" acquired their interests, when they paid for such interests and what interests were actually acquired. The documentation for the transfers was not prepared until late 1995.

(15) The Division believes that the issue of actual notice is important under the circumstances of this case. If the applicants knew of the force pooling hearing and/or the drilling of the subject well and made no attempt to inquire as to their interest in such hearing or inquire as to their respective obligations to pay their proportionate shares of the well expenses until the well became profitable, then even if applicants had been entitled to participate in the well at their election, they may have waited too long to voice their decision.

(16) The Division is concerned with the equity of allowing parties, with knowledge of the facts, and without risk to themselves, to stand by an unreasonable amount of time and see another assume all the risks of drilling a well in which such parties might have shared, and, after success of the well, seek to share in the benefits thereof. The injustice of such a situation is obvious: of permitting ones holding the right to assert ownership in such property to voluntarily await the event determining success or failure, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. If the Division is unable to fashion an equitable solution based upon the facts in this case, the Division is hopeful a court can do so.

(17) Regardless of whether the "partners" should have been notified pursuant to Division Rule 1207 prior to the compulsory pooling hearing, the Division is reopening this case for the reason stated below.

(18) Ordering Paragraphs (4) and (5) of Order No. R-9845 provide that "each known working interest owner" shall be furnished an itemized schedule of estimated well costs and that such working interest owner shall have a right to participate in the well by paying his share of estimated well costs.

(19) Based on the absence of any notice sent by Mitchell to applicants in this case informing them of their election rights to participate in the subject well under Division Order No. R-9845 issued on February 15, 1993, in view of the fact that Mitchell prior to that time (on January 13, 1993) had been given a list of such working interest owners and had also been notified at that same time that those interest owners should be contacted directly regarding the compulsory pooling case, **Case No. 10656 should be reopened** to examine the share of costs that should be apportioned to each interest owner in the subject well as well as determine how future operations should be conducted for such well.

IT IS THEREFORE ORDERED THAT:

(1) **Case No. 10656 is hereby reopened** with the date for hearing to be set no later than the second Division hearing in December 1996. Mitchell shall provide notice to all known interest owners of the hearing.

(2) 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

Decisions to look at:

11722

11472 R-10552

8640 R-7998

8859 R-8047

7922 R-7335 after rec'd application, assigned 50% of 8/8ths overriding royalty to the daughter of his co-lessee

Willis + Myers § 944, p. 680

may be necessary for Comm'n to reduce or eliminate excessive nonoperating interests or to subject them to the burden of operating expenses

O'Neil - dissent of Vice Chief Justice Irwin

Commission has ~~right~~ authority to require holder of an overriding royalty to reduce override when failure to do so abrogates the intent of the force pooling statutes to prevent waste & protect correlative rights

based on - police power to regulate production of oil & gas
private contracts in derogation of that authority
(Stanolind)

70-2-17(D) permits Division to modify existing agreements (unit development) to prevent waste

* ↓ emphasizes that practice endangers correl. rights

(2)

70-2-16(d) - division not necessarily bound by agreements of purchasers for allocation of allowables

legislature intent does not permit modification of existing agreements?

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8686
Order No. R-8047

APPLICATION OF ROBERT E. CHANDLER
CORPORATION FOR COMPULSORY POOLING,
LEA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8 a.m. on September 25, 1985, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 3rd day of October, 1985, 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, Robert E. Chandler Corporation, seeks an order pooling all mineral interests from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico.

(3) The applicant has the right to drill and proposes to drill a well at a standard location thereon.

(4) There are interest owners in the proposed proration unit who have not agreed to pool their interests.

(5) To avoid the drilling of unnecessary wells, to protect correlative rights, to prevent waste, and to afford to the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil in any pool completion resulting from

this order, the subject application should be approved by pooling all mineral interests, whatever they may be, within said unit.

(6) The applicant should be designated the operator of the subject well and unit.

(7) 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.

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

(9) 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.

(10) 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.

(11) $3000.00 per month while drilling and $300.00 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.

(12) 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.

(13) 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 December 31, 1985, the order pooling said unit should become null and void and of no effect whatsoever.

(14) 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.

(15) 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) All mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 31st day of December, 1985, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Granite Wash formation;

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 31st day of December, 1985, Ordering Paragraph No. (1) 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 Ordering Paragraph No. (1) of this order should not be rescinded.

(2) Robert E. Chandler Corporation is hereby designated the operator of the subject well and unit.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

(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.

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

(9) $3000.00 per month while drilling and $300.00 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.

(10) Any unsevered 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.

(11) 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.

(12) All proceeds from production from the subject well which are not disbursed for any reason shall immediately 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.

(13) 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.

(14) The operator of the 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.

(15) 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 herein-above designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8859
Order No. R-8047-A

APPLICATION OF ROBERT E. CHANDLER
CORPORATION FOR AN AMENDMENT TO
DIVISION ORDER NO. R-8047, LEA
COUNTY, NEW MEXICO

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on March 19, 1986, at Santa Fe, New Mexico, before Examiner David R. Catanach.

NOW, on this 9th day of May, 1986, 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, Robert E. Chandler Corporation, seeks amendment of Order No. R-8047 entered October 3, 1985 which pooled the NE/4 SW/4 of Section 7, Township 23 South, Range 38 East, NMPM, Lea County, New Mexico, to extend the effective date thereof including the commencement date of the well to be drilled, and to clarify the treatment of various interests subject to the forced pooling for purposes of allocation of costs and application of the penalty provisions.

(3) Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation and Ronnie H. Westbrook appeared in opposition to the application.

(4) Testimony at the hearing on this matter indicates that at some time after granting of the leases covering the properties involved in this case, the leases were conveyed and certain production payments retained by the conveyor. In turn,

interests in the production payments have been reconveyed for valuable consideration.

(5) The interest that is the subject of the instant proceeding was created by a document dated April 1, 1966 and titled "Conveyance of PARAMOUNT PRODUCTION PAYMENT and RESERVATION of RESERVED PRODUCTION PAYMENT and CONVEYANCE of NET PROFITS OVERRIDING ROYALTY," between the Prudential Insurance Company of America and Joseph E. Seagram and Sons, Inc.

(6) The applicant alleges that the "Net Profits Overriding Royalty" referred to in the above document is properly denominated as a Net Profits Interest and that the drilling of the well authorized by Order No. R-8047 is not economical if the interest is construed as an overriding royalty, insofar as the applicant would be required to absorb all of the costs of drilling and operating the well.

(7) The parties that appeared in opposition to the application in this matter have succeeded to an interest in the subject property and assert that the interest is properly delineated as an overriding royalty, which requires that they be paid their share of production free of all costs. Moreover, they challenge the jurisdiction of the Division to hear this matter.

(8) Testimony and evidence indicate that the interest in question is ambiguous insofar as it is referred to as a "net profits overriding royalty", but that the terms and conditions of the Agreement of April 1, 1966, including provisions stating that the interest is "exclusively an interest in net profits", demonstrate that the interest is not an overriding royalty as it is commonly known in the industry.

(9) Testimony and evidence presented at the hearing indicate that because of the controversy involving the question of the nature of the interest conveyed by the agreement of April 1, 1966, and the uneconomical nature of the proposed well if the interest is an overriding royalty, an extension of time in which to begin drilling a well pursuant to Order No. R-8047 is needed.

IT IS THEREFORE ORDERED THAT:

(1) Ordering Paragraph No. (1) of Division Order No. R-8047 is hereby amended to read as follows:

"(1) All mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation

underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 31st day of August, 1986, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Granite Wash formation;

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 31st day of August, 1986, Ordering Paragraph No. (1) 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 Ordering Paragraph No. (1) of this order should not be rescinded."

(2) The interest created by the Agreement of April 1, 1966, and referred to therein as a "Net Profits Overriding Royalty" is to be treated as a Net Profits interest under the terms of the compulsory pooling order entered by the Division on October 3, 1985, and should bear its appropriate share of the costs of drilling and operation.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

R. L. STAMETS,
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION
OF ROBERT E. CHANDLER CORPORATION
FOR AN AMENDMENT TO DIVISION ORDER
NO. R-8047, LEA COUNTY, NEW MEXICO.

CASE NO. 8859
Order No. R-8047-B

ORDER OF THE DIVISION
STAYING ORDER NO. R-8047 AND ORDER NO. R-8047-A

BY THE DIVISION:

This matter having come before the Division upon the request of Protestants Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation, and Ronnie H. Westbrook (hereinafter "Protestants") for a Stay of Division Order No. R-8047 and Order No. R-8047-A and the Division Director having considered the request and being fully advised in the premises,

NOW, on this 13th day of June, 1986, the Division Director:

FINDS THAT:

(1) Division Order No. R-8047-A was entered on May 9, 1986 upon the application of Robert E. Chandler Corporation for an amendment to Order No. R-8047, Lea County, New Mexico.

(2) On June 2, 1986, Protestants filed with the Division a request for a de novo hearing in this case which is now set for hearing by the Commission on August 7, 1986.

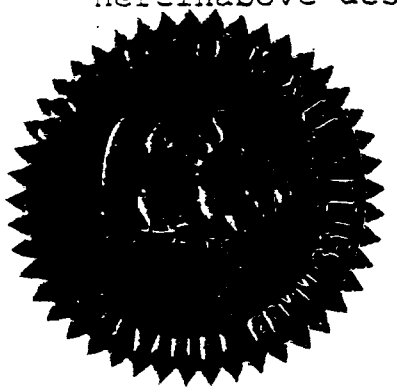
(3) Protestants have complied with the provision of Division Memorandum 3-85 and have filed their request for a stay on June 2, 1986.

IT IS THEREFORE ORDERED THAT:

(1) Division Order No. R-8047 and Order No. R-8047-A are hereby stayed in their entirety.

(2) 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.



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STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8859 DE NOVO
Order No. R-8047-C

APPLICATION OF ROBERT E. CHANDLER CORPORATION FOR AN AMENDMENT TO DIVISION ORDER NO. R-8047, LEA COUNTY, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 a.m. on August 7, 1986, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 22nd day of August, 1986, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

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

(2) By Order No. R-8047, entered on October 3, 1985, all mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, were pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

(3) Robert E. Chandler was designated the operator of said well and unit.

(4) Said order further provided in decretory paragraph (7) that:

"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.

(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."

(5) On March 10, 1986, Robert E. Chandler made application seeking amendment of said Order No. R-8047 to extend the effective date thereof including the commencement date of the well to be drilled, and to clarify the treatment of various interests subject to the forced pooling for purposes of allocation of costs and application of the penalty provisions.

(6) The matter came on for hearing at 8:15 a.m. on March 19, 1986, at Santa Fe, New Mexico, before Oil Conservation Division Examiner David R. Catanach and, pursuant to his hearing, Order No. R-8047-A was issued on May 9, 1986.

(7) On June 2, 1986, application for Hearing De Novo was made by Michael L. Klein, John H. Hendrix, John H. Hendrix Corporation, and Ronnie Westbrook and Order No. R-8047-A was stayed by Order No. R-8047-B.

(8) The matter came on for hearing de novo before the Commission on August 7, 1986.

(9) The Findings in Order No. R-8047-A should be incorporated by reference into this order.

(10) De Novo applicants, Klein et al, are owners of a net profits interest in the pooled unit as referred to in Finding No. (5) in said Order No. R-8047-A.

(11) De Novo applicants contend that the 200 percent risk charge imposed under the terms of Order No. R-8047 is not a well cost for determining when well costs have been paid and for determining when they should begin to receive income from the subject well and unit under their net profits overriding royalty referenced in Finding No. 5 of said Order No. R-8047-A.

(12) The compulsory pooling of the subject acreage was ordered under provisions of Section 70-2-17(c) (NMSA 1978).

(13) That Section of the Oil and Gas Act provides in part that:

"All orders effecting 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 prorata 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 two hundred percent of the nonconsenting working interest owner's or owners' prorata share of the cost of drilling and completing the well."

(14) It appears clear that the statutes intend for the risk charge to be considered a well cost chargeable to the interest of any owner who elects not to pay his share in advance and as such must be factored in when determining when and if such interest has paid out and when profits begin to accrue thereto.

(15) Under the terms of Order No. R-8047, as amended, any well costs, attributable to any non-consenting owner, including risk charges and reasonable charges for well operations, should be recovered before profits accrue for which any associated net profits interest would be eligible.

(16) The terms of Finding No. (15) above should not apply to any royalty interest.

(17) Because of the delay resulting from the De Novo hearing in this case, the date for beginning drilling operations on the subject well and unit should be further extended to December 1, 1986.

(18) Order No. R-8047-A and Order No. R-8047-B should be rescinded.

