FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

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OIL CONSERVATION DIVISION

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

STIPULATION OF DISMISSAL

Appellant, David H. Arrington Oil and Gas, Inc. and Appellee, THE NEW MEXICO OIL CONSERVATION COMMISSION, through their counsel of record, hereby stipulate to the dismissal of Appellant's appeal against said Appellee in this cause with prejudice.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v.

No. D-101-CV-2002-1391

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Defendant.

REPLY PURSUANT TO APPELLANT'S STATEMENT OF APPELLATE ISSUES

I. Introduction

In Appellant's Statement Of Appellate Issues ("Statement"), David H. Arrington Oil And Gas, Inc. ("Arrington") identified two issues for this Court's review, (1) whether the New Mexico Oil Conservation Commission ("OCC") improperly revoked Arrington's drilling permits and (2) whether the OCC improperly failed to first resolve pending compulsory pooling cases was an abdication of its statutory duties under the New Mexico Oil And Gas Act, NMSA 1978 §§ 70-2-17 and 70-2-18 (1935 and 1969).

TMBR/Sharp Drilling, Inc. "(TMBR/Sharp") attempts to evade review of these issues by recasting them as substantial evidence issues. See Response of Appellee TMBR/Sharp Drilling, Inc. to Appellant's Statement Of Appellate Issues ("Response"), pp. 1, 2. However, the dispositive issues before the OCC were not factual issues and the question of whether the OCC had jurisdiction to effectively resolve title, or a legitimate basis upon which to do so, and whether it proceeded improperly by revoking Arrington's July 2001 drilling permits without first resolving the compulsory pooling cases, are questions of law requiring statutory and regulatory

interpretation.[1] Thus, this appeal presents legal questions which are reviewed de novo. Cooper v. Chevron U.S.A. Inc., 2002-NMSC-020, ¶ 16, 132 N.M. 382, 388, 49 P.3d 61, 67.**

II. Reply Regarding Arrington's And TMBR/Sharp's Statements Of Facts

A. TMBR/Sharp's Challenges To Arrington's Facts Are Without Merit

Of the challenges advanced to the statement of facts set forth in Arrington's summary of proceedings, only the challenges to the Statement, Facts 6 and 19 require any reply. Facts 6 and 19 establish that Arrington entered into a farm-out agreement with Ocean Energy, Inc. ("Ocean") on September 10, 2001 regarding the SW/4 of Section 25 and that Arrington continues to own lease interests underlying the W/2 of Section 25 and continues to be eligible to become an operator. In its numbered paragraph 2, TMBR/Sharp attempts to argue that the affidavit of Jeff Bane, which was attached to an exhibit (a pleading in the related district court action), did not constitute "evidence." TMBR/Sharp also inaccurately claims that this affidavit formed the basis for Facts 6 and 19. However, in the "Order of the Oil Conservation Commission" which is the subject of this appeal, Finding No. 21, the OCC found:

> 21. In July and August 2001, Ocean acquired a number of farm-out agreements in Section 25. See TMBR/Sharp Exhibit 10, Schedule 1. By an assignment dated September 10, 2001, Ocean assigned a percentage of the farm-out agreements to Arrington under terms that require Arrington to drill a test well in Section 25 known as the Triple Hackle Dragon "25" Well No. 1 in the NW/4 of that Section.

[RP 4, 329] TMBR/Sharp has not cross-appealed or otherwise properly challenged this finding and cannot, therefore, assert in this proceeding that the finding is unfounded. Moreover, there was an agreement at the outset of the March 26, 2002 hearing that there would be no objection to exhibits. [Tr. pp. 8, 105; RP 367] Having consented to introduction of all exhibits, even if the

[1] The four applications for compulsory pooling still pending before the agency are cases 12816, 12841, 12859 and 12860, Lea County. [See Statement, p. 6, ¶¶ 20, 21]

Bane affidavit were the sole basis for Facts 6 and 19, which it was not,[2] TMBR/Sharp may not now challenge it.

Additionally, the Fifth Judicial District Court's Order did not apply to all of the interests owned by Arrington in Section 25. [See RP 42, 642, 644-45, 652-54] Thus, this Court must take as true the facts that (a) Ocean had ownership interests in July and August of 2001, (b) Arrington acquired those interests by virtue of the farm-out agreement with Ocean, and (c) Arrington is currently eligible to be an operator on Section 25.

B. TMBR/Sharp Has Failed To Set Forth Any Properly Supported Facts

TMBR/Sharp's proposed "facts" are largely comprised of its desired conclusions of law, not facts at all. See TMBR/Sharp's Facts 1, 2, 4, 5, and 6.

Fact No. 3 is misleadingly incomplete. The Fifth Judicial District Court's "Order Granting Partial Summary Judgment Regarding Filing Of Unit Designation" entered in Cause No. CV-2001-315C, Fifth Judicial District, is an interlocutory order which that Court may reconsider on motion or sua sponte at any time prior to entry of a final order. See Sims v. Sims, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 632; Universal Constructors, Inc. v. Fielder, 118 N.M. 657, 659, 884 P.2d 813, 815 (Ct. App. 1994). Moreover, the Order is premised upon the district court's conclusion that an acreage dedication plat pools acreage -- a proposition the OCC expressly and correctly rejected in its Order. [See RP 7, ¶ 34 in which the OCC said that "[A]ny suggestion that the acreage dedication plat 'pools' acreage is expressly disavowed."[3]]

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[2] That the OCC was not relying primarily, if at all, on the Bane affidavit, is demonstrated by the absence of any dispute about Arrington's other leasehold interests in Section 25, the OCC's reference in Finding 2 to TMBR/Sharp's exhibit – not the Bane affidavit – and its refusal to rely on the affidavit on the issue of Mr. Huff's relationship with Arrington.

[3] As decisions about compulsory pooling are based upon evidence relating to, inter alia (1) the presence or absence of a voluntary pooling agreement, (2) whether a reasonable and good faith effort was made to obtain the voluntary participation of others, (3) the reasonableness of well costs, (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of correlative rights, including the drilling of unnecessary wells, (5) the

III. Argument

A. Standard Of Review

The OCC's choice to defer to a court's interlocutory order, which itself is premised on a proposition that the OCC has expressly rejected -- and which is within its special expertise -- was, on its face, arbitrary, capricious, and contrary to law. See Snyder Ranches, Inc. v. Oil Conservation Commission, 110 N.M. 637, 639, 798 P.2d 587, 589 (1990) (agency action is arbitrary and capricious when, viewed in light of the whole record, it is unreasonable or does not have a rational basis); Santa Fe Exploration Co. v. Oil Conservation Commission, 114 N.M. 103, 115, 835 P.2d 819, 831 (1992) (the court should defer to the agency's expertise).

B. The OCC Erred By Treating An Interlocutory Order Which Addressed Only One Of Arrington's Leaseholds As Dispositive And By Proceeding With The Instant Case When There Were Title Disputes And Competing Pooling Applications

The conclusion of law in the OCC's decision is:

> The Oil Conservation Commission has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico.

[RP 7] Relying on its lack of jurisdiction, the OCC accepted as dispositive of the title and lease issues the interlocutory order entered on December 27, 2001 in the Fifth Judicial District. Additionally, the OCC erroneously assumed that the interlocutory order had substantially broader scope than it actually possessed. [See RP 641-42, 644-45, 652-54, which demonstrate that the Fifth Judicial District Court's interlocutory order did not address all of the interests owned by Arrington in Section 25.] The OCC's error with respect to the scope of the interlocutory order led directly to its erroneous determination that the pooling cases did not have

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assessment of a risk penalty, and (6) whether a proposal is otherwise in the interests of conservation, it is clear that the mere approval of a drilling permit or the filing of an acreage dedication plat cannot serve to pool acreage.

to be decided before it ruled on the instant case. The OCC also erred by basing a decision on its perceived lack of jurisdiction over a dispositive issue and by punting that key issue to another adjudicating entity, when doing so would adversely affect the parties' rights in the pending compulsory pooling cases, cases which are within the agency's exclusive jurisdiction. This action constitutes a failure by the OCC to perform its statutory duties under the New Mexico Oil and Gas Act. NMSA 1978 §§ 70-2-17 and 70-2-18.

The Oil and Gas Act gives the OCC two major duties: the prevention of waste and the protection of correlative rights. Santa Fe Exploration Co., 114 N.M. at 112, 835 P.2d at 828. The OCC is empowered, pursuant to § 70-2-11, to make and enforce rules and regulations and issue orders to carry out these two purposes. Id. Under this statutory scheme, issuance of a compulsory pooling order is a quasi-judicial function expressly reserved to the OCC. It cannot be delegated. See Kerr-McGee Nuclear Corp. v. N.M. Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct. App. 1981). The OCC cannot do indirectly that which it is prohibited from doing directly. Gomez v. Nielson's Corp., 119 N.M. 670, 673, 894 P.2d 1026, 1029 (Ct. App. 1995) (policy precludes doing indirectly what one is not permitted to do directly); State ex rel. Patton v. Marron, 22 N.M. 632, 167 P.9, 11 (1917) (party cannot do indirectly what it is forbidden to do directly). Thus, where, as here, the outcome of pooling cases may be prejudged by a permit dispute in which the OCC lacks jurisdiction over the issue it has identified as dispositive, the agency should be required to decide the pooling applications first. If it does not, an indirect, de facto, delegation of authority over the pooling issues results.

In the order denying Arrington a continuance, the OCC recognized that its decision on "the right to drill in the NW/4 of Section 25 is vital to all four [compulsory pooling] cases . . ." [RP 556-57] Thus, it has recognized that the resolution of the pooling cases will significantly

affect the instant case. Notably neither the OCC nor TMBR/Sharp challenge the fact that it is the compulsory pooling cases, and not the issuance of drilling permits, that will determine operatorship of the wells.

TMBR/Sharp's protestations in its Response notwithstanding, it also clearly believes the OCC's decision to rescind Arrington's drilling permits resolved, as a practical matter, the issues which would otherwise have been resolved in the compulsory pooling action with respect to who should be allowed to drill and where. [See Tr. pp. 16, 21, 27-28, 90] It would not otherwise have begun drilling its Blue Fin 25 well, prior to the resolution of the compulsory pooling applications, without having consolidated the unjoined interests and without having allowed the OCD to determine the final configuration of the spacing and proration units in Section 25. [See RP 659; see also RP 255, wherein TMBR/Sharp asserts that the lands at issue have been "pooled" and 294-305 wherein it claimed that compulsory pooling is now unnecessary.] In addition, in its April 29, 2002 motion to continue Case No. 12816 and to dismiss Cases 12859, 12860, and 12841, TMBR/Sharp asserted that the interests have already been effectively "consolidated," and that that is enough to determine the unit configuration which will, in turn, determine the ultimate development of Section 25.

Moreover, it has long been recognized that the mere fact that there is a dispute over title "is not alone sufficient to defeat [one's] right to the permit; neither is it ground for suspending the permit . . ." Magnolia Petroleum Co. v. Railroad Commission, 170 S.W.2d 189, 191 (Tex. 1943); Humble Oil & Refining Co. v. Carr, 243 S.W.2d 709, 714 (Tex. Civ. App. 1951); Jones v. Hunt Oil Co., 456 S.W.2d 506, 512 (Tex. Civ. App. 1970). In the instant case, the OCC specifically found that:

> A dispute exists concerning the validity of Arrington and TMBR/Sharp's mineral leases in Sections 23 and 25,

[RP 3, Finding 15] (emphasis added). The OCC also found that Arrington had a good faith claim to title and a good faith belief that it was authorized to drill the well applied for when it filed its drilling applications. [RP 5-6; Finding 28] The title dispute arose after Arrington's permit applications had been approved. [RP 2-3; Findings 10 and 11; RP 35] Thus, regardless of the ultimate decision on title, because Arrington had a colorable claim of title when the drilling permits were applied for and issued, the OCC should not have revoked those permits, let alone have done so ab initio. Magnolia, 170 S.W.2 at 191; see Gray v. Helmerich & Payne, Inc., 843 S.W.2d 579, 582 (Tex. 1992), reh'g overruled (Aug. 19, 1992), writ denied (Dec. 2, 1992) (the issuance of a drilling permit does not constitute determination of a property right); and see the Division's Order of December 13, 2001 (from which TMBR/Sharp appealed to the OCC), finding that Arrington's colorable claim of title conferred a right to drill and, therefore, that there was no basis for overruling the approval of Arrington's permits. [RP 34, 700, Ex. 11]

The practical effect of the OCC's rescission of Arrington's permits is to prematurely adjudicate title - - exactly what the OCC recognized it should not be doing. [See RP 5-6, 7; Findings 27, 30; and OCC's Conclusion of Law.] The OCC's unintended, premature and unauthorized adjudication of property rights has already had, and will continue to have, a deleterious effect on Arrington and Ocean in the pooling actions. [See Statement, p. 7, ¶ 24; RP 659, and see generally the Response, wherein all of TMBR/Sharp's arguments are based on its assumption that it has been determined to be the owner of the interests in Section 25, and specifically p. 12, where its argument is based upon the assumption that the OCC's order means it is necessarily the party which will be allowed to act as Operator and drill on the Sections at issue; see also RP 3, Finding 15, last sentence, and Statement at pp. 10-11.]

IV. Relief Sought

The OCC's de facto determination of title was beyond its jurisdiction. Its decision was improperly based on an interlocutory order which did not fully and finally resolve an ongoing title dispute. Moreover, Arrington had a good faith claim to title at the time its permits were issued. The Commission's order will unduly influence the compulsory pooling process and could effectively preempt the proper exercise of OCC's statutory mandates to prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells. Therefore, this Court should hold that the OCC abused its discretion by allowing Case Nos. 12731 and 12744 to proceed before the compulsory pooling cases and, further, that it exceeded its authority in issuing Order No. R-11700-B. This Court should further direct the OCC to discharge its statutory duties by addressing the compulsory pooling cases, reinstate Arrington's drilling permits and rescind the drilling permits it prematurely and improvidently issued to TMBR/Sharp.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Reply was mailed to the following counsel of record on October 31, 2002.