IT IS THEREFORE ORDERED THAT:

(1) Ordering Paragraph No. (1) of Division Order No. R-8047 is hereby amended to read as follows:

"(1) All mineral interests, whatever they may be, from the surface to the base of the Granite Wash formation underlying the NE/4 SW/4 of Section 7, Township 22 South, Range 38 East, NMPM, Lea County, New Mexico, are hereby pooled to form a standard 40-acre oil spacing and proration unit to be dedicated to a well to be drilled at a standard oil well location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the 1st day of December, 1986, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Granite Wash formation;

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the 1st day December, 1986, Ordering Paragraph No. (1) 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 Ordering Paragraph No. (1) of this order should not be rescinded."

(2) The findings contained in Order No. R-8047-A are hereby adopted by the Commission.

(3) Except as provided in decretory Paragraph (2) above, Order No. R-8047-A is hereby rescinded.

(4) Order No. R-8047-B is hereby rescinded.

(5) Distribution of proceeds to the Klein et al net profits interest shall be made in accordance with Findings Nos. (14) and (15) of this order and appropriate terms and conditions of Order No. R-8047 as amended.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JIM BACA, Member

ED KELLEY, Member

R. L. STAMETS, Chairman and Secretary

S E A L

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8640
Order No. R-7998

APPLICATION OF CAULKINS OIL
COMPANY FOR COMPULSORY POOLING,
RIO ARRIBA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8 a.m. on July 2, 1985, at Santa Fe, New Mexico, before Examiner Gilbert P. Quintana.

NOW, on this 8th day of August, 1985, 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, Caulkins Oil Company, seeks an order pooling all mineral interests in the Basin-Dakota and Blanco-Mesaverde Pools underlying the N/2 of Section 20, Township 26 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, to form a standard 320-acre gas spacing and proration unit in both pools, and an order pooling all mineral interests in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20, to form a standard 160-acre gas spacing and proration unit in both formations, to be dedicated to a well to be drilled at a standard location thereon.

(3) The applicant further seeks approval to downhole commingle Blanco-Mesaverde and Basin-Dakota production, to downhole commingle Pictured Cliffs and Chacra production, and finally to dually complete through parallel strings of tubing both commingled production streams in the subject well.

(4) The applicant has the right to drill and proposes to drill a well at a standard location in the NE/4 of Section 20.

(5) There is an interest owner in the proposed proration unit, El Paso Natural Gas Company/Meridian Oil, Inc., who has not agreed to pool its interest.

(6) The N/2 of said Section 20 is a standard 320-acre spacing and proration unit for the Blanco-Mesaverde and Basin-Dakota Pools and the NE/4 of the same section is a standard 160-acre spacing and proration unit for the Pictured Cliffs and Chacra formations.

(7) Evidence was presented establishing that 120 acres of the proposed 320-acre spacing unit, being the N/2 NW/4 and SW/4 NW/4 of said Section 20, is under lease to Meridian Oil, Inc. and/or El Paso Natural Gas Company, and that El Paso Natural Gas Company, predecessor in interest to Meridian Oil, Inc., hereafter referred to as "Meridian", created overriding royalty burdens on said 120 acres of $3.96 and $3.73 per mcf of gas.

(8) Evidence was also presented that for each $858.37 of income per day attributable to Meridian's interest in said well, Meridian must pay out $1,508.76 per day, leaving Meridian with a negative daily working interest of $650.39.

(9) If Meridian proved to be a non-consenting participant in the proposed well, payout for its interest would never occur.

(10) Participating working interest owners in the proposed spacing unit will be required to bear the cost and risk of drilling the well in which one-half interest of the well will never pay out.

(11) Said overriding royalty burden placed on Meridian's acreage is in excess of reasonable overriding royalties based on current economic and marketing conditions.

(12) Compulsory pooling of the proposed proration unit under such conditions would not be just or reasonable.

(13) To compulsorily pool the entire N/2 of said Section 20 in the Blanco-Mesaverde and Dakota formations would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said overriding royalty.

(14) In order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the N/2 NW/4 and the SW/4 NW/4 of said Section 20 to a reasonable figure, within a reasonable time, or for the pooling of the N/2 of said Section 20 exclusive of the N/2 NW/4 and the SW/4 NW/4.

(15) Subject to the conditions contained in Finding No. (14) above, to avoid the drilling of unnecessary wells, to prevent waste and to protect correlative rights and to 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 gas in any pool thereunder, the subject application should be approved by pooling all mineral interests, whatever they may be, within said units in the Basin-Dakota and Blanco-Mesaverde Pools and the Pictured Cliffs and Chacra formations.

(16) The applicant, Caulkins Oil Company, should be designated the operator of the subject well and unit.

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

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

(19) Any non-consenting working 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.

(20) 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 estimated well costs reasonably paid exceed reasonable well costs.

(21) A cost of $3,000.00 per month while drilling and $400.00 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.

(22) 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.

(23) Upon failure of the operator of said pooled units to commence drilling of the well to which said units are dedicated on or before November 1, 1985, the order pooling said unit should become null and void and of no effect whatsoever.

(24) The applicant's request to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, and the Pictured Cliffs and Chacra formations, and to dually complete the respective commingled streams with parallel strings of tubing will not result in reservoir damage, waste, or the violation of any correlative rights.

(25) The applicant's request to complete the subject well as described in Finding No. (24) above should be granted provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(26) The applicant should consult with the supervisor of the Division's Aztec District Office to formulate a reasonable allocation of production from each respective producing zone and an assignment of an allowable to the well.

(27) The results of the allocation determination should be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(28) Approval of the subject application will afford the applicant the opportunity to produce its just and equitable share of the gas in the affected pool, will prevent economic loss caused by the drilling of unnecessary wells, avoid the augmentation of risk arising from the drilling of an excessive number of wells, and will otherwise prevent waste and protect correlative rights.

IT IS THEREFORE ORDERED THAT:

(1) All mineral interests, whatever they may be, in the Blanco-Mesaverde and Basin-Dakota Pools underlying the N/2 of Section 20, Township 20 North, Range 6 West, NMPM, Rio Arriba County, New Mexico, are hereby pooled to form a standard 320-acre spacing and proration unit and all mineral interests, whatever they may be, in the Pictured Cliffs and Chacra formations underlying the NE/4 of said Section 20 are hereby pooled to form a standard 160-acre spacing and proration unit to be dedicated to a well to be drilled at a standard location thereon.

PROVIDED HOWEVER THAT, the operator of said unit shall commence drilling of said well on or before November 1, 1985, and shall thereafter continue the completion of said well with due diligence.

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before November 1, 1985, Order (1) of this order shall be null and void and of no effect whatsoever.

PROVIDED FURTHER THAT, should said well not be completed within 120 days after commencement thereof, said operator shall appear before the Division Director and show cause why Order (1) of this order should not be rescinded.

(2) Caulkins Oil Company is hereby designated the operator of the subject well and unit.

(3) Within 30 days from the date the schedule of estimated well costs is furnished to Meridian Oil, Inc., it shall make an election to voluntarily reduce overriding royalty not in excess of a total 12.5 percent for its 120-acre lease, and in the event it does not make that election, the N/2 NW/4 and the SW/4 NW/4 of said Section 20 shall be excluded from the proration and spacing unit and the Division shall upon written request automatically

approve the unit as a non-standard proration and spacing unit consisting of that portion of the N/2 of said Section 20 excluding the N/2 NW/4 and the SW/4 NW/4.

(4) The operator shall notify the Division of the decision of Meridian Oil, Inc., requesting approval of the non-standard proration unit if said party chooses not to or is unable to amend its overriding royalty interest.

(5) 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 units an itemized schedule of estimated well costs.

(6) 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.

(7) 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, that 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.

(8) 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.

(9) 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.

(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.

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

(11) $3,000.00 per month while drilling and $400.00 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.

(12) Any unsevered 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.

(13) 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.

(14) All proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Rio Arriba 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.

(15) The applicant, Caulkins Oil Company, is hereby authorized to downhole commingle the Blanco-Mesaverde and Basin-Dakota Pools, downhole commingle the Pictured Cliffs and Chacra formations, and dually complete the respective commingled streams with parallel strings of tubing provided the supervisor of the Division's Aztec District Office is consulted in approving the specific details of such a completion.

(16) The applicant shall consult the supervisor of said district office to formulate a reasonable allocation of production from each respective producing zone and an assignment of allowable to the well.

(17) The determined production allocation factors for each producing zone shall be delivered to the Division's Santa Fe office for incorporation into the records of this case.

(18) 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

R. L. STAMETS
Director

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8640 DE NOVO
Order No. R-7998-A

APPLICATION OF CAULKINS OIL COMPANY
FOR COMPULSORY POOLING, DOWNHOLE
COMMINGLING, AND DUAL COMPLETION,
RIO ARRIBA COUNTY, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 8:15 a.m. on August 7, 1986, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 21st day of August, 1986, the Commission, a quorum being present, having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS THAT:

On August 7, 1986, an unopposed request for dismissal of this case de novo was received and such request should be granted.

IT IS THEREFORE ORDERED THAT:

Case 8640 de novo is hereby dismissed and Order No. R-7998 is hereby continued 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

JIM BACA, Member

ED KELLEY, Member

R. L. STAMETS, Chairman and
Secretary

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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 7922
Order No. R-7335

APPLICATION OF RIO PECOS CORPORATION
INC. FOR COMPULSORY POOLING, EDDY
COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 9 a.m. on July 20, 1983, at Santa Fe, New Mexico, before Examiner Richard L. Stamets.

NOW, on this 22nd day of August, 1983, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner, and being fully advised in the premises,

FINDS:

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

(2) That the applicant, Rio Pecos Corporation, Inc., seeks an order pooling all mineral interests in the Wolfcamp and Pennsylvanian formations underlying the N/2 of Section 2, Township 18 South, Range 28 East, NMPM, Eddy County, New Mexico.

(3) That the applicant has the right to drill and proposes to drill a well at a standard location thereon.

(4) That there are interest owners in the proposed proration unit who have not agreed to pool their interests.

(5) That the evidence establishes that after receiving notice of the subject compulsory pooling application, Ralph Nix and Loneta Curtis created a 50 percent overriding royalties burden on their interest to Ralph Nix, Jr. and Sarah Garretson, their son and daughter, respectively, in the NE/4 NW/4 of said Section 2.

(6) That the evidence presented established that all other working interest owners in the N/2 of said Section 2 had voluntarily agreed to a 6.25 percent overriding royalty interest.

(7) That the evidence established that a reasonable overriding royalty interest in this proration and spacing unit would be not in excess of 12.5 percent.

(8) That for each $800.00 of income attributable to a well which might be drilled and completed on the N/2 of said Section 2 under terms of this order, the operator would receive, exclusive of expenses and taxes, $37.50 attributable to the NE/4 NW/4.

(9) That as to any comparable 40-acre tract comprising the N/2 of said Section 2, the operator would receive $81.25.

(10) That if the owners in the NE/4 NW/4 of said Section 2 proved to be non-consenting participants in the proposed well, the payout period for their interest in well costs would be 76 percent longer than for comparable interests in other tracts in the N/2 of said section.

(11) That it would not be just and reasonable to require the owners of participating interests in the proposed proration and spacing unit to bear extra costs and risks associated with well cost payout requiring 76 percent more time than others in the unit.

(12) That the smaller share of operating income attributable to the NE/4 NW/4 of said Section 2 could result in operating expenses exceeding operating income as to said tract while the rest of the unit was being operated profitably.

(13) That compulsorily pooling the proposed proration unit under such conditions would not be just or reasonable.

(14) That to compulsorily pool the entire N/2 of said Section 2 would cause the operator of the well to bear an unreasonable, and therefore unnecessary, cost burden as to that portion of the proration unit bearing said 50 percent overriding royalty.

(15) That in order to protect correlative rights, prevent waste, and to avoid compulsory pooling under terms that are not just or reasonable, any compulsory pooling order issuing in this case should provide for voluntary reduction of the overriding royalty for the NE/4 NW/4 to a reasonable figure,

within a reasonable time, or for the pooling of the N/2 of said Section 2 exclusive of the NE/4 NW/4.

(16) That, subject to conditions contained in Finding No. (15) above, to avoid the drilling of unnecessary wells, to protect correlative rights, and to afford to the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the gas in any Wolfcamp or Pennsylvanian Pool lying under the proposed proration unit, the subject application should be approved by pooling all mineral interests, whatever they may be, within said unit.

(17) That as requested by the applicant, Costa Resources, Inc., should be designated the operator of the subject well and unit.

(18) That 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.

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

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

(21) That 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.

(22) That $4,000.00 per month while drilling and $400.00 per month while producing should be fixed as reasonable charges for supervision (combined fixed rates); that 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.