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

ENDORSED
First Judicial District Court

OCT - 9 2002

Santa Fe, Rio Arriba & Los Alamos Counties
Santa Fe, NM 87504-2268

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

THE NEW MEXICO OIL CONSERVATION COMMISSION'S RESPONSE TO APPELLANT'S STATEMENT OF REVIEW ISSUES

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and, pursuant to SCRA 2002, Rule 1-074(L), submits the foregoing as its response to Appellants' Statement of Appellate Issues:

I. INTRODUCTION.

This is an appeal of Order No. R-11700-B of the New Mexico Oil Conservation Commission[1] (hereinafter referred to as "the Commission"). In that order, the Commission found that permits to drill two natural gas wells had been improperly granted to David Arrington Oil and Gas Co. (hereinafter referred to as "Arrington") instead of TMBR/Sharp Drilling Inc. (hereinafter referred to as "TMBR/Sharp"). Order

[1] The Commission is a three-member body created by the Oil and Gas Act and charged with conservation of oil and natural gas resources, prevention of waste of oil and natural gas, protection of correlative rights, and many other tasks related to the production of crude oil and natural gas. See NMSA 1978, §§ 70-2-4, 70-2-6, 70-2-11, 70-2-12 (Repl. 1995 and Supp. 2001).

No. R-11700-B can be found in the Record on Appeal (hereinafter referred to as "RA") at pages 1-8.

This case began when two oil and gas producers applied to the Oil Conservation Division for permits to drill deep natural gas wells to the Mississippian formation below two sections of the same township near Lovington, in Lea County, New Mexico. One of the parties, TMBR/Sharp Drilling Inc., had spent several years searching for sources of natural gas near Lovington. RA at 67-72. In fall of 2000, TMBR/Sharp drilled a natural gas well in Section 24, next to the sections at issue in this appeal. RA at 70, 72. The well was very prolific. RA at 97-98. After being successful with this well, TMBR/Sharp elected to pursue drilling in Sections 23 and 25, where it holds oil and gas leases granted by Madeline Stokes and Erma Stokes Hamilton in 1997.[2] RA at 67-72, 167-172, 482-487.

Arrington and Ocean Energy were also exploring for natural gas in the same general area. Arrington and Ocean Energy executed an agreement in December of 2000 to drill a test well in nearby Section 20. RA at 219-225. Eventually, Arrington focused on the same property held by TMBR/Sharp. In March 2001, a person named James D. Huff, identified by Arrington as its agent, obtained leases from Ms. Stokes and Ms. Hamilton on the same property that had been leased to TMBR/Sharp (Ameristate) in 1997. RA at 528-533. These leases, referred to by the parties herein as "top leases," would not take effect according to their terms until the leases held by TMBR/Sharp became ineffective. RA at 80-81. See 8 Williams & Myers, Oil and Gas Law 1115-1117 ("top lease" defined)(2001).

[2] The lease was held by Ameristate Oil and Gas Inc. Ameristate and TMBR/Sharp subsequently entered into an agreement whereby TMBR/Sharp became the operator of properties listed in the agreement, which included the Stokes/Hamilton leases. RA at 173-210.

The present dispute concerns permits to drill in Sections 23 and 25. A permit to drill a natural gas well in New Mexico is required by rules and regulations of the Oil Conservation Division. 19.15.3.102 NMAC. Such a permit is obtained from a district office of the Oil Conservation Division, and requires, among other things, that the operator provide proof of financial assurance, set forth a casing and cementing program to protect fresh water supplies and other producing formations, identify the source of oil or natural gas that is the objective of the well, and provide an acreage dedication (so that the Division can ensure that the spacing requirements and other applicable requirements are met). See 19.15.3.101, 19.15.3.102, NMAC.

After Mr. Huff obtained the top leases from Ms. Stokes and Ms. Hamilton, Arrington applied to the Oil Conservation Division for permits to drill wells in sections 23 and 25, which were granted. RA at 159-60, 156-58. Less than a month later, TMBR/Sharp applied for permits to drill in the same sections. RA at 164-166, 166-163. TMBR/Sharp's applications were denied because of the permits that had already been issued to Arrington. RA at 161, 164. Spacing rules of the Oil Conservation Division specify how many wells can be placed on a given tract. 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In Sections 23 and 25, no more than one well is permitted on each 320-acre parcel. RA at 3 (Order No. R-11700-B, ¶ 12). Each section is, of course, 640 acres, and a "spacing unit" is half of each section. TMBR/Sharp's applications were denied because additional wells would violate these rules. RA at 161, 164.

The dispute matured when TMBR/Sharp sought review of the decision denying the permits through the Oil Conservation Division's hearing process. The major issue

before the Division (and subsequently, before the Commission) was the validity of Arrington's top leases. By the time this matter was heard by the Oil Conservation Commission during its *de novo* review of the Division's order, the District Court of Lea County had issued a decision that declared that the top leases of Arrington were ineffective. See RA at 329, 403.

II. STATEMENT OF THE ISSUES

Arrington assigns two issues on appeal: (1) whether the Commission improperly revoked Arrington's permits, and (2) whether the Commission should have granted Arrington's request to stay and/or consolidate this dispute with four other disputes pending before the Oil Conservation Division.

Resolution of these issues require the Court to apply the standard of review in NMSA 1978, § 39-3-1.1(D) (Supp. 2002) and Rule 1-074, SCRA 2002 and thereby determine whether Order No. R-11700-B is supported by substantial evidence, whether it was within the scope of authority of the Commission, or whether it was "fraudulent, arbitrary or capricious" or otherwise not in accordance with law.

III. SUMMARY OF THE PROCEEDINGS

On August 8, 2001, the District Supervisor of the Hobbs District Office of the Oil Conservation Division denied a permit to TMBR/Sharp for its proposed natural gas well named the "Leavelle 23 Well No. 1" to be located in the northeast quarter of Section 23 (T16S, R35E, NMPM, Lea County). RA at 164-166. On the same day, the District Supervisor denied a permit to drill to TMBR/Sharp for its proposed "Blue Fin '25' Well No. 1" to be located in the northwest quarter of Section 25 in the same township (T16S, R35E, NMPM, Lea County). RA at 161-163. The District Supervisor denied the permits

because Arrington had previously been granted permits to drill[3] in the same sections. RA at 161, 164.

TMBR/Sharp filed an application before the Oil Conservation Division pursuant to Rule 1203(A) of the rules and regulations of the Oil Conservation Division (19 NMAC 15.N.1203.A), to seek reversal of the District Supervisor's denial of the permits (Case No. 12744) and for an order staying Arrington from commencing operations under the approved permits to drill (Case No. 12731). RA at 226-227. Shortly thereafter, TMBR/Sharp filed suit against Arrington in the Fifth Judicial District Court for declaratory relief, tortuous interference, repudiation, damages and injunctive relief. See RA at 247-285 (Complaint). That suit sought, in part, a declaration that TMBR/Sharp's leases in Sections and 23 and 25 remained valid and that Arrington's leases to the same acreage were not valid. See RA at 252-256.

A Division hearing examiner held an evidentiary hearing on TMBR/Sharp's application on September 20, 2001 and the Director subsequently issued Order No. R-11700 on December 11, 2001. RA at 226-231. The Order denied TMBR/Sharp's applications and left intact the decision of the District Supervisor. Id.

Subsequent to the Order in the Division case, the Fifth Judicial District Court entered summary judgment in favor of TMBR/Sharp concerning its leases in Sections 23 and 25. RA at 329, 403. See also RA at 294-328 (parties' briefs concerning the motion(s) for summary judgment). Accordingly, on January 7, 2002, TMBR/Sharp filed a petition for hearing *de novo* pursuant to NMSA 1978, § 70-2-13 and Rule 1220 (19

[3] Arrington had been granted a permit to drill its "Blue Drake 23" well, to be located in the southeast quarter of Section 23 on July 3, 2000. RA at 159-160. It had also been granted a permit to drill its "Triple-Hackle Dragon 25" well, to be located in the northwest quarter of Section 25 on July 17 or 19, 2001. RA at 156-158.

NMAC 15.N.1220). RA at 396-397. Under these provisions, any order of the Oil Conservation Division may be heard *de novo* by the Commission. Id. The Commission conducted an evidentiary hearing on TMBR/Sharp's applications on March 26, 2002 and issued its Order No. R-11700-B on April 26, 2002. Largely on the basis of the District Court's ruling, the Commission's Order found in favor of TMBR/Sharp and reversed the decision of the District Supervisor. Arrington filed for rehearing, which was denied by operation of law. See NMSA 1978, § 70-2-25 (Supp. 2001). This appeal ensued.

IV. ARGUMENT

A. The Commission's Order.

Order No. R-11700-B dealt with the two major issues raised by Arrington and Ocean Energy: (1) whether TMBR/Sharp's applications to drill should have been approved instead of denied, and (2) whether it was appropriate to hear the permit cases separately from with four pending applications for compulsory pooling in Sections 23 and 25.

On the first issue, the Commission found that TMBR/Sharp should have been issued permits to drill instead of Arrington. RA at 6 (Order, ¶ 29). The Commission's decision was based on Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC) of the rules and regulations of the Oil Conservation Division; those regulations restrict issuance of a drilling permit to an "operator" who is a "person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." RA at 3 (Order, ¶ 13). The Commission noted that TMBR/Sharp's leases in sections 23 and 25 were created by the 1987 oil and gas leases of Madeline Stokes and Erma Stokes Hamilton and the joint operating agreement between

TMBR/Sharp and Ameristate Oil & Gas, Inc. RA at 3 (Order, ¶¶ 16, 17). The Commission further observed that on March 17, 2001, Ms. Stokes and Ms. Hamilton leased the same property to James D. Huff, a "top lease." RA at 4 (Order, ¶ 19). The Commission also observed Arrington had acquired interests in section 25 by virtue of a "farm-out"[4] agreement from Ocean Energy on September 10, 2001. RA at 4 (Order ¶ 21). Finally, the Commission observed that TMBR/Sharp had filed suit in the Fifth Judicial District Court challenging the validity of the top lease, and that the District Court had issued summary judgment to TMBR/Sharp, which in effect declared the top leases of Arrington ineffective. RA at 4 (Order, ¶ 22). When TMBR/Sharp applied for permits, Arrington lacked a presently-existing mineral lease in the west half of Section 25 or the east half of Section 23 to support its applications; TMBR/Sharp should therefore have been granted a permit to drill when it applied in August 2001. RA at 5-6 (Order ¶¶ 28, 29). The Commission accordingly ordered the permits issued to Arrington rescinded, and the matter of the TMBR/Sharp permits remanded to the District Office for appropriate action. RA at 7-8 (Order, decretal ¶¶ 1, 2). Because Arrington and Ocean Energy asserted that the District Court's order would be appealed, the Commission expressly retained jurisdiction of the matter. RA at 6, 8 (Order, ¶ 30, decretal, ¶ 5).

On the second issue, the Commission denied the motions to stay the proceedings pending resolution of the competing applications for compulsory pooling. RA at 8 (Order, decretal ¶ 3). The Commission reasoned that that the two proceedings serve different objectives and should not be confused. RA at 6-7 (Order, ¶¶ 33, 34, 35, 36). The Commission found that issuance of a permit to drill enables to the Oil Conservation

[4] A "farm-out" agreement is a common form of agreement whereby a lease owner who does not desire to drill at the present time assigns the lease or some portion thereof to another operator who is interested in drilling the well. 8 Williams & Myers, Oil and Gas Law at 377 ("Farmout agreement")(2001).

Division to examine the operator's financial assurance and insure that the operator's designation of pool, spacing and setbacks is accurate. The Commission further found that a compulsory pooling proceeding exists to ensure that unnecessary wells are not drilled and that correlative rights are protected. RA at 6 (Order, ¶ 33). The Commission found that such matters are best dealt with separately to avoid confusion. RA at 7 (Order, ¶¶ 34, 35, 36).

B. Standard of Review.

Orders like Order No. R-11700-B may be reversed on four very limited grounds: (1) if, based on the whole record on appeal, the "decision of the agency was not supported by substantial evidence"; (2) if the agency acted "fraudulently, arbitrarily or capriciously"; (3) if the action "was outside the scope of authority of the agency"; or (4) if the action of the agency "was otherwise not in accordance with law." See NMSA 1978, § 70-2-25(B) (Supp. 2000); NMSA 1978, § 39-3-1.1(D) (Supp. 2000) and Rule 1-074, SCRA 2000.

An agency's decision is supported by "substantial evidence" if evidence presented to the agency is such that "a reasonable mind might accept [it] as adequate to support a conclusion." Fugere v. State Taxation and Revenue Department, 120 N.M. 29, 33, 897 P.2d 216 (Ct.App. 1995); Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether evidence is substantial, reviewing courts do not re-weigh the evidence the agency received, but only consider whether it is adequate to support the decision:

> "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citation omitted] In resolving those arguments of the appellant, *we will not weigh the evidence.*

> *By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings.*

Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). While the substantial evidence standard does not require a Court to ignore contradictory evidence if it undermines the reasonableness of a decision, contradictory evidence is viewed in the light most favorable to upholding the agency decision according to the general standard of reasonableness:

> [W]e view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [citation omitted] The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision.

Santa Fe Exploration Co. v. Oil Conservation Commission of the State of New Mexico et al., 114 N.M. 103, 114, 835 P.2d 819 (1992).

An "arbitrary or capricious" administrative action is an "illegal action" or where the agency has not proceeded in the manner required by law. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 783, 907 P.2d 182 (1995), Santa Fe Exploration, supra. at 115. See also Regents of the University of New Mexico v. Hughes, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992)(formulation of judicial review of administrative agency in terms of "arbitrary, unlawful, unreasonable, capricious or not based on substantial evidence" is synonymous with illegality). It is also a decision that does not have a "rational basis" or where the decision is "contrary to logic and reason." Santa Fe Exploration, supra. at 115.

C. The Commission Properly Rescinded Arrington's Drilling Permits.

Arrington takes issue with paragraph 29 of the Commission's order, where the Commission found that, *at the time Arrington applied for a drilling permit to drill* in

Sections 23 and 25, Arrington had no authority over the property and should not have been issued a permit to drill. Statement of Appellate Issues, at 7; RA at 6 (Order, ¶ 29, 31).

Substantial evidence supports finding 29. Arrington was not an operator and should not have been issued a permit to drill because its top leases in Sections 23 and 25 had been declared ineffective by the District Court. RA at 247-285, 252-256, 294-328, 329, 403, 294-328. The Commission observed that Arrington's farm-out from Ocean was not executed until September 10, 2002, and therefore had not been effective at the time TMBR/Sharp applied for its permit. RA at 379-386. Thus, Arrington was not, at the time TMBR/Sharp applied for permits to drill, "duly authorized" or "in charge of the development" on the property for which it had applied for a permit. Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC).

Arrington claims that *during the time it held a drilling permit* it had a right to drill and operate lease interests in the west half of Section 25 that were "separate and apart" from the leases that were involved in the District Court action. Statement of Appellate Issues, at 7. Arrington's parsing of this argument (in italics above) is important. While Arrington may have an interest in the west half of Section 25 *now* by virtue of the farm-out agreement with Ocean Energy, the evidence presented to the Commission and the District Court's order shows that when Arrington filed its applications for a permit to drill in the west half in July 2001, it had no such interest.

Arrington also argues that the Commission failed to consider its interests in the *east half* of Section 25. Statement of Appellate Issues, at 8. However, Arrington's application for a permit to drill requested a spacing unit consisting of the *west half* of

Section 25, not the east half. RA at 152, 156-158. Indeed, Arrington proposed to drill a well in the *northwest* quarter of Section 25. Id. Arrington seems to theorize that its holdings in the east half are relevant because if a north half spacing unit is finally established, and only two spacing units can exist in a 320-acre spacing unit, that its interests in the east half will be affected and the Commission should have considered those interests. But ownership of an interest in the east half of Section 25 cannot support an application for a permit in the west half; without an interest in the west half, Arrington could not become an operator of that well that it applied for --- and should not have been issued a permit to drill. 19.15.1(O)(8) NMAC. Even if it had had evidence of some interest in the east half before it, that evidence would not have been relevant to the Commission's inquiry into Arrington's interests to support its application to drill in the west half.

Arrington further claims the Commission "assumed" that the District Court adjudicated "all of Arrington's title" and implies that the Commission failed to consider an independent interest of Arrington that would have supported its applications. Statement of Appellate Issues, at 8. The Commission made no such assumption. The Order shows that the Commission considered all interests that had been presented, as well as the District Court's ruling. RA at 1-6. The Commission could rightfully assume *from the parties' presentations* (including that of Arrington) that Arrington had no other interests other than those presented. And no evidence of an independent interest was presented to the Commission by Arrington or anyone else. Indeed, Arrington characterized its interests in Section 23 and 25 at the time it applied for drilling permits as "equitable" (RA at 109. ll. 9-10) and presented evidence only of the farm-out and the

disputed top leases. See RA at 24, ll. 6-16 ("... David Arrington ... control[s] an interest in this area. We have in Section 25, in the west half, we have a farmout agreement. That was dated back in September of 2001."); RA at 22, ll. 5-8 ("... David Arrington does own part of the acreage, part of the farmout -- and that's part of the agreements that we're going to put into evidence -- in the west half of section 25."), RA at 105-106 (Arrington presents four exhibits - the farm-out agreement, a letter agreeing to release the permit to drill in Section 23, the December, 2000 agreement between Arrington and Ocean Energy concerning a well in Section 20, and a copy of a ruling of the District Court on the tortuous interference claims).

Although Arrington now seems to argue that it has an "independent interest" or "interests" that otherwise support its application, it did not reveal those interests to the Commission, and has waived the issue. See Duke City Lumber Co. v. New Mexico Environmental Improvement Division, 101 N.M. 301, 308, 681 P.2d 727 (Ct.App. 1983) (party waived objections to testimony of witness during administrative hearing by not objecting); Wolfley v. Real Estate Commission, 100 N.M. 187, 188-189, 668 P.2d 303 (1983) (issues not raised in administrative proceedings will not be considered for the first time on appeal). See also Randolph v. New Mexico Employment Security Department, 108 N.M. 441, 444-445, 774 P.2d 435 (1989) (NMESD's attempt to introduce a letter containing additional evidence after the conclusion of the hearing was improper - the tendered evidence was not to be considered as a part of whole record review by the reviewing courts).

Finally, Arrington, citing to Magnolia Petroleum Co. v. Railroad Commission et al., 141 Tex. 96, 170 SW2d 189 (1943), claims that the *practical effect* of the

Commission's order was to "adjudicate title." Arrington claims that the Commission exceeded its authority when it rescinded Arrington's permit. Arrington claims that the Commission should have taken the approach spelled out in Magnolia Petroleum. Statement of Appellate Issues, at 9.

Magnolia Petroleum does not support this argument. The Oil Conservation Commission did not and could not adjudicate title. Order No. R-11700-B expressly deferred to the district courts on such matters and the Commission agreed that it had no authority to adjudicate title. RA at 5 (Order, at ¶ 27)("The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico.").

The Texas Supreme Court, in Magnolia Petroleum, made a similar finding. In that case, the Court held that the Texas Railroad Commission (the oil and gas regulatory body in Texas) was without power to adjudicate questions of title or rights of possession, and that all such questions must be settled by the courts. Magnolia Petroleum involved a suit by an oil and gas producer against the Railroad Commission to obtain cancellation of two drilling permits issued to a third party. Magnolia Petroleum contended that the permits violated the Railroad Commission's spacing rules and further alleged that the person who had obtained the permits had no title to the property (a quiet title suit had previously been filed in Gregg County, the county in which the property at issue was situated, on this issue). The district court in Travis County cancelled the permit and entered an injunction against the drilling of the two wells. The Travis County court made findings concerning the chain of title of both the minerals and the surface of the disputed

tract so as to conclude that a bona fide dispute existed as to the title of the disputed lands, and the court concluded that given the disputed title and the proceedings in Gregg County, the Railroad Commission should not have issued a drilling permit. An intermediate court of appeals remanded the case to the district court to suspend the case until final judgment of the case in Gregg County.

In that posture, the case reached the Supreme Court, which held the Railroad Commission was without power to "... adjudicate questions of title or rights of possession. These questions must be settled in the courts." Magnolia Petroleum, 170 S.W.2d at 191. The Court further noted that the Railroad Commission lacked the authority to adjudicate title and if it purported to do so, the act would be void: "When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land. If other parties are in possession of the property, as in the present case, they may defend their possession by self-help, or by injunction proceedings. Before the permittee can drill, he must first go to court and establish his title." Id. The Court found that issuance of a drilling permit cannot decide such issues: "[A permit] ... grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary's title. It merely removes the conservation laws and regulations as a bar to drilling the well ..." Id.

Thus, even if the New Mexico Oil Conservation Commission had taken upon itself to impermissibly "adjudicate title" as Arrington claims, under Magnolia Petroleum, any such act would have been void. The permit issued to TMBR/Sharp, even if it had explicitly purported to adjudicated title, would only have "remove[d] the conservation

laws and regulations as a bar to drilling the well ..." Magnolia Petroleum, 170 S.W.2d at 191.

The Texas Supreme Court did note that the Railroad Commission should not completely disregard title questions when it grants a permit to drill. Magnolia Petroleum, 170 S.W.2d at 191. The Court noted that the Railroad Commission should not blindly issue a permit to a person who lacks any claim to the property upon which a permit to drill is sought, and the Court observed that a permit should be refused unless the applicant can claim the property in "good-faith." Magnolia Petroleum, 170 S.W.2d at 191.[5] Arrington seems to use the Court's discussion on this point to argue that a good faith dispute concerning the property still exists (presumably with respect to the top leases), apparently based on the parties' assertions that an appeal of the District Court's summary judgment would be forthcoming after entry of a final order. See RA at 51-51 (statement of Mr. Bruce), 128-129 (statement of Mr. Carroll).

But much more than a "good faith dispute" exists here. The District Court has *adjudicated* Arrington's title and found it wanting. RA at 232 (district court's entry of summary judgment). This is a critical difference between this case and Magnolia Petroleum. In Magnolia Petroleum, the Gregg County court had not yet adjudicated title when the permit dispute reached the courts, and the Supreme Court couldn't justify abating the statutory appeal to await adjudication of title. Magnolia Petroleum, 170 S.W.2d at 191. But Magnolia Petroleum does not hold and cannot be read to hold that the New Mexico Oil Conservation Commission must issue a permit to anyone with a good faith belief in their title if, in fact, a court has declared that title has failed. Such a

[5] The "good faith belief" is the same standard the Commission adopted in this case. See RA at 5-6 (Order, at ¶ 28).

ruling would be nonsensical and violate the very principles that Magnolia Petroleum establishes. Until and unless the district court's ruling is reversed, Arrington's title has failed, and the Commission had no choice but to recognize and accept that fact.

D. The Commission's Decision to Hear This Matter First Was Reasonable and Authorized by Law.

Both Arrington and Ocean Energy attempted to convince the Commission that this matter should be stayed and consolidated with four applications for "compulsory pooling" in Sections 23 and 25. Arrington has filed a motion with this Court seeking the same relief.

The Commission rejected the motions because the applications for compulsory pooling raised entirely different questions than those raised in this case by TMBR/Sharp's applications.

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

RA at 6 (emphasis added). See also RA at 6 (Order, ¶¶ 32-36).

Arrington assigns error to this decision. Arrington argues that the Commission failed to "completely resolve" the dispute and failed to accord "full relief" to the affected parties. Statement of Appellate Issues, at 10. Arrington argues that the Commission has allowed the issues in this case to "unduly influence events" and has failed to consider its statutory mandates to prevent waste, protect correlative rights and prevent the drilling of unnecessary wells. Id. Arrington argues that the Order in this case has caused Arrington more problems and have frustrated its efforts to develop the east half of Section 25, acreage that Arrington claims "should not have been affected by these proceedings." Id.

Like all decisions of the Oil Conservation Commission, its decision to defer hearing the compulsory pooling cases must be judged by the applicable standard of review. See NMSA 1978, § 39-3-1.1(D) and Rule 1-074, SCRA 2000 and discussion at pages 8-9. Relevant to this inquiry, it should be noted that nothing in New Mexico law requires that the Commission consolidate all related or similar cases and adjudicate all together. *See* NMSA 1978, § 70-2-25(B) (no such requirement); NMSA 1978, § 39-3-1.1(D) (no such requirement) and Rule 1-074, NMRA 2002 (no such requirement). To the contrary, the Oil and Gas Act seems to allow the Division to issue a permit to drill *prior to* compulsory pooling proceedings. See NMSA 1978 70-2-17(C)("Where ... [an] owner ... who has the right to drill *has drilled* ... the division ... shall pool ..."). If an owner "has drilled," it is only after receipt of a permit to drill issued by the Division. See RA at 7 (Order, ¶ 34).

Further, the Commission's decision was rationally based on its peculiar knowledge of such proceedings. A compulsory pooling proceeding is one in which an

operator requests the Division to designate the operator of a well. See NMSA 1978, § 70-2-17(C). In compulsory pooling, the interests are "pooled" to a single well, an operator of the well is designated, and the owners of the mineral interests in the spacing unit share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id. Pooling cases involve geology and petroleum engineering, evidence that Arrington argues should have been also considered in this case.

But the Commission understands that compulsory pooling matters are unrelated to permitting, and knows that it would be confusing and unwieldy to deal with two such matters simultaneously, and therefore declined to do so in this case. RA at 6 (Order, ¶¶ 32, 33). The Commission's decision was not irrational or arbitrary. Moreover, the Commission's expertise in handling these complex regulatory matters is well known and entitled to considerable deference. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members. . . . Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment."). See also Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same).

Appellant however argues that the Commission was *mandated* to address the compulsory pooling applications, citing § 70-2-17(C), Sims v. Mechem, 72 NM 186, 188, 382 P.2d 183, 184 (1963), Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct.App. 1981), Van Horn Oil Co. v. Oklahoma Corporation Commission, 753 P.2d 1359, 1363 (1988), Anderson v. Grand River Dam Authority, 446 P.2d 814 (1968) and Am.Jur.2d. ("Administrative Law, Section 522").

These citations do not support the assertion. Section 70-2-17(C) of the Oil and Gas Act provides the Commission with *authority* to enter compulsory pooling orders. It requires the Commission to enter a pooling order only if certain factual predicates are present. On its face, section 70-2-17(C) does not require the Commission to consolidate cases stay cases, or afford a "complete resolution" as proposed by Arrington. Indeed, the Oil and Gas Act expressly permits the Commission to prescribe its rules of order in proceedings and thus permits procedural latitude to make sensible decisions to manage complex and technical cases. NMSA 1978, § 70-2-7 (1987).

The citation to Sims is not helpful either. Sims involved entry of a compulsory pooling order by the Commission. The Court in that case noted that "... the commission is *authorized* to require pooling of property when such pooling has not been agreed upon by the parties ..." Sims, 72 N.M. at 188 (emphasis added). The specific issue in Sims concerned the lack of a finding concerning waste in the order. Sims, 72 N.M. at 189. Sims does not stand for any relevant proposition here as this matter involves the disputed permits. It certainly does not stand for the proposition that the Commission has to bring

the parties before it and adjudicate whether property should be subject to compulsory pooling.

Appellant's citation to Kerr-McGee and Anderson are similarly misplaced. Kerr-McGee involved the promulgation of *regulations* by the New Mexico Environmental Improvement Board. Several actions of the Board were questioned during the promulgation of its radiation protection regulations, including the fact that staff of the Environment Department had drafted the proposed regulations. The Court held that the Board had in fact impermissibly delegated its authority and the regulations should have been drafted by the Board's staff. Kerr-McGee, 97 N.M. at 96-97. Anderson involved a regulation of the Grand River (Oklahoma) Dam Authority requiring permission of adjoining landowners before it would issue a houseboat permit on a lake. After a houseboat owner was unable to obtain approval form the adjoining landowner, the Dam Authority took possession of the houseboat and sold it. The Oklahoma Supreme Court decided that the regulation impermissibly delegated the Dam Authority's authority to the adjoining landowners. Anderson, 446 P.2d at 819.

Kerr-McGee and Anderson concern improper delegation of authority by an agency. They do not apply here. In this case, the Commission has not delegated authority to anyone. The compulsory pooling cases are not yet before it; they remain pending before the Oil Conservation Division and the decision-making authority over those cases hasn't been improperly delegated. See NMSA 1978, § 70-2-6(B). The issue raised by Arrington is not a question of delegation of authority, but the procedure chosen by the Commission to address the issues.