(23) That 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.

(24) That 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 December 1, 1983, the order pooling said unit should become null and void and of no effect whatsoever.

IT IS THEREFORE ORDERED:

(1) That all mineral interests, whatever they may be, in the Wolfcamp and Pennsylvanian formations underlying the N/2 of Section 2, Township 18 South, Range 28 East, NMPM, Eddy County, New Mexico, are hereby pooled to form a standard 320-acre gas spacing and proration unit to be dedicated to a well to be drilled at a standard location thereon.

PROVIDED HOWEVER, that the operator of said unit shall commence the drilling of said well on or before the 1st day of December, 1983, and shall thereafter continue the drilling of said well with due diligence to a depth sufficient to test the Wolfcamp and Pennsylvanian formations;

PROVIDED FURTHER, that in the event said operator does not commence the drilling of said well on or before the 1st day of December, 1983, Order (1) 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 Order (1) of this order should not be rescinded.

(2) That Costa Resources Inc. is hereby designated the operator of the subject well and unit.

(3) That after the effective date of this order and within 90 days prior to commencing said well, the operator shall furnish to the Division; Ralph Nix, Loneta Curtis, Ralph Nix, Jr., and Sarah Garretson, and any other known working interest owner an itemized schedule of estimated well costs.

(4) That within 30 days from the date the schedule of estimated well costs is furnished to Ralph Nix, Jr. and Sarah Garretson, each shall make an election to voluntarily reduce their share of the 50 percent overriding royalty to an overriding royalty not in excess of a total 12.5 percent for their 40 acre lease and that in the event they do not make that election, the NE/4 NW/4 of said Section 2 shall be excluded from the proration and spacing unit and the Division shall automatically approve the unit as a non-standard proration and spacing unit consisting of all of the N/2 of Section 2 except the NE/4 NW/4.

(5) That the operator shall notify the Division of the decision of Ralph Nix, Jr. and Sarah Garretson requesting approval of the non-standard proration unit if said parties chose to not amend their overriding royalty interest.

(6) That within 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting working interest owner participating in the well under terms of this order 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 that 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.

(7) That 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; that 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, that 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.

(8) That 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.

(9) That 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.

(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.

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

(11) That $4,000.00 per month while drilling and $400.00 per month while producing are hereby fixed as reasonable charges for supervision (combined fixed rates); that 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.

(12) That any unsevered 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.

(13) That 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.

(14) That all proceeds from production from the subject well which are not disbursed for any reason shall immediately be placed in escrow in Eddy County, New Mexico, to be paid to the true owner thereof upon demand and proof of ownership; that 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.

(15) That 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

JOE D. RAMEY,
Director

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...s present disability; ...rform manual labor ... cent.; that at the ...ond hernia the same ...at the first: there ...o repair it because ...dition of the walls ...nent in either case ...t respondent might ...rom the accident of ...thout the weakened ...opinion that the two ...n the same condi... ...er accidental injury

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...ove set of circum... ...d by competent evi... ...may have had a ...ntal injury of Jan... ...ss of the condition ...abdomen. In Fain ...rage, 179 Okl. 404, ...e said: "Where, in ...he Industrial Com... ...alleged to exist is ...to require skilled ...to determine the ...of the question is ...ust necessarily be ...ny of skilled pro... ...a finding of fact ...asonably supported,

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jury of January 15, 1936, and that by reason thereof he is totally and permanently disabled.

Finally it is urged: "The Industrial Commission erred in finding that respondent's present condition was due entirely to the injury of January 16, 1936."

In this connection there is cited Noel et al. v. Potts et al., 177 Okl. 13[illegible], 11 P.2d 1[illegible]; Schoenfeld & Hunter Drilling Co. [illegible], 177 Okl. 317, 30 P.2d 162; [illegible] 177 Okl. 62[illegible], [illegible] P.2d 50[illegible]. In Noel v. Potts, supra, we said: "Where in a proceeding [illegible] State Industrial Commission [illegible] of the medical or expert witnesses [illegible] such as to show that the disability [illegible] is due in part to an accidental injury and in part to pre-existing disease [illegible] finding of the commission that the disability is due wholly to the accidental injury is error."

[illegible] is properly [illegible] The [illegible] is [illegible] Ernest, but it must [illegible] that Dr. [illegible] testified that [illegible] condition existed as has been [illegible] by Dr. Ernest and that in his opinion the weakening of the walls by the knife wound would not prevent a successful operation for hernia; that Dr. [illegible] and Dr. Moore both described the [illegible] as resulting from an unsuccessful operation [illegible] attempted. There is competent evidence to sustain the [illegible] of the State Industrial Commission [illegible] the disability resulted from the [illegible] injury of January 15, 1936, [illegible] any prior physical condition.

In [illegible] v. [illegible], 178 Okl. 111, 46 P.2d [illegible], we said: "But it is undisputed that for years prior to the accident he worked as any other able-bodied man [illegible] latent danger by reason of the high blood pressure he performed his duties and earned his pay by the [illegible] of satisfactory work [illegible] any other employee."

[illegible] Magnolia Petroleum Co. v. S[illegible], [illegible] Okl. 5[illegible], 2[illegible] P.2d 137 and cases cited in Noel v. Potts, supra.

Under either theory, whether the State Industrial Commission believed that the [illegible] could not be repaired because of the weakened condition of the abdominal walls [illegible] by Dr. Ernest or that the condition of the respondent at the time of the [illegible] is a result of an unsuccessful operation, the award should be affirmed. The respondent was not suffering from any disability to perform labor at the time of the accident. So far as the record shows, he was capable of doing a whole day's work and was not disabled by any prior accidental injury.

Award affirmed.

OSBORN, C. J., and RILEY, WELCH, PHELPS, GIBSON, HURST, and DAVISON, JJ., concur.

BAYLESS, V. C. J., and CORN, J., absent.

PATTERSON v. STANOLIND OIL & GAS CO. et al.

No. 27834.

Supreme Court of Oklahoma.

March 1, 1938.

1. Mines and minerals ⇐92

The police power of the state extends to protecting correlative rights of owners in a common source of oil and gas supply, and that power may be lawfully exercised by regulating the drilling of wells into common source of supply and distributing the production thereof among the owners of mineral rights in land outlying the common source of supply. 52 Okl.St.Ann. §§ 85–87, 136–138.

2. Constitutional law ⇐296(1)
Eminent domain ⇐2(7)
Mines and minerals ⇐92

The regulation of the drilling of oil and gas wells by the state under its police power into common source of supply and the distribution of the production thereof among owners of mineral rights in land overlying the common source of supply, as provided by the well-spacing act, does not violate provisions of either State or Federal Constitution prohibiting taking of property without just compensation or without due process of law. 52 Okl.St.Ann. §§ 85–87, 136–138; Const.U.S. Amend. 14, § 1; Const.Okl. art. 2, §§ 7, 23.

3. Constitutional law ⇐154(1)

The regulation of the drilling of oil and gas wells by the state under its police pow-

[illegible] into common source of supply and the distribution of the product thereof among owners of [illegible] rights in land overlying the common source of supply, as provided by [illegible] act, does not violate provisions of [illegible] state or Federal Constitutions forbidding the impairment of contract obligations. [illegible] Okl.St.Ann. §§ [illegible], 136– [illegible] Const. [illegible] art. 1, § 1 [illegible] Okl. art. [illegible] § 15.

[illegible] Statutes [illegible]

The oil [illegible] gas well [illegible] act [illegible] [illegible] Okl.St.A [illegible] 85–87, [illegible] Const. [illegible] 5, § [illegible]

[illegible] Constitutional law ⇐[illegible]

The Legislature may [illegible] laws [illegible] the [illegible] purpose and in [illegible] may [illegible] the power [illegible] the [illegible] law.

[illegible] Constitutional law ⇐62

The oil [illegible] gas well [illegible] for distr[illegible] of power [illegible] the state [illegible] power to the executive department [illegible] through the Corporation [illegible] provisions [illegible] 52 [illegible] art. 4, § [illegible]

7. Statutes [illegible]

[illegible]

8. Statutes [illegible]

[illegible] be [illegible] furnish [illegible] adequate [illegible] purpose [illegible] which it [illegible] means [illegible] necessary for [illegible] within the [illegible] of these [illegible]

9. Evidence [illegible]

[illegible] knowledge [illegible] of [illegible] by [illegible]

its own flowing depends on lifting power [illegible] by pressure of natural gas or water, or both, in and around the common source of supply or oil-bearing portions of sand penetrated by the well.

10. Statutes ⇐47

The oil and gas well-spacing act is not invalid on ground that it is indefinite and uncertain as to standard for regulation and administration, since, due to number and [illegible]ility of conditions and circumstances, [illegible] and equitable standard is pos[illegible] [illegible] Ann. §§ [illegible], 136–138.

11. Appeal and error ⇐40(3)

[illegible] that the oil and gas well spacing act violates due processes clauses [illegible] State and Federal Constitution on [illegible] that no provision is made for judicial [illegible] of the orders of the Corporation Commission [illegible] not before the Supreme Court [illegible] had been taken from the Corporation Commission's order com[illegible] of. 52 Okl.St.Ann. §§ [illegible], 136– [illegible] Const. Amend. 14, § 1; Const. [illegible] art. [illegible]

[illegible] by the Court.

The police power of the state includes [illegible] the correlative rights of owners in a common source of oil and gas [illegible] and this power may be exercised by [illegible] the drilling of wells into said [illegible] of supply and distributing [illegible] thereof among the owners [illegible] in land overlying said common [illegible] as provided by chapter [illegible] 1935, 52 Okl.St.Ann. §§ 85–87 [illegible] without violating either sections 7, [illegible] of article 2 of the Oklahoma [illegible] section 15, article 1, and [illegible] 1 of the Fourteenth Amendment to the United States Constitution.

2. Chapter [illegible], article 1, S.L.1935, 52 Okl.St.Ann. §§ 85–87, 136–138, does not con[illegible] [illegible] delegation of legislative power to the Corporation Commission in violation of section 1 of article 4 of the Constitution of Oklahoma.

3. Chapter [illegible], article 1, S.L.1935, 52 Okl.St.Ann. §§ 85–87, 136–138 is not invalid [illegible] of indefiniteness and uncertainty.

4. Until an order of the Corporation Commission is appealed from the nature of [illegible] remains an abstract question [illegible] will not be considered.

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Appeal from [illegible] Court, Tulsa County; Prentiss E. [illegible] Judge.

Action by [illegible] B. Patterson against the Stanolind Oil & Gas Company and [illegible] Corporation, for the recovery of [illegible] royalty payments in the sum of $[illegible]. From a judgment in his favor for the sum of $824.32, the plaintiff appeals.

[illegible]

A. S. [illegible] W. [illegible], and B. [illegible] for plaintiff in error.

Clay T. [illegible], Guy H. Woodward, Victor C. [illegible], Joseph A. Gill, Jr., and [illegible] S. [illegible] of Tulsa, for defendants in error.

W. A. [illegible], Jr., of [illegible], W. T. [illegible] of [illegible], [illegible] of [illegible], [illegible] A. [illegible] of Tulsa, R. [illegible] F. [illegible] of [illegible] City, and [illegible] of Ada, amici curiae.

DAVISON, Justice.

This action [illegible] the constitutionality of chapter [illegible] article 1, Oklahoma Session Laws [illegible], 52 Okl.St.Ann. §§ 85–87, 136–138, an oil and gas conservation measure commonly known as the well-spacing act, [illegible] certain proceedings had before the [illegible] said Commission [illegible] rules and regulations as to the spacing of oil and gas wells in the different pools of Oklahoma. [illegible] action was commenced in the district court [illegible] by the plaintiff [illegible] royalty owner, against [illegible] defendants [illegible] lessees, [illegible] the sum of $[illegible], allegedly [illegible] the proceeds from [illegible] by said lessees by reason of [illegible] ownership of an undivided one-[illegible] interest in the minerals under the [illegible] of land upon which the production [illegible].

The parties [illegible] referred to as [illegible] in the trial court.

The [illegible] that the plaintiff was entitled [illegible] the sum he prayed for, [illegible] his share of the proceeds of said well [illegible] to the sum of only $824.32 [illegible] tendered [illegible] court. The reason [illegible] assigned for the plaintiff being [illegible] this sum rather than the larger [illegible] he sought were that the well [illegible] the production was derived [illegible] in the center of a 10-acre drilling unit, the creation of which was authorized by order of the Corporation Commission issued on June 18, 1936, in accordance with the provisions of chapter 59, S.L.1935, and that after the issuance of said order the owners of the royalty interests in said drilling unit, other than the plaintiff, were entitled, by the provisions of subdivision (c) of section 3, article 1, of said well-spacing act, 52 Okl.St.Ann. § 87, subd. (c), to the difference between the sum they tendered into court and the sum that the plaintiff prayed for.