The citation to Van Horn is the most puzzling reference, because that case *upheld* numerous purely procedural decisions of the Oklahoma Corporation Commission. In Van Horn, a compulsory pooling proceeding, the Oklahoma Supreme Court upheld the Commission's decisions: (1) *to proceed to hearing and deny Van Horn Oil Company's motion to continue,* (2) to elect to proceed to hearing despite the fact that Van Horn's principals could not participate because they were on vacation, (3) to conduct an oral hearing on Van Horn's challenge to a hearing officer, (4) to decide contrary to the hearing officer's recommendations, and (5) its refusal to re-open the record to take additional evidence. Van Horn alleged on appeal that the Commission could not overrule the findings of its hearing officer once the hearing officer had been delegated authority to hear the matter. The Oklahoma Supreme Court made clear that no such principle exists because the hearing officer's "decision" was only a recommendation to the Corporation Commission, not a decision. Van Horn, 753 P.2d 1359. The Court commented, in *dicta*, that the Commission would have been without power to completely delegate its decision-making power to the hearing officer.

This citation isn't any more relevant than Kerr-McGee and Anderson because delegation is not a factor here. If it stands for anything, Van Horn stands for the proposition that the Commission has inherent power to manage the cases and matters before it.

Courts invariably give deference to administrative agencies on purely procedural matters like this one. *See e.g.* In the Matter of the Otero County Electric Cooperative, 108 N.M. 462, 774 P.2d 1050 (1989); Mobil Oil Exploration & Producing S.E. v. United Distribution Companies, 498 U.S. 211, 112 L.Ed.2d 636, 111 S.Ct. 615 (1991); Vermont

Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978); Northern Border Pipeline Co. v. Federal Energy Regulatory Comm'n, 129 F.3d 1315, 1319 (D.C. Cir. 1997); United States v. Jenks, 22 F.3d 1513, 1518 (10th Cir. 1994), *after remand* 129 F.3d 1348 (10th Cir. 1997); American Airlines Inc. v. Civil Aeronautics Board, 495 F.2d 1010 (D.C. Cir. 1974).

The procedural discretion vested in administrative bodies is critical to their proper functioning and efficiency. For example, in Matter of Otero County, the Supreme Court approved the Public Service Commission's decision to sever an issue concerning the fairness of a utility billing method known as "demand metering" from a proceeding devoted to customer complaints. The Supreme Court held the Commission had discretion to conduct such an inquiry separately, to preserve the *status quo* of the utility's income stream while separately addressing the important question raised by the customer:

> In this case, the PSC granted a rate request, but ordered a separate proceeding to review the fairness of demand metering. Given the nine-month time constraint of [the Public Utility Act], and the imperative of "just and reasonable" rates under [the Public Utility Act], the PSC's severance is a reasonable procedure under its legislative mandates. This procedure allowed the PSC to leave the utility's income stream intact, while preserving its mandate under [the Public Utility Act] to determine the reasonableness of Otero's rate structure.

Matter of Otero County, 108 N.M. at 465. Here, the Oil Conservation Commission's decision to hear separately matters concerning the issuance of a drilling permit and compulsory pooling, like the decision of the Public Service Commission's decision to address demand metering separately from ratemaking, is both reasonable and permissible under the Oil and Gas Act and is entitled to considerable deference.

E. Order No. R-11700-B Should Be Affirmed.

Order No. R-11700-B was supported by substantial evidence, including the District Court's declaration that TMBR/Sharp's mineral interests in Sections 23 and 25 had not failed, the farm-out agreement of September 10, 2001, and the lack of any other evidence of an independent mineral interest to support Arrington's applications for permits to drill. A reasonable mind would accept this evidence as adequate to support the conclusions reached. Grace, 87 N.M. 208.

The Commission's decision to address the permitting issue separately from the compulsory pooling issue was rational and reasonable and based on the Commission's understanding of the essential differences between such proceedings and is entitled to substantial deference. Matter of Otero County, 108 N.M. at 465. The decision to hear the matters separately was not unreasonable, was not contrary to law, and was not arbitrary or capricious, and as such should be upheld. See NMSA 1978, §§ 70-2-25(B), 39-3-1.1(D) and Rule 1-074, NMRA 2002.

V. STATEMENT OF RELIEF SOUGHT

The Commission requests affirmance of Order No. R-11700-B, dismissal of Arrington's appeal herein, and issuance of the appropriate mandate.

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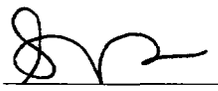

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v. **No.**
D-101-CV-2002-1391

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant.

APPELLANT'S STATEMENT OF APPELLATE ISSUES

David H. Arrington Oil and Gas, Inc., ("Arrington"), through its attorneys, Miller Stratvert & Torgerson, P.A., (J. Scott Hall), pursuant to NMRA 1-074(K)(1-4) 2002, files this Statement of Appellate Issues pursuant to its appeal of Order R-11700-B issued on April 26, 2002, by the New Mexico Oil Conservation Commission ("OCC").

I. STATEMENT OF THE ISSUES

A. Whether the OCC improperly revoked Arrington's drilling permits for two gas wells it planned to drill in Lea County.

B. Whether the OCC improperly failed to resolve pending compulsory pooling cases prior to the revocation of Arrington's drilling permits and the issuance of new drilling permits to TMBR/Sharp Drilling, Inc. And, whether as a consequence, the OCC failed to perform its statutory duties under NMSA 1978 §§ 70-2-17 and 70-2-18 of the New Mexico Oil and Gas Act (NMSA

1978 §§ 70-2-1, *et seq.*) to determine relevant geologic, engineering, waste and conservation issues.

II. SUMMARY OF PROCEEDINGS

David H. Arrington Oil and Gas, Inc., ("Appellant" or "Arrington"), appeals from a decision of the New Mexico Oil Conservation Commission, ("Appellee", "OCC", or "Commission"), revoking drilling permits previously issued to Arrington and subsequently approving drilling permits affecting the same lands filed by another oil and gas operator, TMBR/Sharp Drilling, Inc..

1. Three oil operators, Arrington, TMBR/Sharp Drilling, Inc., ("TMBR/Sharp"), and Ocean Energy, Inc., ("Ocean"), have been competing for New Mexico Oil Conservation Division (referred to variously as "NMOCD", "OCD", or "Division") regulatory approval to drill wells to the Mississippian formation on certain lands in Lea County.

2. Each of the wells involved must be located on a 320-acre "drilling unit", also referred to as "spacing units" or "proration units", established by the NMOCD as ". . . being the area that can be efficiently and economically drained and developed by one well." NMSA 1978 § 70-2-17(B).

3. Arrington owns a substantial portion of the oil and gas leasehold working interest in and under the W/2 of Section 25, T-16-S, R-35-E in Lea County, and Arrington has the right to drill thereon.

4. Initially, on July 17, 2001, the Division approved Arrington's Application for permit to Drill (often referred to as an "APD" or "drilling permit") for the Triple-Hackle

Dragon 25 Well No. 1 on a drilling unit consisting of the W/2 of Section 25[1], followed by the approval on July 30, 2001 of the APD for Arrington's Blue Drake 23 Well No. 1 for a drilling unit consisting of the E/2 of Section 23. (Sections 25 and 23 adjoin one another in Township 16 South, Range 35 East.) [RP 156-158.]

5. Prior to July 17, 2001, Arrington claimed ownership to a substantial portion of the working interest in the NW/4 of Section 25 pursuant to a "toplease" which it claimed was effective subsequent to the expiration of an oil and gas lease owned by TMBR/Sharp on the same lands. [RP 544, Para. 13, 14 and 15; 247, 252-255; 342-369.]

6. On September 10, 2001, Arrington and Ocean Energy entered into a Farmout Agreement with Ocean Energy, Inc., whereby Arrington acquired Ocean's oil and gas lease interests in the SW/4 of Section 25, among other lands. [RP 219-255; 367-369; 379-386; 425-432; 439-440; 534-541.]

7. It is undisputed that from September 10, 2001, during the time it held the drilling permit for the Triple-Hackle Dragon 25 Well No. 1, Arrington owned (and continues to own) lease rights in the SW/4 of Section 25 pursuant to the Farmout Agreement with Ocean Energy.

8. Applications filed in August, 2001 by TMBR/Sharp for permits to drill its Leavelle 23 No. 1 well and the Blue Fin 25 No. 1 well in Sections 23 and 25, respectively, had been denied by the Division's Hobbs district office on August 8, 2001 due to the previous approval of the Arrington drilling permits for the same lands. [RP 153, 155.]

9. On August 7, 2001, TMBR/Sharp filed administrative applications in Case Nos. 12731 and 12744 seeking review by the Division's hearing examiners of the denial

[1] Arrington and Ocean Energy have since agreed that Ocean will drill the well in the

of its drilling permits and the approval of Arrington's APD's and to prevent Arrington from commencing drilling operations. [RP 154.] The cases were consolidated for hearing. On December 13, 2001, the Division, through its Director,[2] determined in Order No. R-11700 that Arrington's drilling permits had been properly approved. [RP 542-547.] TMBR/Sharp did not present any geological or engineering testimony or evidence supporting its proposed drilling locations [RP 545, Para. 20.] Dissatisfied with that result, TMBR/Sharp pursued a *de novo* appeal with the New Mexico Oil Conservation Commission. [RP 396.]

10. On March 15, 2002, without notice to the Arrington, TMBR/Sharp Drilling, Inc. filed another APD with the Division's District I office for its Blue Fin 25 Well No. 1 which was also proposed to be drilled to the Mississippian formation in the NW/4 of Section 25, T-16-S, R-35-E, NMPM in Lea County. The C-102 acreage dedication plat which accompanied the filing of the TMBR/Sharp Drilling, Inc. APD proposed to dedicate the N/2 of said Section 25 to the Blue Fin 25 Well No. 1.

11. It is undisputed that Arrington owned (and continues to own) lease rights in the SW/4 of Section 25 pursuant to the Farmout Agreement with Ocean Energy before TMBR/Sharp filed its drilling permits with the NMOCD on March 15, 2002.

12. On March 20, 2002, without notice to the Arrington, the Division's District I office approved the APD for the Blue Fin 25 Well No. 1.

13. As a consequence of the actions of the Division's District I office, there existed two simultaneously approved drilling permits that both proposed to dedicate the NW/4 of Section 25 in violation of the Division's rules (19 NMAC 15.C.104(C)(2)(c)).

W/2 of Section 25 under a "Farmout" agreement.

[2] The Director of the NMOCD is also the Chairperson of the three-member NMOCC.

14. At the time of the filing of the drilling permits, there were owners of other interests in the N/2 and W/2 of Section 25, respectively, who had not voluntarily agreed to participate in the drilling of the proposed wells. Neither Arrington nor TMBR/Sharp had consolidated the interests of all the non-participating owners either by way of a voluntary agreement, communitization agreement, or compulsory pooling order. Both Arrington and TMBR/Sharp subsequently initiated separate "compulsory pooling" proceedings before the Division seeking to consolidate those interests. [RP 558, 559.]

15. On March 15, 2002, Arrington filed its Motion To Vacate The Commission Hearing which explained that the pending compulsory pooling cases would resolve the dispute over the issuance of the drilling permits. [RP 558-561]. On April 20, 2002, in a letter to the Commission's chairman, Ocean Energy's counsel pointed out that it was the Commission's statutory duty to act prevent waste and protect correlative rights, citing to NMSA 1978 Section 70-2-11, and noted further that "[a]n APD is, and must be, subsidiary to a compulsory pooling order." [RP 613]

16. On March 21, 2002, the Commission Chair issued an interim order denying the motion to vacate the Commission hearing scheduled on TMBR/Sharp's de novo appeal. The finding at Paragraph 2 of the interim order states: "Arrington's motion to vacate the hearing argues that resolution of competing pooling applications before the Division in Case No. 12816 and Case No. 12841 will moot the matters before the Commission. *However, it instead appears that the issue of the right to drill in the NW/4 of Section 25 is vital to all four cases and should be resolved expeditiously."* [RP 556, 557]

17. On April 26, 2002, the New Mexico Oil Conservation Commission issued Order No. R-11700-B in Case Nos. 12731 and 12744. [RP 1-8.] In Order No. R-11700-

B, the Commission, citing to an Order entered on December 24, 2001, by the District Court, Fifth Judicial District, in separately pending litigation involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands.

18. On May 1, 2002, the Division's District I office notified Arrington that its approved APD was canceled. Arrington received the notification on May 7, 2002. [RP 6, Para 29.]

19. Arrington continues to own lease interests underlying the W/2 of Section 25 and continues to be eligible to be operator. [RP 367-369; 219-255.]

20. In the interim, on January 28, 2002, TMBR/Sharp had filed an application for compulsory pooling in Case No. 12816 seeking to consolidate the working interests in the N/2 of Section 25 for its Blue Fin 25 Well No. 1. Ocean Energy, Inc. also filed separate compulsory pooling applications (Case No. 12841 and Case No. 12860) seeking to pool the W/2 of Section 25 for two alternative proposed Mississippian formation well locations in the NW/4 and SW/4, respectively. [RP 558, 559.]

21. More recently, Arrington has filed its application for compulsory pooling in Case No. 12859 to create an E/2 unit in Section 25 for its Glass-Eyed Midge 25 No. 1 Atoka/Morrow/Mississippian well to be drilled in the NE/4. Arrington's C-101 APD for the Glass-Eyed Midge 25 No. 1 well was issued by the Division on December 17, 2001 and its C-102 reflecting an E/2 unit was filed on November 29, 2001. [RP 681, 691-694.] The N/2 TMBR/Sharp unit is in obvious conflict with the E/2 and W/2 units proposed by Arrington and Ocean Energy.

22. In the proceedings before the Division and Commission, TMBR/Sharp took the position that it was unnecessary for the agency to first consider the compulsory pooling issues before deciding the drilling permit cases. [RP 550-554.]

23. At the time the Commission entered Order No. R-11700-B, no geologic, engineering or equitable evidence having a bearing on the development of Section 23 and 25 had been presented to the Division or the Commission. [RP 558, 559.]

24. TMBR/Sharp began drilling its Blue Fin 25 Well No. 1 on May 7, 2002, without having consolidated the unjoined interests and without allowing the Division to determine the final configuration of the spacing and proration units in Section 25. [RP 659.]

III. ARGUMENT

A. The OCD improperly revoked Arrington's drilling permits.

In Order No. R-11700-B, the Commission, citing to the separately pending litigation in the district court involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands and had "no authority over the property". (RP 1-8, Order R-11700-B, Par. 29.) This finding was the primary basis for the Commission's determination. This finding is clearly based on error. Arrington established that during the time it held the drilling permit it had the right to drill and operate as the owner of lease interests in the W/2 of Section 25 separate and apart from the oil and gas leases involved in the district court litigation. [RP 367-369; 219-255.]

In addition, at the time it filed the APD for its Triple Hackle-Dragon 25 No. 1 Well, Arrington owned separate oil and gas lease interests in the E/2 of Section 25 that

were independent from the conflicting leases that are the subject of the district court litigation cited by the Commission in Order No. R-11700-B. [RP 367-369.] As such, Arrington was eligible to become the operator of that well and the permit to drill that was issued to it on December 17, 2001 should have been undisturbed.

In Paragraph 14 of its Order, the OCD states:

> *"14. The central issue in this case is whether Arrington was eligible to become the operator of the wells in question...If Arrington was eligible to become the operator, then the permits were properly issued to Arrington."*

In its findings at Paragraph 29 of Order R-11700-B, the Commission erroneously assumed that the rulings issued by the 5th Judicial District Court served to adjudicate all of the title owned by Arrington. Instead, the scope of the district court rulings affected only the lands encumbered by the Stokes/Hamilton base lease claimed by Ameristate and TMBR/Sharp and the top-lease claimed by Arrington located in the NW/4 of Section 25, as well as in SE/4 of Section 23. The interests separately owned by Arrington in the SW/4 of Section 25 remained unaffected. As such, Arrington continued to be eligible to become operator throughout. Arrington's APD should be reinstated.

At finding paragraph 28 of Order R-11700-B, the Commission found that Arrington had applied for its permit to drill "...under a good faith claim to title and a good faith belief that it is authorized to drill the well applied for." [RP 5.] Although Order R-11700-B also recognized that Arrington acquired independent title to the SW/4 of Section 25 under its farmout agreement with Ocean Energy [Paragraph 24], that significant fact was otherwise ignored by the Commission. It is indisputable that at the time Arrington held its drilling permit, it was the owner of the right to drill and was in lawful possession of the APD.

Under the Commission's rationale, the revocation of Arrington's drilling permit based on a third-party's challenge to its title was (1) clearly erroneous, and (2) not supported by the evidence. Moreover, the revocation did exactly what the Commission purported to eschew in its order: The practical effect of the revocation was to adjudicate title. For this reason, the Commission exceeded its authority in removing Arrington's permit and transfering it to TMBR/Sharp.

The proper action for the Commission to follow in this instance was established by its corallary agency in Texas, the Railroad Commission, in a case with closely analogous facts. In *Magnolia Petroleum Co. v. Railroad Commission, et al.*,[3] Magnolia challenged the issuance of a drilling permit to Landman as Magnolia was simultaneously challenging Landman's title to the tract in question in a trespass and quiet title suit in district court. The Texas Supreme Court refused to go so far as to cancel or even suspend Landman's drilling permit. The *Magnolia* court said:

> "Of course the Railroad Commission should no do the useless thing of granting a permit to one who does not claim the property in good faith. The Commission should deny the permit if it does not reasonably appear to it that the applicant has a good faith claim in the property. If the applicant makes a reasonably satisfactory showing of a good-faith claim of ownership in the property, the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit; neither is it ground for suspending the permit or abating the statutory appeal pending settlement of the title controversy."

[3] 141 Tex. 96, 170 S. W. 2nd 189 *at* 191 (1943).

B. The OCC improperly failed to resolve pending compulsory pooling claims prior to issuance of its drilling permit to TMBR/Sharp Drilling covering E/2 of Section 25. Consequently, the OCC failed to perform its statutory duties under NMSA 1978 §§ 70-2-17 and 70-2-18 of the New Mexico Oil and Gas Act (NMSA 1978 §§ 70-2-1, *et seq.*) to determine relevant geologic, engineering, waste and conservation issues.

Order No. R-11700-B was improvidently issued, failing to completely resolve the dispute before the agency or accord full relief to the affected parties. The initial determination of Cases 12731 and 12744 has allowed the permitting issue to unduly influence events and has pre-empted proper consideration by the agency's of its statutory mandates to prevent waste, protect correlative rights and avoid the drilling of unnecessary wells. As a further consequence of its issuance, Order No. R-11700-B has precipitated more problems for the parties, including the Division, that have become manifest in the frustrated efforts of Arrington to develop the E/2 of Section 25, acreage that should not have been affected by the proceedings.

TMBR/Sharp asserts the filing of a drilling permit is sufficient to "consolidate" interests and that is enough to determine the unit configuration, which will, in turn, determine the ultimate development of the entirety of Section 25. [RP 247; 255; 294-305.] As a further consequence, TMBR/Sharp has placed itself in the position of having to argue to the Division that compulsory pooling is unnecessary altogether. [TR, Pg. 15, L 24-25; Pg. 16, L 1-14; Pg. 19, L 1-6.] (*See* April 29, 2002 Motion of TMBR/Sharp Drilling, Inc. To Continue Case No. 12816 and To Dismiss Cases 12859, 12860, and 12841.)

It is apparent that issues of waste, correlative rights, and unnecessary drilling are inextricably bound with the issue of which operator may be entitled to drilling permits. These interrelated disputes cannot be resolved separately until the agency discharges its statutory obligations to consider the pooling applications and make its determinations, based on geologic,

and engineering evidence that the resulting development will prevent waste and protect correlative rights. At the time the OCC issued Order No. R-11700-B, those issues had not been determined.

The determination, first, that TMBR/Sharp may have been entitled to have its drilling permits approved before issues of correlative rights and waste are considered exalts a mere ministerial act over the substantive and discretionary quasi-judicial function that the Division is ***mandated*** to perform under N.M. Stat. Ann. 1978 Sections 70-2-17 and 70-2-18.[4]

In a situation such as this, where multiple owners have not agreed to pool their interests, under the Division's compulsory pooling statutes, on application, the agency is obliged to convene a hearing and consider evidence probative of whether pooling is necessary "...to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste". N. M. Stat. Ann. 1978 Section 70-2-17(C). See Simms v. Mechem 72 N.M. 186, 188, 382 P.2d 183, 184 (1963). ("Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties[.]") Where the evidence presented substantially supports affirmative findings and conclusions on any one of these issues, then the statute directs that the Division "***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit." *Id.*, (emphasis added). Even under this statutory hearing process, depending on the evidence, the issuance of a compulsory pooling order is discretionary and is by no means an entitlement. This quasi-judicial function is expressly reserved to the Commission and the Director or her duly appointed examiners (N. M. Stat. Ann. 1978 sec. 70-2-13) and ***no part*** of it may be delegated by fiat under the guise of a ministerial approval of a drilling permit. *See* Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct. App. 1981). In Kerr-McGee, the Court of Appeals held that duties which are

quasi-judicial in nature, and which require the exercise of judgment cannot be delegated. Id. As Kerr-McGee was a case of first impression in New Mexico, the Court of Appeals relied on Oklahoma case law. The Supreme Court of Oklahoma in Van Horn Oil Co. v. Okla. Corp. Com'n., 753 P.2d 1359, 1363 (1988) cited to the same authority relied on the New Mexico Court of Appeals when it quoted:

> Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Citing, Anderson v. Grand River Dam Authority, 446 JP.2d 814 (1968). The Anderson Court also quoted with approval from American Jurisprudence and Corpus Juris Secundum:

> In 2 Am. Jur. 2nd Administrative Law, Section 222, it is said: It is a general principal of law, expressed in the maxim "delegates no protest delegare", that a delegated power may not be further delegated by the person to whom such power is delegated and than in all cases of delegated authority, or personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment and discretion, the authority is purely personal and cannot be delegated to another***. A commission charged by law with power to promulgate rules, cannot in turn, delegate that power to another."

Because New Mexico has expressly adopted Oklahoma law, it is the law in this state that an administrative body may not delegate a statutory function, particularly in the manner that TMBR/Sharp advocates.

In making any determination under the compulsory pooling statute, under long-standing practice,[5] the Division will consider evidence relating to, among other matters: (1) the presence or absence of a voluntary pooling agreement; (2) whether a reasonable and good-faith effort was made to obtain the voluntary participation of others; (3) reasonableness of well costs; (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of

[5] Compulsory Pooling proceedings are identified as adjudicatory matters under the Division's rules at 19 NMAC 15N.1207.A(1).

correlative rights, including the drilling of unnecessary wells; (5) the assessment of a risk penalty; and (6) whether a proposal is otherwise in the interests of conservation. The mere approval of a drilling permit and the filing of an acreage dedication plat serve to do none of these things and neither have any of the functions enumerated above been delegated outside the Division's regular hearing process.[6]

It is inappropriate to allow any portion of the pooling process to be subsumed by the mere processing of a drilling permit. Order No. R-11700-B, Par. 33. ("An application for a permit to drill serves different objectives than an application of compulsory pooling and the two proceedings should not be confused.") [RP 1-8.] Moreover, the issuance of a drilling permit does not constitute any determination of a property right. *See* Gray v. Helmerich & Payne, Inc., et al, 843 S.W. 2d 579 (Tex. 2000).

Whether intentional or not, the practical effect of Order R-11700-B was to allow a ministerial event to dictate events to the exclusion of the statutory adjudicatory functions that ought first be performed by the Division and the Commission.

IV. RELIEF SOUGHT

Arrington requests that the Court enter its Order directing the Commission to:

a. Proceed to expeditiously address and implement compulsory pooling within the W/2 of Section 25, properly addressing geologic engineering, waste and conservation and other statutory factors.

b. Reinstate Arrington's drilling permit to allow it to drill it proposed Triple-Hackle Dragon 25 Well No. 1 on the W/2 of Section 25;

c. Revoke TMBR/Sharp's drilling permit on its Blue Fin 25 Well No. 1;

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[5] *See* Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963).
[6] N. M. Stat. Ann. 1978 Section 70-2-17(C): "All orders effecting such pooling shall be made after notice and hearing[.]"

d. Reinstate Arrington's drilling permit and otherwise allow Arrington to drill its Glass-Eye Midge 25 Well No. 1 in the E/2 of Section 25.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL & GAS, INC.,

Appellant,

v. No. D-101-CV-2002-1391

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

RESPONSE OF APPELLEE TMBR/SHARP DRILLING, INC. TO APPELLANT'S STATEMENT OF APPELLATE ISSUES

TMBR/Sharp Drilling, Inc. ("TMBR/Sharp") submits its response to the Statement of Appellate Issues filed by Appellant ("Arrington") in this case relative to Arrington's appeal of New Mexico Oil Conservation Commission ("OCC") Order No. R-11700-B as follows:

Disputed or Incomplete Statement of Issues

TMBR/Sharp submits that no genuine issues exist in this case upon which appellate relief can be granted, but reading Arrington's Statement of Appellant Issues in its entirety, it appears that the issues argued by Arrington are more properly stated as:

1. Whether substantial evidence exists in the Record Proper to justify the OCC's finding of fact that Arrington was not an "Operator" for the

purposes of NMAC 19.15.7.0 (8) of any acreage in the W/2 Section 25, Township 16 South, Range 35 East, N.M.P.M., Lea County, New Mexico on July 17, 2001 and therefore not entitled to receive a permit to conduct drilling operations thereon.

2. Whether the OCC acted contrary to law by revoking drilling permits improvidently issued to Arrington prior to the resolution of certain independently filed compulsory pooling cases involving Arrington, TMBR/Sharp, and others.

TMBR/Sharp also believes that Arrington is asserting a third appellate issue which was not specifically identified in its Statement, to-wit:

3. Whether the OCC acted arbitrarily or capriciously in revoking Arrington's drilling permit for a well to which the E/2 Section 25, Township 16 South, Range 35 East was dedicated when said permit conflicted with a prior-filed and subsequently validated application filed by TMBR/Sharp dedicating the NE/4 Section 25 to a N/2 Section 25 spacing unit.

Disputed or Incomplete Summary of the Proceedings

In its Statement, Arrington seeks to recite certain "facts" that either (a) have no reference to the Record Proper or (b) are founded solely in the non-evidentiary remarks, arguments and statements of counsel. More particularly, TMBR/Sharp submits that "fact" nos. 1, 2, 3, 7, 10, 11, 13, 14, 15, 18, 19, 20, 21, 23, and 24 do not conform to the requirements of NMRA 1-074 (K)(2) and

the same must be disregarded by this Court in conducting its whole record review.

Additionally, TMBR/Sharp asserts that the following "facts" proposed by Arrington give this Court an incomplete picture of the Record Proper as it pertains to the appellate issues raised by Arrington:

1. Sections 23 and 25, Township 16 South, Range 35 East, N.M.P.M., Lea County, New Mexico ("Section 23" and "Section 25", respectively) only adjoin each other diagonally, if at all, notwithstanding Arrington's assertion in "fact" no. 4.

2. Arrington's assertion in "fact" nos. 6 and 19 are based upon an affidavit of Jeff Bane that was attached as an exhibit to a summary judgment pleading filed by Arrington in Lea County District Court Cause No. CV-2001-315C, found in the Record Proper, Pages 367-369. Mr. Bane did not appear at the hearing held by the OCC held on March 26, 2002 and his affidavit in an unrelated case cannot constitute evidence in this case.

3. Arrington's reference to the Record Proper, Pages 153 and 155, in "fact" no. 8 appears to be in error. The August, 2001 Applications for Permit to Drill ("APD") filed by TMBR/Sharp and initial denials thereof by the Hobbs District Office of the New Mexico Oil Conservation Division ("OCD") are found in the Record Proper, Pages 161-166.1

4. Arrington's reference to the Record Proper, Page 154 in "fact" no. 9 appears to be in error. The appeal taken by TMBR/Sharp to the OCD relating to the denials of its August, 2001 APDs are found in the Record Proper, Page 104, Lines 19, et seq. and Page 112, Lines 11, et seq.

5. The APD filed by TMBR/Sharp on March 15, 2002, characterized in "fact" no. 10 as "another" APD, was a supplemental submission to the N/2 Section 25 APD filed by TMBR/Sharp in August of 2001. Record Proper, Page 105, Lines 22, et seq.

6. No requirement exists under New Mexico law to notify third parties when an APD has been filed or when any drilling permit has been canceled by the OCC. Arrington's references to lack of notice in "fact" nos. 10 and 12 seek to create a non-relevant subissue in this case.