At the trial no evidence was introduced except the lease of the defendants, the mineral deed of the plaintiff, and the various documents filed in the proceedings had before the Corporation Commission in which the above-mentioned well-spacing order was issued. The parties stipulated the physical facts concerning the drilling, location, and production of the well in question.

The trial court rendered judgment for the plaintiff for only the amount which the defendants had tendered, and the plaintiff has appealed.

The land upon which the aforementioned order of the Corporation Commission established 10-acre well-spacing is known as "The North Wellston Area" in Lincoln county, and includes 520 acres as shown on the plat below. The only specific portions of this area necessary to mention herein take up an 80-acre tract described as the $N\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 35, Tp. 15 N., R. 2 E., designated by the shaded strips on the plat. Of this tract, the north 25 acres and the south 55 acres are under separate ownership and are covered by separate oil and gas leases jointly owned by the defendants. On the plat below, the 25-acre tract is represented by the portion in darker shading marked tract A, while the 55-acre tract is represented by the portion in lighter shading and is designated as tract B. The plaintiff's mineral deed covers tract A, only. The site upon which the defendants drilled the well in question is in the center of a 10-acre unit in the northeast corner of the 80-acre tract. This unit consists of $6\frac{1}{4}$ acres in tract A and $3\frac{3}{4}$ acres in tract B and is represented by the small heavily outlined square on the plat. As shown by the large dot representing the location of the well, the same is entirely upon tract A in which

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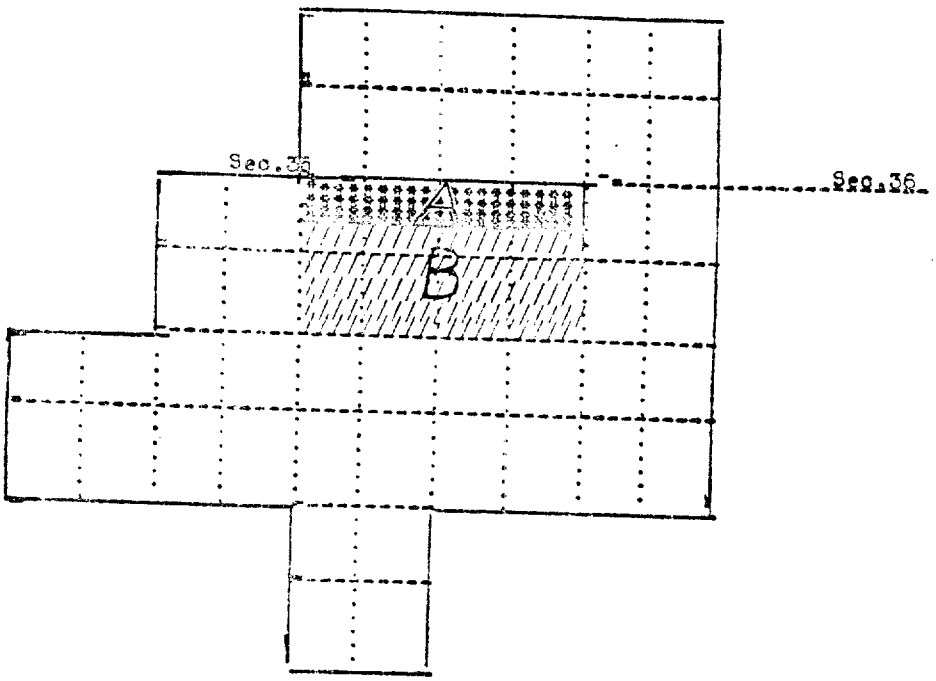
the plaintiff's interest he The well was completed some months prior to the date of the aforesaid spacing order of the commission.



The allegations contained in the plaintiff's reply to the defendants answer which pleaded the proceedings of the Corporation Commission out of which the well-spacing order for the North Wellston area was issued as the basis for their contention that the plaintiff was entitled only to the sum that they tendered instead of the sum he prayed for are substantially as follows: That said proceedings of the commission and the statute authorizing same are violative of the following constitutional provisions, to wit: Section 7, article 2, of the Oklahoma Constitution which prohibits the taking of life, liberty, or property without due process of law, and section 1 of the Fourteenth Amendment to the United States Constitution which contains the same prohibition and provides for equal protection of law to all citizens; section 23, article 2, of the Oklahoma Constitution which prohibits the taking of property for private use; section 59, article 5, of the Oklahoma Constitution which provides for the uniform operation of laws; section 15, article 2, of the Oklahoma Constitution and section 10, article 1, of the United States Constitution which prohibits the impairment of contract obligations; and section 1, article 4, of the Oklahoma Constitution which provides for a distribution of the powers of government.

In this appeal the plaintiff presents essentially the same contentions that he advanced in the trial court in support of the allegations above named, except that he specifies additional error in the retroactive effect which the judgment of the trial court gave the Corporation Commission's well-spacing order in question. This error has been confessed before this court and in this connection the defendants have tendered the additional sum of $47.65, which represents the proportion claimed by the plaintiff of the proceeds of the oil produced by the well in question from the time that it was completed as a producer to the date of the commission's spacing order. Another departure from the issues joined in the trial court is the waiver by plaintiff's counsel, upon oral argument, of one of the contentions previously urged to support the allegation that the plaintiff has been denied due process, to wit, that he was not legally summoned to the proceedings in which the well-spacing order was made and entered.

The questions raised herein can be consolidated into two principal ones and stated as follows: (1) Does the state have the power to enact legislation providing

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[illegible] well-spacing? (2) If it does possess such power, is the same constitutionally exercised by the enactment of chapter 131, Session Laws 1933, 52 Okl.St.Ann. §§ 84–135, and its amendment which is chapter 59, article 1, Session Laws 1935, 52 Okl.St.Ann. §§ 85 [illegible] 136–138, and by the proceedings therein prescribed?

As to the first question, the plaintiff contends that the well-spacing order in question [illegible] of property without due process of law in that it authorizes the distribution of the production of the well in question (as well as all others in the North Wellston pool), in accordance with the provisions of subdivision [illegible] of section 3, article 1, chapter 59, S.L. 1935, 52 Okl.St.Ann. § 87, subd. (c), which reads as follows: "In the event a producing well, or wells, is completed upon a unit where there are two or more separately owned tracts, any royalty owner or group of royalty owners, holding the royalty interest under a separately owned tract, shall share in one-eighth (1/8) of all of the production from the well or wells drilled within the unit in the proportion that the acreage of their separately owned tract bears to the entire acreage of the unit."

In the present case, the defendants' compliance with the above provision allows the owners of the mineral rights in the 3¾ acres [illegible] to share with the plaintiff and his co-owners of the mineral rights in the other 6¼ acres of the unit, the oil and gas produced from the well on said unit, though said well is located entirely upon the surface of the 6¼-acre tract. The plaintiff contends that according to the fundamental rule of oil and gas ownership, the owner of land is entitled to all of such minerals that he is able to reduce to possession thereon and that he [illegible] according to said rule is entitled to his portion of all of the oil and gas produced on said 6¼ acres that is provided for in his mineral deed and the defendants' lease. His contention is that when such portion is reduced by the distribution of this production among the owners of the adjoining 3¾ acres, he is deprived of property without due process of law and that the same is taken for private use without just compensation and that the contractual obligations of both the deed and the lease are thereby abrogated.

The plaintiff's counsel impliedly admit, as they must, that if the power to enact laws for the spacing of oil and gas wells comes within the police power of the state, then this power, when reasonably exercised, supersedes individual property and contract rights, but they contend that the police power does not extend to the power assumed by the Legislature in the enactment of the statutes in question.

The contention of the defendants is that the theory of ownership in oil and gas relied upon by the plaintiff is not applicable to oil and gas derived from a source of supply common to adjoining tracts of land and that the production of the well in question is derived from such a common source of supply. This claim as to the character of the source of supply is supported by the finding to that effect that is incorporated in the order of the Corporation Commission herein attacked and there is no evidence in the record to dispute this finding. Therefore, we must assume that the source of supply of the well in question is common to the land adjoining it and that said pool underlies not only the 6¼ acres of land on which the well is located, but that it also extends beneath the 3¾-acre tract. Thus we have but to see whether the claims of the owners of the land on which the oil and gas is produced to all of said production shall be defeated by the rights of adjoining owners in said pool. The decision of the United States Supreme Court in the case of Ohio Oil Company v. State of Indiana, 177 U.S. 190, 20 S.Ct. 576, 584, 44 L.Ed. 729, was based upon the theory that the right of the owner of land to the oil and gas thereunder is not exclusive but is common to and merely coequal with the rights of other landowners to take from the common source of supply, and therefore that his property rights to said oil and gas are subject to the legislative power to prevent the destruction of the common source of supply. It has already been decided that this police power of the state to prevent the destruction of the common source of supply may be exercised by regulation of the production therefrom. In Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559, 564, 76 L.Ed. 1062, 86 A.L.R. 403, the principles asserted in the Indiana Case, supra, were recognized, and the court said:

"Every person has the right to drill wells on his own land and take from the

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pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction, or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface, and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool." (Citing many authorities.)

The cases which uphold the power of the state to prevent the depletion of a common source of supply of gas and oil by the regulation of production are numerous. The exercise of such power has also been upheld under the provisions of our own State Constitution. C. C. Julian Oil & Royalties Co. v. Copshaw et al., 145 Okl. 237, 292 P. 841; Wilcox Oil & Gas Co. v. State, 162 Okl. 89, 19 P.2d 347, 86 A.L.R. 421; and Sterling Refining Co. v. Walker, 165 Okl. 45, 25 P.2d 312. It has also been held that such regulation could be lawfully exercised by limitations upon the drilling of wells and well-spacing. Marrs v. City of Oxford, 8 Cir., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied 280 U.S. 573, 50 S.Ct. 29, 74 L.Ed. 625; Oxford Oil Co. v. Atlantic Oil Producing Co., 5 Cir., 22 F.2d 507, certiorari denied 277 U.S. 585, 48 S.Ct. 433, 72 L.Ed. 1006; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; Helmerich & Payne v. Kansas Petroleum Corp., 136 Kan. 254, 14 P.2d 663. In Blevins v. Harris, 172 Okl. 90, 44 P.2d 112, this court held that the one-eighth royalty provision of an oil and gas lease was not violated by an order of the board of adjustment authorized by an Oklahoma City ordinance, which provided that the owners of various tracts which had been joined together to constitute a drilling block should participate in the one-eighth royalty of all the oil produced from a well to be drilled on said block. In that case we quoted with approval certain portions of the opinion in Marrs v. City of Oxford, supra. In the Marrs Case, the Circuit Court of Appeals upheld as denying none of the rights, privileges, and immunities guaranteed by the Federal Constitution, a Kansas City ordinance which provided for a distribution among the owners of portions of a city block, shares of the proceeds from a well drilled in the block in the proportion that the size of their parcels bore to the entire area of said block. In both the Blevins Case and the Marrs Case, effect was given to the principle of the correlative rights of adjoining owners announced in the following language of the United States Supreme Court in Ohio Oil Co. v. State of Indiana, supra:

"But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

From the foregoing authorities, it is obvious that it is not beyond the police power of the state to restrict the individual owner's taking from the common source of supply, as well as to authorize a "just distribution" among the various owners of mineral rights in land overlying the common source of supply, of that portion of said supply so taken or reduced to possession by the individual owner. The restriction of drilling by the spacing of wells seems to be a much more feasible and effective method of securing a just distribution for such owners than restrictions upon production after same has already commenced, for it tends to eliminate many distinct faults apparent in such regulations. One of these was pointed out by Judge Kennamer when the case of Champlin Refining Co. v. Corporation Commission, supra, was before the federal District Court, 51 F.2d 823, 834. He said the following of the 1915 conservation law:

"Acreage is ignored and an operator with two 5,000-barrel wells on 5 acres may take out of the common source of supply, under the provisions of section 4, as much oil as an operator with two 5,000-barrel wells on 20 acres in the same field. Proportionate taking per well is wholly inequitable if the Legislature intends to secure 'a just distribution, to arise from the enjoyment * * * of their privilege to reduce to possession,' because the operator with 20 acres has four times as much privilege as the operator with 5 acres in the same field."

The "wasteful necessity of drilling offset wells" is another vice which is minimized by such restrictions on drilling. Helmerich & Payne v. Roxana Petroleum Corp., 136 Kan. 254, 14 P.2d 663. One of the essentials to the preservation of the common source of supply or the prevention of its waste is the preservation of the reservoir energy necessary to production therefrom by the natural process of flowing. This has been recognized by the courts and the power of the state to prevent the waste of said reservoir energy is beyond successful contradiction. People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Bandini Petroleum Co. v. Superior Court of Los Angeles County, California, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826; Champlin Refining Co. v. Corporation Commission, supra, and others. The restriction of drilling limits the number of penetrations in the reservoir and it seems logical that the less the reservoir is punctured, the less the supply of reservoir energy is likely to be depleted.