7. It appears from the instrument found in the Record Proper, Page 154, that Arrington's APD in Section 23 dedicated the E/2 thereof to a proposed well rather than the S/2 Section 23 as asserted by Arrington in "fact" no. 17. 8. It does not appear that Record Proper, Page 6, Paragraph 29 relates to the assertion made by Arrington in "fact" no. 18.

9. Arrington's assertion in "fact" no. 19 is conclusory in nature and in any event, cannot be based upon a letter of agreement between Arrington and Ocean Energy, Inc. ("Ocean") that was not fully executed by all parties until

November 14, 2001 (see Record Proper, Page 225) and that was not authenticated at the OCC hearing below through the testimony of an Arrington or Ocean representative.

TMBR/Sharp believes that certain facts are contained in the Record Proper to which no reference was made by Arrington that are relevant to this Court's determination, to-wit:

1. At the time Arrington applied for its drilling permits in Sections 23 and 25 in July, 2001, Arrington had no leasehold interest of record in Lea County, New Mexico. Record Proper, Page 104, Lines 19, et seq.

2. Arrington did not acquire a leasehold interest in the NW/4 Section 25 or SE/4 Section 23 until September 17, 2001. Record Proper, Page 105, Lines 2, et seq.

3. The leasehold interest acquired by Arrington in the NW/4 Section 25 and SE/4 Section 23 has been determined by a court of competent jurisdiction to be a future (and not present) estate. Record Proper, Pages 394 and 395.

4. Arrington did not acquire a contractual leasehold interest in the SW/4 Section 25 until its agreement with Ocean was fully executed on November 14, 2001. Record Proper, Page 225.

5. TMBR/Sharp was the owner of leasehold interests in Sections 23 and 25 in August, 2001. Record Proper, Page 76, Lines 25, et seq., Page 79,

Lines 20, et seq., and Page 81, Lines 24, et seq.

6. TMBR/Sharp owned the leasehold interests identified above at the time it filed its APDs. Record Proper, Pages 162 and 165.

7. The APD filed by TMBR/Sharp in March, 2002 relative to Section 25 was a supplemental filing to its previous August, 2001 filing. Record Proper, Page 105, Lines 22, et seq.

Argument

Arrington, in its Statement, endeavors to lay out what it hopes this Court will believe to be a fairly complex administrative decision making process rife with factual and legal issues requiring resolution. In truth, the decision appealed from below (admittedly the subject of protracted proceedings) deals with a fairly straightforward scenario. When a party having no right to apply for a drilling permit under New Mexico law somehow obtains that permit and thereby prevents a party who has a right to obtain the same, the OCC may revoke the improperly granted permit and issue a permit to the party who is entitled thereto, without regard to any permit applications that may have been later filed. Arrington's efforts to find appellate issues in the OCC's rendering of Order No. R-11700-B by means of artificial complication must fail for the reasons set forth below.

1. Standard of Review: In reviewing an administrative decision of the OCC, this Court should not substitute its judgment for that of the

administrative body; rather, this Court is restricted in this case to considering whether the OCC acted arbitrarily, capriciously, or contrary to law, or whether the administrative order appealed from is substantially supported by the evidence, or whether a decision contrary to law has been rendered. Snyder Ranches, Inc. v. Oil Conservation Commission, 110 NM 637, 798 P.2d 587 (1990). The whole record must be examined, viewing evidence in a light most favorable to the agency's decision. Id. Administrative action is arbitrary and capricious only when said action, when viewed in light of the whole record, is unreasonable or does not have a rational basis. Id. Even if another conclusion might have been reached by the administrative agency, its decision is not arbitrary or capricious if exercised honestly and upon due consideration of the facts. Id. "Substantial evidence", for the purposes of an administrative appeal, is such evidence as a reasonable mind might accept as adequate to support a conclusion. Viking Petroleum v. Oil Conservation Commission, 100 NM 451, 672 P.2d 280 (1983). Special weight is given by the Courts to the experience, technical competence and specialized knowledge of the Oil Conservation Commission. Id.

2. Substantial Evidence Exists in the Record Proper That Arrington Was Not an Operator of E/2 Section 23 or W/2 Section 25 Lands in July, 2001: Only a party who meets the regulatory definition of "operator" is authorized to receive a permit to drill from the OCD. NMAC 19.15.M.1101.A and

19.15.3.102. "operator" is defined in NMAC 19.15.7.0 (8) as a person who, "...duly authorized, is in charge of the development of a lease..." The evidence presented at the hearing before the OCC below clearly and substantially supports the OCC's finding that Arrington was not an "operator" of E/2 Section 23 or W/2 Section 25 lands in July, 2001, when its drilling permits in said sections were applied for. As to the SE/4 Section 23 and the NW/4 Section 25, Arrington did not acquire a leasehold interest to which it could be in charge of development until September 17, 2001, and this interest has been determined by a court of competent jurisdiction to be an estate subordinate to TMBR/Sharp's rights therein. As to the SW/4 Section 25, Arrington did not acquire a contractual leasehold interest from Ocean to which it could be in charge of development until the agreement between the parties was fully executed on November 14, 2001. Finding of Fact nos. 23-29 in Order No. R-11700-B are sufficiently extensive to show the basis of the Order as regards Arrington's entitlement to Section 23 and Section 25 drilling permits in July, 2001 and set forth the reasoning of the OCC in reaching its conclusion, thereby satisfying the rule enunciated in Viking, supra, at Page 282 (citing Fasken v. Oil Conservation Commission, 87 NM 292, 532 P.2d 588 (1975)). The facts appearing in the Record Proper pertaining to Arrington's lack of authorization to conduct development on Sections 23 and 25 in July, 2001 are

surely sufficient for a reasonable mind to accept to support the conclusion that Arrington was not an "operator" at that time and not entitled to receive the drilling permits in question.

For the reasons set forth above, Arrington's Appellate Issue No. 1 must be answered in the affirmative and Arrington's appeal must fail in this regard.

3. The OCC Did Not Act Contrary to Law in Revoking Permits Improvidently Granted to Arrington Pending the Conclusion of Certain Compulsory Pooling Proceedings Relating to Section 25: No New Mexico statute exists describing the particular manner in which drilling permits are issued by the OCD; rather, permitting is a subject governed by the regulations promulgated by the OCC pursuant to Section 70-2-12(A) and 70-2-7 NMSA (1978). No requirement exists under any part of NMAC Section 19 that drilling permits be granted by the OCD with reference to other pending proceedings before that body or the OCC. Quite the contrary, Finding of Fact Nos. 34-36 in Order No. R-11700-B, which describe the separate procedures which should have been followed by the OCD as regards permitting, are altogether consistent with existing New Mexico law.

Section 70-2-17(C) NMSA (1978) provides a party who proposes to drill a well to a common source of supply within a spacing unit the right to compulsorily pool uncommitted mineral interests within said unit under certain circumstances. The same subsection extends compulsory pooling rights to a

party who has drilled a well, clearly contemplating that a permit was already issued to said party. The OCC's separation of its permitting and compulsory pooling functions is, therefore, the only means by which all parts of Section 70-2-17 can be read to be effective. Arrington's reliance on Simms v. Mechem, 72 NM 186, 382 P.2d 183 (1963) in its Statement for the proposition that permitting may only be accomplished by the OCD after all compulsory pooling issues between interested parties are resolved is misplaced. First of all, Simms dealt with facts entirely different than those present here. More particularly, the issue of permitting was not even before the court in Simms. Finally, the order issued by the OCC in Simms was not nearly as complete in its findings and conclusions as Order No. R-11700-B.

Order No. R-11700-B does nothing more than resolve the permitting issues between TMBR/Sharp and Arrington. The Order in no way endeavors to decide those issues which are properly triable before the OCD in the context of a compulsory pooling proceeding. Arrington has, therefore, the continuing right to argue what orientation the spacing units for wells in Section 25 should have based on the geology that it believes to exist, just as it did on April 25, 2002, the day before the Order was entered by the OCC. Arrington's efforts to distract this Court's attention from the core issues present in this case by extensive discussion of ministerial/substantive administrative duty delegation and the policy underpinnings of the New Mexico Oil and Gas Act should be

resisted.

The simple fact is that neither the statutes pertaining to oil conservation nor the regulations promulgated by the OCC thereunder require or even allow the process of permitting to be held hostage by the process of compulsory pooling. The 696 pages constituting the Record Proper in this case clearly evidence the tortuous administrative process that TMBR/Sharp has been forced to follow in order to drill a well on lands in which it clearly owns an interest. The OCC's decision allowing TMBR/Sharp to enjoy the basic benefits afforded by its oil and gas leases in Sections 23 and 25 is in all respects consistent with and not contrary to law.

For the reasons set forth above, Arrington's Appellate Issue No. 2 must be answered in the negative, and Arrington's appeal must fail in this regard.

4. The OCC Did Not Act Arbitrarily or Capriciously in Revoking Arrington's Drilling Permit for an E/2 Section 25 Well: The OCC's policy of only permitting a well or wells within a spacing unit to the first qualified operator who has applied for the same seems to be an unarguable example of administrative common sense. As noted by Arrington in its Statement, it is the legislative mandate of the OCC and the OCD to prevent waste and protect correlative rights. This mandate cannot be accomplished when spacing units within a given area overlap, as would be the case if Arrington's drilling permit for the E/2 Section 25 was allowed to exist contemporaneously with a drilling

permit in favor of TMBR/Sharp for the N/2 Section 25. The OCC determined in Order No. R-11700-B that TMBR/Sharp was the first qualified party to apply for a spacing unit including the NE/4 Section 25 and should have been granted its permit in August, 2001. Arrington's efforts to subvert the priority of qualified party filing system utilized by the OCD has no basis in law or logic and must be resisted by this Court. Examining the record as a whole, viewing the evidence in a light most favorable to the agency's decision, the OCC acted reasonably in confirming a policy that has a rational basis and in this case, there is really no room for different opinions on the subject. The requirements of Snyder Ranches have, therefore, been satisfied.

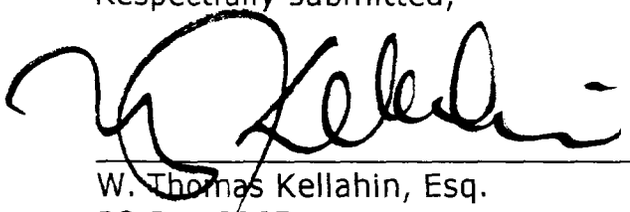
For the reasons set forth above, Arrington's Appellate Issue No. 3 must be answered in the negative and Arrington's appeal must fail in this regard.

Conclusion

The Record Proper in this case reflects that Arrington expended unbelievable effort in delaying the issuance of drilling permits to TMBR/Sharp for wells to be drilled in the N/2 Section 25 and E/2 Section 23. Arrington posited every conceivable argument before the OCD and the OCC in the hope that TMBR/Sharp's drilling activities will be blocked or delayed but remarkably, offered no testimony at the hearing below. The OCC duly considered all of Arrington's arguments and in a decision clearly analyzing all

of the issues and subissues present in this case, determined that revoking Arrington's improvidently granted permits and issuing TMBR/Sharp the permits to which it was entitled was the only result consistent with New Mexico statutes, case law, and OCC regulations. The OCC was in all respects correct in its reasoning and Arrington's appeal should be denied.

Respectfully submitted,



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Attorneys for Appellee
TMBR/Sharp Drilling, Inc.

I hereby certify that a true and correct copy of the foregoing pleading was mailed to the following counsel of record this 8 day of October, 2002:

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David Brooks, Esq.
New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Thomas Kellahin

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-entitled cause of action has been scheduled for hearing before the Honorable Daniel A. Sanchez, at the date, time, and place set forth below:

Date: October 9, 2002

Time: 3:30 p.m.

Place: Judge Steve Herrera Judicial Complex

Purpose: Plaintiff's Motion for Temporary Stay Pending Consolidation

Time Allocated: 30 minutes

FIRST JUDICIAL DISTRICT COURT

BY Sandy DeVera
Calendar Clerk

I hereby certify that I mailed a copy of the foregoing Notice of Hearing on the date of filing to:

James Bruce, Esq.
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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER ENLARGING PAGE LIMIT

THIS MATTER having come before the court upon motion of Appellee, the New Mexico Oil Conservation Commission, by and through its counsel of record, for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages, and the Court having reviewed the pleadings, noted that Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002) imposes, without permission of the Court, a fifteen (15) page restriction on argument, and noted the concurrence of counsel for Appellant,

FINDS that the motion is well-taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the page limit for the argument portion of Appellee's statement of review issues should be, and hereby is, extended to not more than twenty (20) pages.

DANIEL A. SANCHEZ

The Honorable Daniel A. Sanchez

Submitted by:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
505) 476-3462 (facsimile)

Telephonically approved, September 18, 2002:

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Attorney for Ocean Energy

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

MOTION TO ENLARGE PAGE LIMIT

COMES NOW Appellee, the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and moves the Court for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages. As grounds for the motion, Appellee states:

1. This matter is an appeal of an Order of the New Mexico Oil Conservation Commission. As such it is governed in part by Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002).

2. Rule 74(N) restricts the argument portion of the statement of appellate issues to fifteen (15) pages except with permission of the Court to the contrary.

3. This appeal concerns highly technical issues related to the regulation of oil and natural gas drilling, and Appellee is concerned that it will be unable to assist the Court to understand the complex issues in fifteen pages. However, Appellee believes that the issues can be fully addressed in no more than twenty pages of argument.

4. Counsel of record have been contacted and do not oppose the page enlargement or this motion.

WHEREFORE, Appellee moves the Court for an Order en enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages.

Respectfully Submitted:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
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(505) 476-3462 (facsimile)

Certificate Of Service

Counsel for Appellee, the New Mexico Oil Conservation Commission, hereby certifies that a copy of this document was mailed to counsel listed below, this 19th day of September, 2002:

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Kellahin & Kellahin
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Santa Fe, New Mexico 87504-2265

James Bruce
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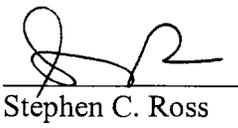
Santa Fe, New Mexico 87504-1056

Respectfully Submitted:



Stephen C. Ross
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FACSIMILE COVER SHEET

DATE: September 23, 2002
TIME: 7:00 AM

NUMBER OF PAGES: -3-

***

TO: Steve Ross, Esq.
OF: OCC
FAX: (505) 476-3462

TO: J. Scott Hall, Esq.
OF: Miller Law Firm
FAX: (505) 989-9857

RE: TMBR/Sharp-Arrington dispute

Dear Steve and Scott:

I would like to filing this motion today. Please call and let me know if you concur.

Regards,

FIRST JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

vs. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

TMBR/SHARP DRILLING INC.
MOTION FOR DESIGNATION AS AN APPELLEE

TMBR/SHARP DRILLING, INC. and move that it appear as an Appellee in support of The New Mexico Oil Conservation Commission, and state:

1. TMBR/Sharp Drilling, Inc. is a party of record in this case having obtained Order R-11700-B from the New Mexico Oil Conservation Commission ("Commission") which is now the subject of this appeal by David H. Arrington Oil and Gas Inc.'s ("Arrington").

2. Arrington's appeal is taken against the Commission and TMBR/Sharp Drilling, Inc.

3. TMBR/Sharp Drilling Inc, is the prevailing party before the Commission and now seeks to have the Court affirm the Commission's decision in Order R-11700-B.

4. This motion is unopposed.

WHEREFORE, TMBR/Sharp Drilling, Inc. moves that its motion to granted as requested.

Respectfully submitted,

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Attorneys for TMBR/Sharp Drilling Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was mailed to opposing counsel this 15th day of July 2002 as follows:

J. Scott Hall, Esq.
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Attorneys for Appellant

Stephen C. Ross, Esq.
Oil Conservation Commission
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505
Attorney for the Commission

W. Thomas Kellahin

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant.

APPELLANT'S STATEMENT OF APPELLATE ISSUES

David H. Arrington Oil and Gas, Inc., ("Arrington"), through its attorneys, Miller Stratvert & Torgerson, P.A., (J. Scott Hall), pursuant to NMRA 1-074(K)(1-4) 2002, files this Statement of Appellate Issues pursuant to its appeal of Order R-11700-B issued on April 26, 2002, by the New Mexico Oil Conservation Commission ("OCC").

I. STATEMENT OF THE ISSUES

A. Whether the OCC improperly revoked Arrington's drilling permits for two gas wells it planned to drill in Lea County.

B. Whether the OCC improperly failed to resolve pending compulsory pooling cases prior to the revocation of Arrington's drilling permits and the issuance of new drilling permits to TMBR/Sharp Drilling, Inc. And, whether as a consequence, the OCC failed to perform its statutory duties under NMSA 1978 §§ 70-2-17 and 70-2-18 of the New Mexico Oil and Gas Act (NMSA

1978 §§ 70-2-1, *et seq.*) to determine relevant geologic, engineering, waste and conservation issues.

II. SUMMARY OF PROCEEDINGS

David H. Arrington Oil and Gas, Inc., ("Appellant" or "Arrington"), appeals from a decision of the New Mexico Oil Conservation Commission, ("Appellee", "OCC", or "Commission"), revoking drilling permits previously issued to Arrington and subsequently approving drilling permits affecting the same lands filed by another oil and gas operator, TMBR/Sharp Drilling, Inc..

1. Three oil operators, Arrington, TMBR/Sharp Drilling, Inc., ("TMBR/Sharp"), and Ocean Energy, Inc., ("Ocean"), have been competing for New Mexico Oil Conservation Division (referred to variously as "NMOCD", "OCD", or "Division") regulatory approval to drill wells to the Mississippian formation on certain lands in Lea County.

2. Each of the wells involved must be located on a 320-acre "drilling unit", also referred to as "spacing units" or "proration units", established by the NMOCD as ". . . being the area that can be efficiently and economically drained and developed by one well." NMSA 1978 § 70-2-17(B).

3. Arrington owns a substantial portion of the oil and gas leasehold working interest in and under the W/2 of Section 25, T-16-S, R-35-E in Lea County, and Arrington has the right to drill thereon.

4. Initially, on July 17, 2001, the Division approved Arrington's Application for permit to Drill (often referred to as an "APD" or "drilling permit") for the Triple-Hackle

Dragon 25 Well No. 1 on a drilling unit consisting of the W/2 of Section 25[1], followed by the approval on July 30, 2001 of the APD for Arrington's Blue Drake 23 Well No. 1 for a drilling unit consisting of the E/2 of Section 23. (Sections 25 and 23 adjoin one another in Township 16 South, Range 35 East.) [RP 156-158.]

5. Prior to July 17, 2001, Arrington claimed ownership to a substantial portion of the working interest in the NW/4 of Section 25 pursuant to a "toplease" which it claimed was effective subsequent to the expiration of an oil and gas lease owned by TMBR/Sharp on the same lands. [RP 544, Para. 13, 14 and 15; 247, 252-255; 342-369.]

6. On September 10, 2001, Arrington and Ocean Energy entered into a Farmout Agreement with Ocean Energy, Inc., whereby Arrington acquired Ocean's oil and gas lease interests in the SW/4 of Section 25, among other lands. [RP 219-255; 367-369; 379-386; 425-432; 439-440; 534-541.]

7. It is undisputed that from September 10, 2001, during the time it held the drilling permit for the Triple-Hackle Dragon 25 Well No. 1, Arrington owned (and continues to own) lease rights in the SW/4 of Section 25 pursuant to the Farmout Agreement with Ocean Energy.

8. Applications filed in August, 2001 by TMBR/Sharp for permits to drill its Leavelle 23 No. 1 well and the Blue Fin 25 No. 1 well in Sections 23 and 25, respectively, had been denied by the Division's Hobbs district office on August 8, 2001 due to the previous approval of the Arrington drilling permits for the same lands. [RP 153, 155.]

9. On August 7, 2001, TMBR/Sharp filed administrative applications in Case Nos. 12731 and 12744 seeking review by the Division's hearing examiners of the denial

[1] Arrington and Ocean Energy have since agreed that Ocean will drill the well in the

of its drilling permits and the approval of Arrington's APD's and to prevent Arrington from commencing drilling operations. [RP 154.] The cases were consolidated for hearing. On December 13, 2001, the Division, through its Director,[2] determined in Order No. R-11700 that Arrington's drilling permits had been properly approved. [RP 542-547.] TMBR/Sharp did not present any geological or engineering testimony or evidence supporting its proposed drilling locations [RP 545, Para. 20.] Dissatisfied with that result, TMBR/Sharp pursued a *de novo* appeal with the New Mexico Oil Conservation Commission. [RP 396.]

10. On March 15, 2002, without notice to the Arrington, TMBR/Sharp Drilling, Inc. filed another APD with the Division's District I office for its Blue Fin 25 Well No. 1 which was also proposed to be drilled to the Mississippian formation in the NW/4 of Section 25, T-16-S, R-35-E, NMPM in Lea County. The C-102 acreage dedication plat which accompanied the filing of the TMBR/Sharp Drilling, Inc. APD proposed to dedicate the N/2 of said Section 25 to the Blue Fin 25 Well No. 1.

11. It is undisputed that Arrington owned (and continues to own) lease rights in the SW/4 of Section 25 pursuant to the Farmout Agreement with Ocean Energy before TMBR/Sharp filed its drilling permits with the NMOCD on March 15, 2002.

12. On March 20, 2002, without notice to the Arrington, the Division's District I office approved the APD for the Blue Fin 25 Well No. 1.

13. As a consequence of the actions of the Division's District I office, there existed two simultaneously approved drilling permits that both proposed to dedicate the NW/4 of Section 25 in violation of the Division's rules (19 NMAC 15.C.104(C)(2)(c)).

W/2 of Section 25 under a "Farmout" agreement.

[2] The Director of the NMOCD is also the Chairperson of the three-member NMOCC.

14. At the time of the filing of the drilling permits, there were owners of other interests in the N/2 and W/2 of Section 25, respectively, who had not voluntarily agreed to participate in the drilling of the proposed wells. Neither Arrington nor TMBR/Sharp had consolidated the interests of all the non-participating owners either by way of a voluntary agreement, communitization agreement, or compulsory pooling order. Both Arrington and TMBR/Sharp subsequently initiated separate "compulsory pooling" proceedings before the Division seeking to consolidate those interests. [RP 558, 559.]

15. On March 15, 2002, Arrington filed its Motion To Vacate The Commission Hearing which explained that the pending compulsory pooling cases would resolve the dispute over the issuance of the drilling permits. [RP 558-561]. On April 20, 2002, in a letter to the Commission's chairman, Ocean Energy's counsel pointed out that it was the Commission's statutory duty to act prevent waste and protect correlative rights, citing to NMSA 1978 Section 70-2-11, and noted further that "[a]n APD is, and must be, subsidiary to a compulsory pooling order." [RP 613]

16. On March 21, 2002, the Commission Chair issued an interim order denying the motion to vacate the Commission hearing scheduled on TMBR/Sharp's de novo appeal. The finding at Paragraph 2 of the interim order states: "Arrington's motion to vacate the hearing argues that resolution of competing pooling applications before the Division in Case No. 12816 and Case No. 12841 will moot the matters before the Commission. *However, it instead appears that the issue of the right to drill in the NW/4 of Section 25 is vital to all four cases and should be resolved expeditiously.*" [RP 556, 557]

17. On April 26, 2002, the New Mexico Oil Conservation Commission issued Order No. R-11700-B in Case Nos. 12731 and 12744. [RP 1-8.] In Order No. R-11700-

B, the Commission, citing to an Order entered on December 24, 2001, by the District Court, Fifth Judicial District, in separately pending litigation involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands.

18. On May 1, 2002, the Division's District I office notified Arrington that its approved APD was canceled. Arrington received the notification on May 7, 2002. [RP 6, Para 29.]

19. Arrington continues to own lease interests underlying the W/2 of Section 25 and continues to be eligible to be operator. [RP 367-369; 219-255.]

20. In the interim, on January 28, 2002, TMBR/Sharp had filed an application for compulsory pooling in Case No. 12816 seeking to consolidate the working interests in the N/2 of Section 25 for its Blue Fin 25 Well No. 1. Ocean Energy, Inc. also filed separate compulsory pooling applications (Case No. 12841 and Case No. 12860) seeking to pool the W/2 of Section 25 for two alternative proposed Mississippian formation well locations in the NW/4 and SW/4, respectively. [RP 558, 559.]

21. More recently, Arrington has filed its application for compulsory pooling in Case No. 12859 to create an E/2 unit in Section 25 for its Glass-Eyed Midge 25 No. 1 Atoka/Morrow/Mississippian well to be drilled in the NE/4. Arrington's C-101 APD for the Glass-Eyed Midge 25 No. 1 well was issued by the Division on December 17, 2001 and its C-102 reflecting an E/2 unit was filed on November 29, 2001. [RP 681, 691-694.] The N/2 TMBR/Sharp unit is in obvious conflict with the E/2 and W/2 units proposed by Arrington and Ocean Energy.

22. In the proceedings before the Division and Commission, TMBR/Sharp took the position that it was unnecessary for the agency to first consider the compulsory pooling issues before deciding the drilling permit cases. [RP 550-554.]

23. At the time the Commission entered Order No. R-11700-B, no geologic, engineering or equitable evidence having a bearing on the development of Section 23 and 25 had been presented to the Division or the Commission. [RP 558, 559.]

24. TMBR/Sharp began drilling its Blue Fin 25 Well No. 1 on May 7, 2002, without having consolidated the unjoined interests and without allowing the Division to determine the final configuration of the spacing and proration units in Section 25. [RP 659.]

III. ARGUMENT

A. The OCD improperly revoked Arrington's drilling permits.

In Order No. R-11700-B, the Commission, citing to the separately pending litigation in the district court involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands and had "no authority over the property". (RP 1-8, Order R-11700-B, Par. 29.) This finding was the primary basis for the Commission's determination. This finding is clearly based on error. Arrington established that during the time it held the drilling permit it had the right to drill and operate as the owner of lease interests in the W/2 of Section 25 separate and apart from the oil and gas leases involved in the district court litigation. [RP 367-369; 219-255.]

In addition, at the time it filed the APD for its Triple Hackle-Dragon 25 No. 1 Well, Arrington owned separate oil and gas lease interests in the E/2 of Section 25 that

were independent from the conflicting leases that are the subject of the district court litigation cited by the Commission in Order No. R-11700-B. [RP 367-369.] As such, Arrington was eligible to become the operator of that well and the permit to drill that was issued to it on December 17, 2001 should have been undisturbed.

In Paragraph 14 of its Order, the OCD states:

> *"14. The central issue in this case is whether Arrington was eligible to become the operator of the wells in question...If Arrington was eligible to become the operator, then the permits were properly issued to Arrington."*

In its findings at Paragraph 29 of Order R-11700-B, the Commission erroneously assumed that the rulings issued by the 5th Judicial District Court served to adjudicate all of the title owned by Arrington. Instead, the scope of the district court rulings affected only the lands encumbered by the Stokes/Hamilton base lease claimed by Ameristate and TMBR/Sharp and the top-lease claimed by Arrington located in the NW/4 of Section 25, as well as in SE/4 of Section 23. The interests separately owned by Arrington in the SW/4 of Section 25 remained unaffected. As such, Arrington continued to be eligible to become operator throughout. Arrington's APD should be reinstated.

At finding paragraph 28 of Order R-11700-B, the Commission found that Arrington had applied for its permit to drill "...under a good faith claim to title and a good faith belief that it is authorized to drill the well applied for." [RP 5.] Although Order R-11700-B also recognized that Arrington acquired independent title to the SW/4 of Section 25 under its farmout agreement with Ocean Energy [Paragraph 24], that significant fact was otherwise ignored by the Commission. It is indisputable that at the time Arrington held its drilling permit, it was the owner of the right to drill and was in lawful possession of the APD.

Under the Commission's rationale, the revocation of Arrington's drilling permit based on a third-party's challenge to its title was (1) clearly erroneous, and (2) not supported by the evidence. Moreover, the revocation did exactly what the Commission purported to eschew in its order: The practical effect of the revocation was to adjudicate title. For this reason, the Commission exceeded its authority in removing Arrington's permit and transfering it to TMBR/Sharp.