[1-3] Thus, in our opinion, it is well established that the police power of the state extends to protecting the correlative rights of owners in a common source of oil and gas supply and this power may be lawfully exercised by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply. As to the charge that such regulations deprive the individual of property without compensation or due process of law, the defendants very convincingly demonstrate that the enforcement of chapter 59, art. 1, S.L.1935, 52 Okl.St.Ann. §§ 85–87, 136–138, though it may reduce the plaintiff's immediate or current receipts from the production of the well in question, yet, in protecting the common source of supply from sporadic drilling, it will tend to prolong his receipts so that their total or his ultimate benefit from said pool will be greater than it would be if the number of wells drilled into the pool was not limited. However, be that as it may, since the plaintiff's mineral deed did not grant him the benefit, use, or possession of any definite amount of minerals nor the right to reduce any certain amount of minerals to possession, but only gave him an ownership in the oil and gas that might be captured or reduced to possession, and since the right to capture from a common source of supply may be limited or restricted by the state, it may be said that such a grant can confer no right or title in property that is not already subject to being limited, restricted, or modified by the state's said power. The extent of private contract in such matters being at all times subject to limitation by the inherent police power of the state, any muniment of title is impotent to assume or to convey any property right in the common source of supply superior to or entirely independent of said sovereign power. Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the State or Federal Constitution which prohibit the taking of property without just compensation or without due process of law and forbid the impairment of contract obligations. As we view it, the property here involved has not been taken or confiscated: its use has merely been restricted and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect. In Brown et al. v. Humble Oil & Refining Company, supra, the following words were quoted with approval from Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, 478:

"All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exer-

tion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law."

[4] The plaintiff's contention that the statute in question does not have a uniform operation and therefore violates section 59 of article 5 of the Oklahoma Constitution is made in connection with and based upon his assertion that it allows the taking of private property for private use. As we have found the latter contention ineffective, and we perceive of no other respect in which it might seriously be considered contrary to that section of the Constitution, we conclude that section 59, article 5, is not violated by said act.

[5, 6] Next, we come to the consideration of whether or not the statute in question is a lawful exertion of the state's power to regulate the drilling of oil and gas wells. The plaintiff's contention is that, admitting the state possesses such power, still the act in question is an unlawful use of same, because it violates section 1, article 4, of the Oklahoma Constitution, which provides for the distribution of the powers of the state to the legislative, judicial, and executive branches of its government. In support of this contention, plaintiff's counsel assert that the statute complained of undertakes to delegate to the executive department, acting through the Corporation Commission, an administrative board, the legislative power which, they say, can only be exercised by the Legislature itself. Counsel recognize the well-settled rule that the Legislature may enact a law, complete within itself, the object of which is a general purpose, and, for the purpose of carrying the act into operation, may delegate to administrative agencies the power to prescribe details in connection with the administration and enforcement of said law. The claim, however, is that the well-spacing act is not complete within itself as it prescribes no standard by which the Corporation Commission shall be governed in deciding whether or not an area shall be divided into spacing units and what the character of the units shall be, after evidence such as described in subdivision (b), section 3, of the act, 52 Okl. St.Ann. § 87, subd. (b), has been received and therefore that said law leaves to the commission more than just the details of its administration and enforcement. This argument assumes that the Corporation Commission is nothing more than an administrative body and herein lies one of its fallacies. By the Constitution itself, the Corporation Commission was granted powers over transportation and transmission companies which are legislative and judicial as well as executive in their nature, and the extension by legislative enactment of the field over which these powers can be exercised is authorized by section 35, article 9, of the Constitution. Russell v. Walker, 160 Okl. 145, 15 P.2d 114, 119. The enactment of statutes such as the one in question cannot be held to violate section 1, article 4, of the Oklahoma Constitution for said section is inapplicable to the Corporation Commission. In the Russell Case, supra, we said:

"The subject of the first part of article 4, supra, is powers of government. The subject of the second part is departments of government. While it is provided in the second part of the article that the legislative, executive, and judicial departments of government shall be separate and distinct and that neither shall exercise the powers properly belonging to either of the others, those statements are coupled with an exception, as follows, 'except as provided in this Constitution.' One of the exceptions is the corporation commission, which, by the provisions of article 9, supra, was vested with legislative, executive and judicial authority. The provision that the legislative, executive, and judicial departments of government shall be separate and distinct and that neither shall exercise the powers properly belonging to either of the others, by reason of the exception in article 4, supra, is not applicable to the corporation commission."

Because of the character of the Corporation Commission's grant of powers by our State Constitution, we must reiterate with reference to the authorities cited by plaintiff's counsel in this case, what we said in the Russell Case, as follows:

"For that reason the decisions from other states cited by the petitioners are neither persuasive nor controlling, in the absence of a showing that the Constitutions of the states in which those decisions were rendered contained the broad grant of legislative power which is contained in section 35, supra."

All of the cases cited by the plaintiff as authority for his contention have reference to agencies possessing powers of purely administrative character and lack the extraordinary powers granted the Cor-

poration Commission by the Constitution of Oklahoma.

[7-9] Though we believe in the principle that an act whose enforcement is trusted to any agency of the government should be definite and certain enough to let the agency know what the Legislature intended to provide for and how the legislative will is to be carried out in the administration and enforcement of the act, still we must also recognize that there are certain subjects of legislation in which the application of this principle is necessarily limited. In our estimation, well-spacing is such a subject. We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly, just when and under what conditions an oil-producing area should be divided into drilling units, and what size and shape the units should be. The best manner of well-spacing or a criterion by which this might be arrived at could not be anticipated or prescribed in advance of the opening of an oil field because of the difference between the conditions in one field and those in another and the variability of the effect which such conditions have upon the objects to be obtained. The impossibility of fixing a definite standard for the administration and enforcement of oil and gas conservation measures has been given great weight in the judicial determinations of their validity in other jurisdictions. See Brown v. Humble Oil & Refining Co., supra, and People v. Associated Oil Company, 211 Cal. 93, 294 P. 717, 724. In the latter of these cases, the court was considering the validity of a statute for the prevention of the waste of natural gas. With reference to the contention that the standard set forth in said act was objectionable on account of its vagueness and uncertainty, the court said:

"Therefore, because of the many and varying conditions peculiar to each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion of gas to the amount of oil produced, it may be said that it would be impossible for the Legislature to frame a measure based on ratios or percentages or definite proportions which would operate without discrimination, and that what is a reasonable proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case."

In our opinion the validity of the statute in question should be tested by the rule stated in Vol. 25 of Ruling Case Law at page 810, as follows:

"An act will not be declared inoperative and ineffectual on the ground that it furnishes no adequate means to secure the purpose for which it was passed, if men of common sense and reason can devise and provide the means, and all the instrumentalities necessary for its execution are within the reach of those intrusted therewith."

The well-spacing sections of the statute in question are obviously designed to prevent waste by limiting the number of wells drilled into the common source of supply to a number which will enable the recovery of the most oil from said supply. It is a matter of common knowledge that the recovery of oil through a well by the natural process of its own flowing depends upon the lifting power exerted by the pressure of natural gas or water or both in and around the common source of supply or oil-bearing portion of the sand penetrated by the well. This lifting power which brings the oil from its reservoir through the well to the surface is generally known as "reservoir energy" by those conversant with the more or less scientific facts of oil production. Therefore, the amount of oil which can be recovered by the natural flowing of wells from any given reservoir depends upon the amount, character, and availability of said reservoir energy. By mathematical calculation, it can be determined to the extent of reasonable certainty just how much pressure is necessary to lift the production of a well to the surface from each particular common source of supply. The amount of reservoir energy as well as the amount of oil present in a common source of supply can now be determined to a fair degree of certainty without extensive drilling. Considering these sums together with the amount of energy necessarily expended in bringing said oil to the surface, it can be ascertained how the production should best be regulated to procure the greatest recovery from the common source of supply. Regulation, of course, includes a determination of the location of the wells and the amount of oil each should be allowed to produce, so that the reser-

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voir energy will not be exhausted before all of the recoverable oil is wrested from the common source of supply. In this determination, there are many physical facts of the particular mineral area which must be taken into consideration, such as the character and extent of the reservoir; the dip, depth, thickness, porosity, and permeability of the producing sand; the nature, character, and location of the reservoir energy, etc. Such information can be obtained in advance of the complete development of a given area by geological calculation and correlation upon data compiled from core drilling and siesmographing as well as surface surveys and the discoveries made in neighboring wells. In performing its functions as a fact-finding body, the Corporation Commission is empowered by chapter 131, S.L.1933, 52 Okl. St.Ann. §§ 84–135, and chapter 59, article 1, S.L.1935, 52 Okl.St.Ann. §§ 85–87, 136–138, to take evidence upon all of these subjects and others found by scientific investigation and research to have a bearing upon securing the greatest possible recovery from the common source of supply and by application of the principles of physics, chemistry, geology, and mathematics, can determine by certain calculations, at what intervals of space, wells should be located in order to bring about such recovery and thus prevent waste and also protect the correlative rights of all of the owners of interests therein. Such desirable results have not been obtained and cannot be obtained from sporadic drilling. Therefore, since it is a matter of undisputed fact that the kind of well-spacing unit which will induce the greatest recovery from a particular oil and gas reservoir or common source of supply is a matter which can be determined within the limits of human knowledge and to a fair degree of certainty and since the Corporation Commission has been granted powers withheld from ordinary administrative agencies, which enable it to function as a legislative as well as a judicial and executive body, it follows that the commission, within itself, can determine the character of drilling unit best adapted to preserving the reservoir energy and the correlative rights of the owners in a common source of supply, unlimited by standard except the rules of procedure provided and the objects expressed in the two waste-prevention statutes enacted as chapter 131 of the Oklahoma Session Laws of 1933 and chapter 59, article 1, of the Oklahoma Session Laws of 1935.

The uncertainty and indefiniteness of said statutes is also advanced as a ground for the contention that they violate the due process clauses of the Oklahoma and United States Constitutions. Plaintiff's counsel refer to the opinion of the United States Supreme Court in the Champlin Case, supra, as if it were authority for their contention. In that case, the court declined to uphold the validity of section 7962, O.S.1931, 52 Okl.St.Ann. § 278 note, which provided a penalty for the violation of other sections of the 1915 waste-prevention statute because said statute contained no definition of the term "waste." The rule followed in that instance was quoted from the opinion in Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, as follows:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In the Champlin opinion, the court further states:

"The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling, and, upon the trial of one charged with committing waste in violation of the act, the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest

in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in section 4 (sec. 7957 [52 Okl.St.Ann. § 274]) would require regular gauging of all producing wells in each field; a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the act.

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

With reference to counsel's insistence that we apply to the well-spacing sections of the 1935 act, the same rule with reference to indefiniteness and uncertainty that was applied to the penal section of the 1915 act in the above-quoted opinion, we cannot help but observe that the United States Supreme Court might have applied the rule to defeat the regulatory provisions of the 1915 law had it found the rule appropriate for such an extensive application. It does not appear from the opinion in the Champlin Case whether or not the specific objection was made to the regulatory provisions of the act, but it is certain that it was there contended that these provisions violated the due process clause, which is the basis of the rule as to indefiniteness and uncertainty and that contention was not upheld.

In reviewing the history of this constitutional limitation of indefiniteness and uncertainty upon the validity of statutes, we find good reason for a studied limitation of its application. 45 Harv.L.Rev. 160; 1 Geo.Wash.L.Rev. 114; 8 Wisconsin L.Rev. 176; 11 Tex.L.Rev. 212. The requirement of definiteness and certainty was first applied to criminal statutes only, and though at first it was not based upon any certain constitutional provision, it developed from the rule of construction that penal statutes are to be construed strictly in favor of the accused. See Lewis' Sutherland, Statutory Construction, 2d Ed., 1904, chap. XIV. Later, in seeking constitutional basis for this limitation in criminal cases, the Sixth Amendment to the United States Constitution was relied upon, when it was discovered that the accused was not being "informed of the nature and cause of the accusation." Thereafter, in cases brought to test the validity of statutes, under State Constitutions which contained no provision such as the Sixth Amendment to the Federal Constitution, due process clauses were used as a basis for holding such statutes unconstitutional. Among the first of these cases was Louisville & Nashville R. Co. v. Railroad Commissioner of Tennessee, C.C., 19 F. 679, in which a Tennessee statute granting the Railroad Commission of that state the power to fix reasonable railroad rates and providing a penalty for the collection of "unreasonable" rates was declared invalid. The reason given by the court for declaring the act unconstitutional on the ground of uncertainty was that the enforcement thereof would result in the delegation to a jury of the power of deciding in a prosecution under the act the unreasonableness of a given rate without any standard having been set forth by the Legislature by which a verdict was to be reached. The rule of uncertainty has also been applied by the United States Supreme Court in the wage scale cases, the most notable of which is Connally v. General Construction Co., supra. However, the application of this rule to such cases has not been universal. See Ruark v. International Union of Operating Engineers, 157 Md. 576, 582, 146 A. 797, 799; Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628, 50 A.L.R. 1473; State v. Tibbetts, 21 Okl.Cr. 168, 205 P. 776. In cases where it would be very difficult to prescribe by a statute a definite standard for its administration, the United States Supreme Court has refused to apply the rule. Examples of this are found in Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 355, 48 L.Ed. 525, and Mutual Film Corporation v. Industrial Commission of Ohio et al., 236 U.S. 230, 35 S.Ct. 387, 392, 59 L.Ed. 552, Ann.Cas.1916C, 296. In the Buttfield Case the court had before it for consideration the constitutionality of a congressional act designed to prevent the importation of impure and unwholesome tea. The act made it unlawful to import to the United States tea which was inferior in purity, quality, and fitness for consumption to the standards fixed by the Secretary of the Treasury. In urging the unconstitutionality of said

act, it was argued that this delegation of power to the Secretary of the Treasury was an unconstitutional delegation of legislative power to an administrative official, for it set forth no criterion by which the Secretary should be guided in fixing the standards of purity, quality, and fitness by which the tea importations were to be judged. In deciding that this act was not an unlawful delegation of legislative power, the court followed the rule stated in Marshall Field & Co. v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294, and spoke the following:

"We may say of the legislation in this case, as was said of the legislation considered in Marshall Field & Co. v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The above quotation is sufficient to reveal that the courts recognize a very real and practical limit to the degree of definiteness and certainty which can be attained in legislation upon some subjects and we believe that the matter of well-spacing is one of those subjects.

In the Mutual Film Corporation Case, supra, there was before the court for consideration an Ohio statute, 103 Ohio Laws, p. 399, creating under the authority and superintendence of the Industrial Commission of that state a board of censors for motion picture films and providing for the imposition of a penalty for each exhibition of films without the approval of the board and providing that "only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

In that case the court said:

"The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men, and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite Gundling v. Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U.S. 380, 32 S.Ct. 152, 56 L.Ed. 240; Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435; Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525. See also, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417. If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible."

[10] From our review of the decisions of all courts in cases involving statutes alleged to be too indefinite and uncertain to be valid, we have reached the conclusion that there is irreconcilable conflict of opinion and grave doubt and uncertainty as to the application of the doctrine. To us it seems that the exigencies of the particular case, in the final analysis, has been the controlling factor in such decisions. One thing of which we are certain, however, is that the reason which brought about the original application of the rule with reference to definiteness and certainty in criminal statutes does not exist in the present case. Here, the liberty or freedom of the person of no one is involved. This case does not invoke a consideration by us of the doctrine of uncertainty as it would be applied to penal statutes as did the Champlin Case, supra, in view of the fact that plaintiff is not being proceeded against under the penal provisions of the 1933 act. This case merely involves the use of certain alleged property rights of the plaintiff, and in the well-spacing act we believe that the Legislature has gone as far toward fixing a

standard for the regulation of these rights as could be done, considering the nature of the things sought to be regulated and the number and variability of conditions and circumstances which have a bearing upon attaining the expressed objects of the act. It would be impossible for the Legislature to formulate a standard which would justly and equitably measure the application of the principles of well-spacing to every common source of supply, because of the wide variety of factors to be considered, as hereinbefore noted.

[11] Another ground upon which the plaintiff urges that the act violates the due process clauses of our State and Federal Constitutions is that no provision is made therein for judicial review of the orders of the commission. The provisions of said law which provide for appeal from the orders of the commission with reference to well-spacing are section 3, chapter 59, article 1, S.L.1935, 52 Okl.St.Ann. § 87, and sections 28, 29, and 30 of chapter 131, S.L.1933, 52 Okl.St.Ann. §§ 111–113. It is argued that the review provided for in these sections is legislative rather than judicial, and that therefore no judicial review is provided. However, this question, like that of the validity of the penal sections of chapter 131, supra, is not properly before the court at this time. A principle of long standing in constitutional law is that "a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." See Cooley, Constitutional Limitations, 6th Ed., 196; 11 American Jurisprudence 748; 12 C.J. 780; Sarlls v. State ex rel. Trimble et al., 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718, 727; State of Minnesota ex rel. Clinton Falls Nursery Co. et al. v. Steele County, Board of County Com'rs et al., 181 Minn. 427, 232 N.W. 737, 71 A.L.R. 1190; People of State of California v. Irwin L. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331, 1336. This principle is applicable to objections to separable portions of an act as well as those to the entire act. See Stine v. Lewis, 33 Okl. 609, 127 P. 396, in which this rule was observed. Constitutional questions are not dealt with abstractly. Bandini Petroleum Co. et al. v. Superior Court, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826. In Aikins v. Kingsbury, 247 U.S. 484, 38 S.Ct. 558, 560, 62 L.Ed. 1226, the Supreme Court of the United States said: "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right."

There it was held: "A purchaser of public land who offers no excuse for his confessed default is not in a position to challenge the validity of a forfeiture statute on the ground that the omission to provide for a judicial review of the default renders the statute invalid as taking his property without due process of law, since such omission does not injure him, and if supplied would not benefit him."

A consideration by use of the nature of the review provided by the statute in question upon the appeal of orders of the Corporation Commission would have no bearing on the rights of the plaintiff in this action, for no appeal has been taken from the order complained of. Since no attempt has been made to secure an appellate review of said order, it is of no consequence with reference to the subject-matter of this action, whether such review, if invoked, would have been legislative or judicial in its nature. Finding this question purely an abstract one in this case, we decline to consider it here.

As we have found the so-called "well-spacing act" or chapter 131, Session Laws of Oklahoma 1933, as amended by chapter 59, article 1, Session Laws of Oklahoma 1935, 52 Okl.St.Ann. §§ 84–138, valid in all of the respects that its validity is properly question in this case, it is our opinion that the judgment of the trial court should be affirmed, but that the amount thereof should be increased to $872 in conformity with the confession of error filed in this court by the defendants; and it is hereby so ordered.

OSBORN, C. J., BAYLESS, V. C. J., and RILEY, WELCH, PHELPS, CORN, and HURST, JJ., concur.

GIBSON, J., concurs in conclusion.

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From: Brooks, David K
Sent: Thursday, June 21, 2001 11:01 AM
To: Stogner, Michael
Subject: Case 12601; Bettis, Boyle and Stovall

Mike:

I have in front of me the opposing briefs on this matter. Although my instincts favor granting the applications for the reasons I discussed with you previously, Sun-West's brief makes a telling point with reference to the statutory language.

I would like to consider this some more, and do a memorandum with a complete exposition of my thoughts. However, I obviously need to review the prior OCD rulings that have been cited. I understood you were going to pull and review those, and would appreciate if you would forward copies thereof to me.

Thanks,

DB

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W. THOMAS KELLAHIN*

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

JASON KELLAHIN (RETIRED 1991)

OIL CONSERVATION DIV.
01 AUG 14 PM 1:52

August 14, 2001

HAND DELIVERED

David Brooks, Esq.
Oil Conservation Division
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: compulsory pooling
excessive or unreasonable burdens

Dear Mr. Brooks:

Enclosed for your information are copies of memorandums which I have filed in various compulsory pooling cases dealing with requests to set aside excessive burdens. To the best of my recollection, the Division has consistently decided it had the authority to set these burdens aside and has exercised that authority to do so.

Very truly yours,

W. Thomas Kellahin

KELLAHIN AND KELLAHIN
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March 31, 1997

Mr. David R. Catanach
Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87504

HAND DELIVERED

Rand Carroll, Esq.
Oil Conservation Division
2040 South Pacheco
Santa FE, New Mexico 87504

HAND DELIVERED

Re: ***MEMORANDUM***
NMOCD Case 11722
Application of Nearburg Exploration Company, L.L.C.
for compulsory pooling, Lea County, New Mexico

Gentlemen:

On behalf of Nearburg Exploration Company, please find enclosed our Memorandum in support of the Division's jurisdiction and authority to reduced the excessive overriding royalty burdens in this case which was heard on March 20, 1997.

Very truly yours,

W. Thomas Kellahin

cc: Nearburg Exploration Company, L.L.C.
Attn: Duke Roush

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. 11722

APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

NEARBURG EXPLORATION COMPANY'S MEMORANDUM

This matter is before the Division on the application of Nearburg Exploration Company, L.L.C. ("Nearburg") for an order pooling all mineral interests from the surface to the base of the Morrow formation underlying the E/2 of Section 28, Township 20 South, Range 33 East, NMPM, Lea County, New Mexico.

BACKGROUND

Included in Nearburg's application is a request that sixteen overriding royalty interests totalling 34.6875% which burden the Murphy Petroleum Corporation's net revenue interest in the SW/4SE/4 are an excessive overriding royalty burden ("ORR") which should be proportionately reduced to 12.5% in order to provide the necessary minimum economics to support drilling, completing and operating this well.

Currently, Murphy Petroleum Corporation's net revenue interest in the SW/4SE/4 is 52.8125% because it is burdened with a 12.5% federal royalty and 34.6875% overriding royalty burdens. If these total overriding royalty burdens are reduced to 12.5% it will increase Murphy Petroleum Corporation net revenue interest to 75% which will result in a 2.11% return on investment and a 24.97% rate of return.

ISSUE

It is the compulsory pooling practice of this Division that, pursuant to a compulsory pooling order, the operator may recover the nonconsenting working interest owner's share of costs plus a risk penalty only out of the nonconsenting working interest owners share of production and not out of the share allocated to royalty owners and overriding royalty owners ("nonoperating interests"). In order to take advantage of that practice, a working interest owners might burden its interest to the point it becomes useless. Obviously, the larger the royalty interest and other nonoperating interest burdens are, the smaller is the remaining production that is attributable to the non-consenting working interest owners and to which the participating working interest owners must look in order to recover the non-consenting working interest owner's share of costs plus the appropriate penalty.

The Division is concerned that the compulsory pooling provisions of the New Mexico "Oil and Gas Act" Section 70-2-17(C) NMSA (1978) and the compulsory pooling orders issued pursuant thereto will become useless if consenting or non-consenting working interest owners can avoid the costs and penalty factor of a compulsory pooling order simply by reducing their net revenue working interest percentage by creating excessive nonoperating right burdens.

The issue is whether the Division has jurisdiction and authority to alleviate that problem by any of the following options:

(1) placing the economic consequences of the excessive ORR directly on the ORR interest owner by **permanently** reducing the overriding royalty burden to a percentage that is not excessive;

(2) shifting the economic consequences of the excessive ORR directly on the ORR interest owner **until the well pays out its costs and penalties** by **temporarily** reducing the overriding royalty burden to a percentage that is not excessive; or

(3) placing the economic consequences of the excessive ORR directly on the working interest owner by requiring the working interest owner whose interest is subject to excessive ORR burdens to pay his percentage of the costs and penalties involved as if the excessive ORR did not exist.

AUTHORITY

Nearburg contends that the Division has the necessary jurisdiction and authority to alleviate this problem by doing any of the above.

The Commission has extensive statutory authority granted to it by the Oil and Gas Act. **Santa Fe Exploration Co. v. Oil Conversation Com'n,** 114 N.M. 103, 835 P.2d 819 (1992). **Continental Oil Co. v. Oil Conservation Comm'n**, 70 N.M. 310, 373 P.2d 809 (1962).

Pursuant to Section 70-2-6 NMSA (1978), the New Mexico Legislature has delegated to and charged the Oil Conservation Division of New Mexico with the jurisdictional authority over **all matters** relating to the conservation of oil and gas:

> It shall have jurisdiction, authority, and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas...."

More specifically, in Section 70-2-19(C) NMSA (1978), the New Mexico Legislature has explicitly granted to the Oil Conservation Division the jurisdiction to decide the terms and conditions of compulsory pooling orders "[F]or the purpose of determining the portion of production owned by the persons owning interests in the pooled oil or gas or both..."

There are no limitations or restrictions contained in Section 70-2-17(C) which preclude the Division from setting aside, reducing or otherwise declaring invalid excessive overriding royalty burdens. In fact the Oil and Gas Act specifically authorizes compulsory pooling of all owners **including** working interest, royalty and overriding royalty interest owners.

While Section 70-2-17(C) states the Division's order "may include a charge for risk....which charge for risk shall not exceed two hundred percent of the nonconsenting working interest owner's or owners' prorate share of the cost of drilling and completing the well" that does not preclude the Division from determining that a nonconsenting working interest owner's "prorata share" must be increased and corresponding decrease his ORR burdens so that the well can be economically drilled and completed.

Parties by private contract, agreement or assignment, cannot circumvent or preclude the Commission for exercising its jurisdiction and authority. **Patterson v. Stanolind Oil & Gas Co.**, 182 Okla 155, 77 P.2d 83 (1938).

As the Commission has jurisdiction over all categories of owners and the authority to determine the allocation of drilling and completing costs among working interest owners, surely it has jurisdiction to determine who those working interest owners are and what percentage of their gross working interest shall be subject to such costs and penalties.

The first state compulsory pooling statutes were enacted in New Mexico in 1935.[1] While there is no case law in New Mexico specifically on this point, there have been four such cases in Oklahoma. In the first two cases, the Oklahoma decisions left open the resolution of this question [2] which was finally addressed in **O'Neill v. American Quasar Petroleum Co.** 617 P.2d 181 (Okla 1980) and in **North American Royalties Inc. v. Corporation Comm'n**, P.2d 539 (Okla. App. 1984).

In New Mexico, a party whose interest is pooled by order of the Division may elect:

> (1) to pay his share of the costs and receive a working interest share of production; or
>
> (2) to be carried by the operator with the carried costs to be satisfied out of production **plus** a penalty factor and thereafter to receive a working interest share of production.

In Oklahoma, a party whose interest is pooled by order of the Commission may elect among the following options:

> (1) to pay his share of the costs and receive a working interest share of production;

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[1] Texas does **not** allow compulsory pooling. Oklahoma's pooling statute which is substantially different from New Mexico's was also enacted in 1935.

[2] See **Youngblood v. Seewald**, 299 F.2d 680 (10th Cir. Okla 1961) and **Holmes v. Corporation Comm'n**, 466 P.2d 630 (Okla. 1970).

(2) to be carried by the operator with the carried costs to be satisfied out of production **plus** a penalty factor **and** thereafter to receive a working interest share of production; or

(3) to sell his working interest to the operator for a bonus and a retained overriding royalty percentage the amount of which **is determined** by the Commission.

This last option which is **not** available in New Mexico, has afforded a unique solution in Oklahoma to the issue of how to solve the problem of excessive nonoperating burdens such as excessive overriding royalties, production payments or net profits interest. In **North American Royalties Inc. v. Corporation Comm'n**, P.2d 539 (Okla. App. 1984), the Oklahoma Court of Appeals, relied upon **O'Neill v. American Quasar Petroleum Co.** 617 P.2d 181 (Okla. 1980), and held that the Oklahoma Commission's ability to set the amount of bonus provided a mechanism to relieve the operator of the problem of paying the same consideration to a working interest burdened with excessive burdens as it would to a working interest without such burdens.

Because Oklahoma's pooling statute is limited to pooling only working interest and unleased mineral interests, the Oklahoma Supreme Court has held that its Commission lacks the power to change an excessive overriding royalty into a working interest. **O'Neill v. American Quasar Petroleum Co.** 617 P.2d 181 (Okla 1980).

O'Neill, supra, involved a 77-acre working interest which was burdened by 4 overriding royalties totalling 9+% of gross production, two of which had the option of converting to 6.25% working interests on payout. The Oklahoma Commission force pooled this interest into a 640-acre unit, offering these ORR owners the alternative of participating in drilling or receiving reduced fractional production shares in proportion to their ownerships and acreage.

In a 5-4 decision, the court held the Commission may not convert these interests from expense free to expense bearing status.

The Oklahoma decision in **O'Neill**, supra, is distinguishable from the law in New Mexico on several grounds:

(1) In Oklahoma, unlike New Mexico, when an owner of a working interest elects not to participate in a unit well, electing rather to accept a bonus or royalty in lieu thereof, that working interest becomes the property of the operator, and the interests of the ORR owners do not come from the original lessee's interest but are attributable to the unit operator. See **Youngblood v. Seewald**, supra.

(2) In New Mexico, the compulsory pooling statute specifically authorizes the pooling of royalty interests. See Section 70-2-17(C) NMSA (1978), while Oklahoma's pooling statute is specifically limited to working interest owners and unleased mineral owners. [3]

(3) In Oklahoma, the creation of a drilling and spacing unit "pools" royalty interests by operation of law, but working interests are pooled by voluntary agreement or a separate Commission order. **Whitaker v. Texaco, Inc.** 283 F.2d 169 (Okla. 10 Cir 1960).[4]

It is of particular interest to note the well reasoned dissents in **O'Neill**, supra, which are highly critical of the Oklahoma Commission for its "utter failure to make essential explanatory findings as to the very basis upon which its determination is sought to be rested" and which urged that:

"contractual rights relating to overriding royalty interests, production payments, etc., may be amended and modified [by the Commission] to the extent necessary to conform to the requirements of forced pooling..."

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[3] In Oklahoma, the royalty and ORR owners are "pooled" by operation of law with the entry of a spacing order establishing well spacing. See **O'Neill**, supra, at page 184.

[4] Oklahoma's compulsory pooling statute is specifically limited to working interest and unleased mineral owners and does not include royalty or ORR owners.

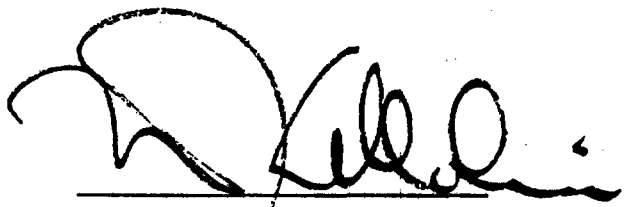
In prior New Mexico Oil Conservation Division cases, the Division has decided similar cases by entering orders which assisted the operator whose spacing units contained excessive nonoperating burdens.[5]

CONCLUSION

Nearburg concurs in the suggestion made by William & Myers[6] that it may be necessary for the Division to reduce or eliminate excessive nonoperating interests or to subject them to the burden of operating expenses.

In such instances, the Division must and does have the power to deal with excessive nonoperating burdens by being able to reach the various burdens for necessary adjustment of the working interest value. In New Mexico, unlike Oklahoma, there is no statutory impediment to allowing flexibility in allocating lease obligations in order to prevent waste and protect correlative rights.

Respectfully submitted,



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[5] See OCD Case 11472 (Order R-10552), Case 8640 (Order No. R-7998), Case 8859 (Order No. R-8047), Case 7922 (Order No. R-7335).

[6] See Williams and Meyers, **Oil and Gas Law**, Section 944, page 680 (1997).

STATE OF NEW MEXICO

DEPARTMENT OF ENERGY AND MINERALS

OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION
OF RIO PECOS CORPORATION FOR
COMPULSORY POOLING, EDDY COUNTY,
NEW MEXICO

CASE 7922

RIO PECOS CORPORATION MEMORANDUM

ISSUE: CAN A LESSEE AVOID THE APPLICATION OF THE NEW MEXICO FORCE POOLING STATUTES BY CREATING AN EXCESSIVE OVERRIDING ROYALTY BURDEN AFTER NOTICE OF A FORCE POOLING APPLICATION?

FACTS:

On June 24, 1983, Rio Pecos Corporation filed a compulsory pooling application with the New Mexico Oil Conservation Division. On June 23, 1983, a copy of that pooling application was mailed to Ralph Nix and Loneta S. Curtis.

The proration unit to be pooled consists of the N/2 of Section 2, T18S, R28E, NMPM, Eddy County, New Mexico. This half section consists of various separate State of New Mexico oil and gas leases.

Ralph Nix and Loneta Curtis are the oil and gas lessees of State of New Mexico Lease E-6946-3 consisting of 40 acres being the NE/4NW/4 of Section 2.

After receiving notice of the application to pool his interest, Ralph Nix assigned a 50% of 8/8ths Overriding Royalty to Sarah Garretson, the daughter of Mr. Curtis, the other lessee.

PROBLEM:

(1) The problem arises because Section 70-2-17(c) NMSA-1978 provides that costs of the well and the risk factor applies only to non-consenting mineral and working interest owners and not to royalty or overriding royalty owners:

"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 prorata 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 two hundred percent of the nonconsenting working interest owner's or owners' prorata share of the cost of drilling and completing the well."

CLAIM OF RIO PECOS CORPORATION:

It is the claim of Rio Pecos Corporation that Ralph Nix created an excessive overriding royalty burden against his interest as a subterfuge to minimize the extent that his interest would be subject to his proportionate share of the costs of the well and the risk factor penalty.

The forced pooling statutes in their present form become useless if non-consenting working interest owners can avoid the penalty and costs factors of a pooling order simply by creating excessive overriding royalty burdens. In certain situations, that excessive overriding royalty burden could be so high as to make the entire proration unit uneconomic thus precluding the operator from drilling a well despite having obtained a pooling order.

POSSIBLE SOLUTIONS:

Possible solutions to this problem include the following:

1. One possible solution to avoid this unacceptable practice would be to apply the risk factor and costs assessments to the non-consenting parties based upon the percentage of interests as they exist on the date the non-consenting parties are first notified of a compulsory pooling application.

2. Another possible solution would be to declare that some percentage is a fair and reasonable royalty and overriding royalty and treat the excess as a working interest until payout of the penalty and well costs when it would revert back to a royalty interest.

3. Another possible solution would be to delete from participating in the proration unit the lease with the excessive royalty burdens,ie, approve a non-standard proration unit for the operator.

4. Seek legislation that would specifically amend the pooling statute to provide relief.

5. In those situations where it is appropriate enter a pooling order pooling the non-consenting working interest and royalty owners and provide that they make an election to voluntarily reduce the royalty burdens to some percentage within a specific period of time or declare that that tract be excluded from the proration unit and approve a non-standard proration unit.

6. In those situations where an excessive royalty burdened lease cannot reasonably be excluded from the proration unit, enter a pooling order pooling the non-consenting working and royalty owners and providing that that portion of the overriding royalty or royalty interest that is excessive shall be treated as a working interest until the costs of the well and the risk factor are repaid to the operator.

LEGAL AUTHORITY:

Our research has discovered only one reported case which addresses whether a lessee may avoid the application of a force pooling statue by creating an excessive overriding royalty burden.

It is O'Neill vs. American Quasar Petroleum Co., 617 P. 2d 181 (Oklahoma). O'Neill is a 5-4 decision of the Oklahoma Supreme Court. The majority recognized that a lessee may, in bad faith, burden a lease with overriding royalties to the extent that the lease becomes uneconomic. However, the Supreme Court held that the resolution of this problem was for the legislature not for the courts as follows:

> "If the Commission may not require an override owner to participate in the drilling operation and share the costs thereof, and if, as noted above, the owner of a lease may pass unbearable overide burdens to third parties in contemplation of a pooling order which will transfer the burden of satisfying those overrides to the owner of the working interest when the lessee chooses not to participate, it is conceivable

> that a lessee acting in bad faith might burden a lease to the point it becomes useless. The existence of such a potential problem does not militate, in and of itself, that the Legislature has afforded the Corporation Commission the power to change an overriding royalty into a working interest to alleviate that situation. In our opinion, such power is not clearly indicated by the Legislature, and the effect of such a grant of power on the State, its people and the oil and gas industry in general is a matter to be weighed against the potential abuse in the legislative arena and not in this forum."

The entire case is based on the definition of "owner" in the Oklahoma statutes. "Owner" in the Oklahoma statute is defined exactly as "owner" is defined in the New Mexico statutes in 70-2-33. In Oklahoma and New Mexico "owner" is defined in terms of the right to drill. The Oklahoma Supreme Court concluded that overriding royalty owners are not owners for the purposes of apportionment of drilling costs and left the solution up to the Oklahoma legislature.

There are two dissenting opinions in O'Neill, which we believe provided a better solution. The dissent of Vice Chief Justice Irwin sets forth the proposition that the Commission has the authority to require the holder of an overriding royalty to reduce his override when his failure to do so abrogates the intent of the force pooling statutes to prevent waste and protect correlative rights. Justice Irwin bases this view on the following analysis. Under the police power of the state, the state has the authority to regulate the production of oil and gas, and private contracts in derogation of that authority to regulate oil and gas must yield to the state's authority. Patterson v. Stanolind Oil & Gas Co. 77 P.2d 83 (1938). Parties to contracts are bound by the existing law at the time of the execution of the contract. Layton v. Pan American Petroleum Corporation. 383 P.2d 624 (1963). Since the state has the authority and the power to regulate production of oil and gas, it has, by implication, the power to modify private contracts which are in derogation of that authority. Justice Irwin says that any other approach would permit thwarting of the force pooling statutes.

There is apparently some presumption in Oklahoma that a 1/8 royalty is fair and reasonable and that a royalty in excess of that is excessive. New Mexico has a

similar provision in Section 70-2-17 NMSA-1978 which declares that unleased mineral interest are apportioned 7/8th to working interest and 1/8th to royalty interests.

Justice Opala, concurring and dissenting, states that the Commission may reach for modification interests of those who are without drilling rights (overriding royalty owners). Justice Opala bases this on the inherent power of the Commission to modify interests within the pooled unit. Justice Opala says that "upon proper finding of a tenable ground therefore, supported by substantial evidence, the commission has the authority to affect, in forced pooling, overriding royalty or other interests not coupled with drilling rights or working interest in praesenti." At p. 190.

New Mexico statutes do provide for a modification of existing agreements with regard to the development of a unit. Section 70-2-17d NMSA-1978 provides that the division, upon hearing and after notice, may subsequently modify any such plan to the extend necessary to prevent waste as prohibited by this act. In addition, Section 70-2-16d NMSA-1978 provides that the division is not necessarily bound by the agreements of purchasers for the allocation of allowables, and makes it clear that the division may fix pool allowables to prevent unreasonable discrimination between pools. It is clear, then, that there is some legislative intent apparent from the face of the statutes that permits modification by the Commission of private contracts.

In Holmes v. Corporation Commission, 466 P 2d 630 (1970) 36 O&GR 635, a brother assigned a lease to his sister reserving production payments of $2000 per acre payable out of 1/2 of 7/8 of production. Incidentally, the court found that the brother and sister had entered into similar relationships with regard to other leases. The testimony before the Commission showed that the leasehold estate had no value and a well could not be drilled. The Commission imposed a 250% penalty. In holding that the 250% penalty was not arbitrary or capricious, the Supreme Court of Oklahoma said that:

> "[brother's] action is burdening the leasehold estate in the east half of section 8 with the production payment in the amount set forth in the assignment of the leasehold estate to this sister, caused the leasehold estate to have little, if any, value for the purposes of determining a price which applicant, as a reasonably prudent operator, could afford to pay. In view of this action of

> burdening the leasehold estate, of protestants' failure to introduce evidence concerning the amount of the bonus penalty, of the costs of development, and of the estimated time to recover these costs, we cannot say that the order of the trial tribunal was arbitrary, unreasonable or contrary to the evidence." At 641.

It appears, however, that Oklahoma does not have a statutory penalty as we do.

We find no authority to support the argument that the overriding royalty and working interest percentages are fixed as of the date of filing the force pooling application. We believe that an attempt to solve the problem in that direction would be held to be an unreasonable restraint on alienation, and probably a violation of the due process clause. In additon, Section 70-2-18 NMSA-1978 provides that the pooling order is effective from first production. We believe it will be impossible to argue that while the order is not effective until production, mineral interests are fixed as of the date of filing an application.

CONCLUSION

We are of the opinion that the Commission has the general statutory authority and the power to modify the Nix assignment of an overriding royalty by requiring the overriding royalty owner to make an election as to whether or not she will reduce her royalty to a reasonable percentage, or to require her to convert her overriding royalty interest into a working interest so that well costs can be assessed against her.

Respectfully Submitted:

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STATE OF NEW MEXICO
DEPARTMENT OF ENERGY AND MINERALS
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF ROBERT E. CHANDLER CORPORATION FOR AN AMENDMENT TO DIVISION ORDER R-8047.

CASE: 8859

MEMORANDUM OF ROBERT E. CHANDLER CORPORATION IN SUPPORT OF DIVISION JURISDICTION IN THIS MATTER AND IN OPPOSITION TO MICHAEL L. KLEIN, et al, MOTION TO DISMISS

The application of Robert E. Chandler Corporation ("Chandler") seeks to have the Division decide a disputed factual issue and to determine what leasehold interests are operating interests from which Chandler can collect the costs of the well and the risk factor penalty pursuant to Division Pooling Order R-8047.

Michael L. Klein and other owners of a net profits interest in the affected acreage contend that a net profits interest they own is not subject to its share of the costs of the well or penalty because it is not a working interest. Klein contends that the Division lacks jurisdiction to determine if the net profits interest is subject to the costs of the well and the risk factor and that matter should be resolved in a declaratory action in District Court.

Contrary to the contentions of Klein, it is not the District Court's job to determine working interest under a Division pooling order. The Division has jurisdiction over the subject matter in dispute in this case; i.e., what are the working interests?

FACTS:

Chandler seeks to drill an oil well on a 40-acre tract in which he owns 50% of the leasehold working interest. The remaining 50% working interest in the 40-acre tract was owned by Sun Exploration and Production Company.

Despite Chandler's efforts, Sun refused to voluntarily participate in the drilling of the well and on September 25, 1985, the Division held a hearing in Case 8686 on Chandler's application to force pool the balance of the interest in this tract. The testimony established that the well would cost approximately $500,000 and that Chandler anticipated recoverable reserves of 100,000 barrels of oil. The Division entered Pooling Order R-8047 pooling the Sun interest and granting Chandler a 200% risk penalty.

Sun was notified, pursuant to the Pooling Order, and failed to participate within the time limits required by the order. During this period, Sun and Klein, with others, were in litigation over the Sun interest in this acreage and other acreage. Further, the Sun interest was

subject to an April 1, 1966 Agreement between Prudential Insurance Company and Seagram & Sons, which among other things, created a 50% net profits interest.

Chandler sought and obtained an extension of the Pooling Order drilling date to April 1, 1986 in order to await the settlement of Sun-Klein litigation. That litigation is being settled and as a result Sun is to assign its interest in this tract along with the net profits interest to Klein.

Klein has asserted that if Chandler drilled the oil well pursuant to the Pooling Order that he will demand that the net profits interest which he obtained from Sun must be paid to him from initial production and is not subject to share in the costs of the well and penalty.

On March 19, 1986, the Division held a hearing upon Chandler's application for a decision by the Division to define what constitutes a working interest against which the costs and penalty can apply. Mr. John Savage, a petroleum engineer with 35 years of experience, testified that if the Klein 25% net profits interest was treated like a true overriding royalty then it would constitute an excessive burden upon Chandler and he could not drill the well despite having a pooling order.

Mr. Savage testified that if the 25% net profits interest was subject to the costs of the well (see Chandler Exhibit 8), then one-half of the costs of the well would be charged to Klein ($250,000) and Chandler

would have one-half of the reserves (50,000 barrels x $17/per barrel) at a value of $850,000 from which to recover the Klein cost that Chandler would have to carry. If the net profits interest is charged with its share of the costs and penalty, the economics of the project show it is only marginally profitable taking 66 months to payout, showing a return on investment of 2.4 to 1 and a rate of return of 22.4%. However, if the 25% net profits interest is NOT subject to pay its share of the costs and penalty, then there will only be available $425,000 from Klein's share of production from which Chandler can recover $750,000 to which Division Order R-8047 says he is entitled.

A net profits interest is defined by Williams and Meyers as an interest which "continues for the duration of the leasehold, one party continuing to bear costs and the other receiving a share of proceeds after payment of such costs." 8 H. Williams and C. Meyers, Oil and Gas Law at 102 (1984). Indeed, the interest covered by the Prudential-Seagram Agreement is expressly defined on page 10 of the document as follows:

Against the net profits account shall be charged the following:

> (a) All capital costs incurred by Seagram in connection with its owning, operating, exploring, developing, maintaining or abandoning the Subject Interests or any part thereof or any wells thereon which are incurred and paid by Seagram after the Effective Date;

(b) All direct costs of operation of the Subject Interests (including all wells located thereon) which are incurred and paid by Seagram after the discharge of the Reserved Production Payment.

(c) That portion of the reasonable district office expenses of Seagram incurred after the discharge of the Reserved Production Payment for any district of Seagram in which any of the Subject Interests are located which is properly allocable to the Subject Interest, such allocation to be made on the basis of the ratio of the number of producing wells in such district subject to the Net Profits Overriding Royalty which are operated by Seagram to the total number of producing wells in such district operated by Seagram, provided, however, that the charges to the net profits account for district expense shall not duplicate any charges for district expenses receivable by Seagram as operator under any operating agreement or any charges properly made under any other clause hereof.

JURISDICTION:

Pursuant to Section 70-2-6 NMSA-1978, the New Mexico Legislature has delegated to and charged the Oil Conservation Division of New Mexico with the jurisdictional authority over all matters relating to the conservation of oil and gas:

> It shall have jurisdiction, authority, and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas...

More specifically, in Section 70-2-17(c) NMSA-1978, the New Mexico Legislature has explicitly granted to the Oil Conservation Division the jurisdiction to decide the terms and conditions of forced pooling orders "[F]or the

purpose of determining the portions of production owned by the persons owning interests in the pooled oil or gas or both..."

It is basic Hornbook Law that where a court or administrative body is dealing with a controversy of the kind it is authorized to adjudicate, and has the parties before it, it has jurisdiction. In this case we have the parties before the Division to discuss the terms and conditions of a pooling order entered by the Division, so that the Division can define the types of non-consenting working interests, which are subject to paying costs and penalty under such an order. See Thermoid Western v. Union Pacific Railroad Company, 365 P.2d 65 (Utah 1961).

The forced pooling statutes and orders of this Division become useless if non-consenting working interest owners can avoid the cost and penalty factors of a pooling order simply by declaring their working interest to be subject to excessive overriding royalty burdens. In this case Klein seeks to escape the effects of the pooling order by declaring its 25% net profits interest to be of the same nature as an overriding royalty. Klein then agrues that the Division has no jurisdiction to modify its interest. Chandler contends that the question before the Division is not the modification of Klein's interest, whatever it may be, but whether or not it is a working interest subject to its

share of well costs. This the Division may do under Mitchell v. Simpson, 493 P.2d 399 (Wyo. 1972).

> In order to effectuate such powers (prevent waste and protect correlative rights), the Commission had jurisdiction and authority over all persons necessary for such effectuation, including oil and gas lessor or one having only royalty interests.

As the Commission has jurisdiction to determine the allocation of drilling costs among working interest owners, surely it has jurisdiction to determine who those working interest owners are.

The evidence at the March 19, 1986 hearing was that if the 25% net profits interest is treated as an overriding royalty, then that excessive royalty burden would be too high and the entire spacing unit uneconomic, thus precluding Chandler from drilling the well despite having obtained a pooling order.

It is the practice of this Division that the consenting owners may recover the non-consenting owner's share of costs plus risk penalty only out of the non-consenting owners share of production and not out of the share allocated to royalty owners and overriding royalty owners. In order to take advantage of that practice, Klein declares its "net profits interest" not to be a "working interest" and thus free of the costs. Obviously, the larger the royalty interest and other non-working interest burdens are, the smaller is the remaining production that is attributable to the non-

consenting owners and to which the participating owners must look in order to recover the non-consenting owner's share of costs plus the appropriate penalty.

The undisputed testimony in this case is that the 25% net profits interest was made subject to the cost in the original 1966 Agreement with Prudential and Seagram and must be subject to the costs and penalty or the well cannot be economically drilled, thus violating the correlative rights of Chandler and circumventing the Division's pooling order.

Kellahin & Kellahin

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Bettis Boyle and Stovall

app: Steve Ingraham
Bill Carr

✓ Division record

Record clear on closely held corp. ?

Carr:

connection between Gulf Coast and Sun West

i: Working interest to ~~non~~ cost-bearing ~~interest~~ royalty interest – through private contract – to defeat Oil + Gas Act of Division's authority

1-30. posting app.
Sun West owner of mineral interest unleased

2-15 Sunwest leased to Gulf Coast
27.5% royalty
well uneconomic above 18%

Division order: interests treated as unleased mineral interest → 1/8 royalty / 7/8 wi

} after B/B → 27.5% royalty / 62.5% wi

this reduces the amount subject to the 200% risk penalty – can make a project uneconomic

Ingram:

disputes connection between companies —

can't affect status of real property post hoc
not within enumerated powers —

Division order "a taking" because it determined
title to real property —

deny transfer done to circumvent Commission's
jurisdiction

believes there should be "stds." (what are they?)
distinguishes previous cases
Newburg } extreme
Cahlkins } cases

Stubbs did not testify that well was
uneconomic, said "undesirable"

police power was not exercised reasonably due-
even assuming valid in this case

retroactivity -

affiliates - no evidence that corps are affiliates

Carr:

Patterson v. Stalder 0:1

1930s - ok.

not a taking -

Continue to January?

more evidence?