The proper action for the Commission to follow in this instance was established by its corallary agency in Texas, the Railroad Commission, in a case with closely analogous facts. In *Magnolia Petroleum Co. v. Railroad Commission, et al.*,[3] Magnolia challenged the issuance of a drilling permit to Landman as Magnolia was simultaneously challenging Landman's title to the tract in question in a trespass and quiet title suit in district court. The Texas Supreme Court refused to go so far as to cancel or even suspend Landman's drilling permit. The *Magnolia* court said:

> "Of course the Railroad Commission should no do the useless thing of granting a permit to one who does not claim the property in good faith. The Commission should deny the permit if it does not reasonably appear to it that the applicant has a good faith claim in the property. If the applicant makes a reasonably satisfactory showing of a good-faith claim of ownership in the property, the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit; neither is it ground for suspending the permit or abating the statutory appeal pending settlement of the title controversy."

[3] 141 Tex. 96, 170 S. W. 2nd 189 *at* 191 (1943).

B. The OCC improperly failed to resolve pending compulsory pooling claims prior to issuance of its drilling permit to TMBR/Sharp Drilling covering E/2 of Section 25. Consequently, the OCC failed to perform its statutory duties under NMSA 1978 §§ 70-2-17 and 70-2-18 of the New Mexico Oil and Gas Act (NMSA 1978 §§ 70-2-1, *et seq.*) to determine relevant geologic, engineering, waste and conservation issues.

Order No. R-11700-B was improvidently issued, failing to completely resolve the dispute before the agency or accord full relief to the affected parties. The initial determination of Cases 12731 and 12744 has allowed the permitting issue to unduly influence events and has pre-empted proper consideration by the agency's of its statutory mandates to prevent waste, protect correlative rights and avoid the drilling of unnecessary wells. As a further consequence of its issuance, Order No. R-11700-B has precipitated more problems for the parties, including the Division, that have become manifest in the frustrated efforts of Arrington to develop the E/2 of Section 25, acreage that should not have been affected by the proceedings.

TMBR/Sharp asserts the filing of a drilling permit is sufficient to "consolidate" interests and that is enough to determine the unit configuration, which will, in turn, determine the ultimate development of the entirety of Section 25. [RP 247; 255; 294-305.] As a further consequence, TMBR/Sharp has placed itself in the position of having to argue to the Division that compulsory pooling is unnecessary altogether. [TR, Pg. 15, L 24-25; Pg. 16, L 1-14; Pg. 19, L 1-6.] (*See* April 29, 2002 Motion of TMBR/Sharp Drilling, Inc. To Continue Case No. 12816 and To Dismiss Cases 12859, 12860, and 12841.)

It is apparent that issues of waste, correlative rights, and unnecessary drilling are inextricably bound with the issue of which operator may be entitled to drilling permits. These interrelated disputes cannot be resolved separately until the agency discharges its statutory obligations to consider the pooling applications and make its determinations, based on geologic,

and engineering evidence that the resulting development will prevent waste and protect correlative rights. At the time the OCC issued Order No. R-11700-B, those issues had not been determined.

The determination, first, that TMBR/Sharp may have been entitled to have its drilling permits approved before issues of correlative rights and waste are considered exalts a mere ministerial act over the substantive and discretionary quasi-judicial function that the Division is *mandated* to perform under N.M. Stat. Ann. 1978 Sections 70-2-17 and 70-2-18.[4]

In a situation such as this, where multiple owners have not agreed to pool their interests, under the Division's compulsory pooling statutes, on application, the agency is obliged to convene a hearing and consider evidence probative of whether pooling is necessary "...to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste". N. M. Stat. Ann. 1978 Section 70-2-17(C). See Simms v. Mechem 72 N.M. 186, 188, 382 P.2d 183, 184 (1963). ("Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties[.]") Where the evidence presented substantially supports affirmative findings and conclusions on any one of these issues, then the statute directs that the Division "***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit." *Id.*, (emphasis added). Even under this statutory hearing process, depending on the evidence, the issuance of a compulsory pooling order is discretionary and is by no means an entitlement. This quasi-judicial function is expressly reserved to the Commission and the Director or her duly appointed examiners (N. M. Stat. Ann. 1978 sec. 70-2-13) and ***no part*** of it may be delegated by fiat under the guise of a ministerial approval of a drilling permit. *See* Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct. App. 1981). In Kerr-McGee, the Court of Appeals held that duties which are

quasi-judicial in nature, and which require the exercise of judgment cannot be delegated. Id. As Kerr-McGee was a case of first impression in New Mexico, the Court of Appeals relied on Oklahoma case law. The Supreme Court of Oklahoma in Van Horn Oil Co. v. Okla. Corp. Com'n., 753 P.2d 1359, 1363 (1988) cited to the same authority relied on the New Mexico Court of Appeals when it quoted:

> Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Citing, Anderson v. Grand River Dam Authority, 446 JP.2d 814 (1968). The Anderson Court also quoted with approval from American Jurisprudence and Corpus Juris Secundum:

> In 2 Am. Jur. 2nd Administrative Law, Section 222, it is said: It is a general principal of law, expressed in the maxim "delegates no protest delegare", that a delegated power may not be further delegated by the person to whom such power is delegated and than in all cases of delegated authority, or personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment and discretion, the authority is purely personal and cannot be delegated to another***. A commission charged by law with power to promulgate rules, cannot in turn, delegate that power to another."

Because New Mexico has expressly adopted Oklahoma law, it is the law in this state that an administrative body may not delegate a statutory function, particularly in the manner that TMBR/Sharp advocates.

In making any determination under the compulsory pooling statute, under long-standing practice,[5] the Division will consider evidence relating to, among other matters: (1) the presence or absence of a voluntary pooling agreement; (2) whether a reasonable and good-faith effort was made to obtain the voluntary participation of others; (3) reasonableness of well costs; (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of

[5] Compulsory Pooling proceedings are identified as adjudicatory matters under the Division's rules at 19 NMAC 15N.1207.A(1).

correlative rights, including the drilling of unnecessary wells; (5) the assessment of a risk penalty; and (6) whether a proposal is otherwise in the interests of conservation. The mere approval of a drilling permit and the filing of an acreage dedication plat serve to do none of these things and neither have any of the functions enumerated above been delegated outside the Division's regular hearing process.[6]

It is inappropriate to allow any portion of the pooling process to be subsumed by the mere processing of a drilling permit. Order No. R-11700-B, Par. 33. ("An application for a permit to drill serves different objectives than an application of compulsory pooling and the two proceedings should not be confused.") [RP 1-8.] Moreover, the issuance of a drilling permit does not constitute any determination of a property right. *See* Gray v. Helmerich & Payne, Inc., et al. 843 S.W. 2d 579 (Tex. 2000).

Whether intentional or not, the practical effect of Order R-11700-B was to allow a ministerial event to dictate events to the exclusion of the statutory adjudicatory functions that ought first be performed by the Division and the Commission.

IV. RELIEF SOUGHT

Arrington requests that the Court enter its Order directing the Commission to:

a. Proceed to expeditiously address and implement compulsory pooling within the W/2 of Section 25, properly addressing geologic engineering, waste and conservation and other statutory factors.

b. Reinstate Arrington's drilling permit to allow it to drill it proposed Triple-Hackle Dragon 25 Well No. 1 on the W/2 of Section 25;

c. Revoke TMBR/Sharp's drilling permit on its Blue Fin 25 Well No. 1;

---

[5] *See* Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963).
[6] N. M. Stat. Ann. 1978 Section 70-2-17(C): "All orders effecting such pooling shall be made after notice and hearing[.]"

d. Reinstate Arrington's drilling permit and otherwise allow Arrington to drill its Glass-Eye Midge 25 Well No. 1 in the E/2 of Section 25.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By _____
J. Scott Hall
Attorneys for David H. Arrington Oil & Gas, Inc.
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on the 9th day of September, 2002 as follows:

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David Brooks, Esq.
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Cotton Bledsoe Tighe & Dawson
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Midland, Texas 79701

William F. Carr, Esq.
Post Office Box 2208
Santa Fe, New Mexico 87504

_____
J. Scott Hall

FILED
FIRST JUDICIAL
DISTRICT COURT
02 AUG 26 PM 4:07

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. D0101CV200201391

DAVID H. ARRINGTON OIL AND GAS, INC.
PLAINTIFF,

VS.

THE NEW MEXICO OIL CONSERVATION COMMISSION
DEFENDANT.

NOTICE OF JUDGE ASSIGNMENT

The above referenced cause has been reassigned to Judge DANIEL SANCHEZ, District Judge, Division VII, effective AUGUST 22, 2002, due to the EXCUSAL of Judge CAROL J. VIGIL, District Judge, Division III.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: Audrey Marra

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel on the 26TH day of AUGUST, 2002.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: Audrey Marra
Date: August 26, 2002

(SEAL)

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant.

REQUEST FOR SETTING

1. Jury: __ Non-Jury: X_

2. Judge to whom assigned: Honorable Daniel A. Sanchez

3. Disqualified Judges: Honorable Carol Vigil; Honorable James A. Hall; Honorable Margaret Kegel

4. Specific matter(s) to be heard: Plaintiff's Motion for Temporary Stay Pending Consolidation

5. Estimated time for hearing all parties and witnesses: 30 minutes

6. Date Pre-trial order was filed or date of pre-trial conference: N/A

7. There (are/**are not**) any hearings presently set; and if so when: _____

8. Names, addresses, and telephone numbers of all counsel or parties pro se entitled to notice:

James Bruce, Esq.
Post Office Box 1056
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J. Scott Hall, Esq.
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Kellahin & Kellahin
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Santa Fe, New Mexico 87504-2265

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

By _____
J. Scott Hall
Attorneys for Plaintiff
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614 Telephone
(505) 989-9857 Facsimile

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was hand delivered to counsel of record this 26 day of August, 2002.

_____
J. Scott Hall

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Plaintiff,

v.

No. D-101-CV-2002-1391

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant.

NOTICE OF PEREMPTORY EXCUSAL

Pursuant to NMRA 1-088.1(B)(2), the Plaintiff, David H. Arrington Oil and Gas, Inc., by counsel, hereby notifies the Court that it is exercising its right to excuse the Honorable Carol Vigil from presiding over the above-captioned cause.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By J. Scott Hall

J. SCOTT HALL
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

Attorneys for Plaintiff

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on the 22 day of August, 2002, as follows:

W. Thomas Kellahin, Esq.
117 North Guadalupe Street
Santa Fe, New Mexico 87501

Stephen C. Ross, Esq.
New Mexico Oil Conservation Division
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Santa Fe, New Mexico 87505

J. Scott Hall

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

FILED
FIRST JUDICIAL
DISTRICT COURT
02 AUG 22 AM 9:5[illegible]

CASE NO. D0101CV200201391

DAVID H ARRINGTON OIL AND GAS INC.
PLAINTIFF,

VS.

THE NEW MEXICO OIL CONSERVATION COMMISSION
DEFENDANT.

NOTICE OF JUDGE ASSIGNMENT

The above referenced cause has been reassigned to Judge CAROL J. VIGIL, District Judge, Division III, effective AUGUST 21, 2002, due to the RECUSAL of Judge JAMES A HALL, District Judge, Division II.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: _____

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel on the 22ND day of AUGUST, 2002.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: _____
Date: Aug. 22, 2002

(SEAL)

FILED
FIRST JUDICIAL
DISTRICT COURT
02 AUG 19 PM 3:17

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. D0101CV200201391

DAVID H. ARRINGTON OIL AND GAS, INC.
PLAINTIFF,

VS.

THE NEW MEXICO OIL CONSERVATION COMMISSION
DEFENDANT.

RECEIVED
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Oil Conservation Division

AMENDED
NOTICE OF JUDGE ASSIGNMENT

The above referenced cause has been reassigned to Judge JAMES A. HALL, District Judge, Division II, effective AUGUST 12, 2002, due to the EXCUSAL of Judge MARGARET KEGEL, District Judge, Division V.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: L. Aguilar

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel on the 19TH day of AUGUST, 2002.

WILLIAM J. PARRAS
DISTRICT COURT CLERK
By: L. Aguilar
Date: August 19, 2002

(SEAL)

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER GRANTING MOTION FOR EXTENSION OF TIME

THIS MATTER having come before the Court upon Plaintiff's unopposed motion for extension of time to file a Statement of Reasons and the court finding good cause therefor and noting that the Motion is unopposed

IT IS ORDERED that Plaintiff shall have until September 6, 2002 to file a Statement of Reasons in the above-captioned matter.

Margaret Kegel

DISTRICT COURT JUDGE

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

By _____

J. Scott Hall
Attorneys for Plaintiff
Post Office Box 1986
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(505) 989-9857 fax

Concurrence by:

KELLAHIN & KELLAHIN

Telephonic Approval August 7, 2002
W. Thomas Kellahin, Esq.
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NEW MEXICO OIL CONSERVATION COMMISSION

Telephonic Approval August 7, 2002
Steve Ross, Esq.
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FILED
FIRST JUDICIAL
DISTRICT COURT

02 AUG 12 PM 3:20

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. D0101CV200201391

RECEIVED
AUG 1 4 2002
Oil Conservation Division

DAVID H. ARRINGTON OIL AND GAS, INC
PLAINTIFF

VS.

THE NEW MEXICO OIL CONSERVATION COMMISSION
DEFENDANT

NOTICE OF JUDGE ASSIGNMENT

The above referenced cause has not been reassigned due to Local Rule 1-088.1 which states that the election to excuse must be filed within ten (10) days after the latter of notice of assignment or reassignment of the case to a judge.

WILLIAM J. PARRAS
DISTRICT COURT CLERK

By: _____

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to counsel on the 12TH day of AUGUST, 2002.

WILLIAM J. PARRAS
DISTRICT COURT CLERK

By: _____

Date: August 12, 2002

(SEAL)

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

UNOPPOSED MOTION FOR EXTENSION OF TIME

Plaintiff moves this Court for its order extending the time for Plaintiff David Arrington Oil and Gas, Inc. ("Arrington") to file its Statement of Reasons to September 6, 2002 and as grounds therefor states:

1. Movant's counsel did not participate in the agency hearing from which this appeal is brought and additional time is required to obtain complete files on the matter.

For this reason, Plaintiff requests that the deadline for filing its Statement of Reasons be extended to September 6, 2002. This motion is not opposed.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By _____

J. Scott Hall
Attorneys for David H. Arrington Oil & Gas, Inc.
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was hand delivered to counsel of record on this the 7 day of August, 2002, as follows:

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Steve Ross, Esq.
New Mexico Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

William F. Carr, Esq.
Holland and Hart, LLP and
Campbell and Carr
110 North Guadalupe Street, No. 1
Santa Fe, New Mexico 87501

J. Scott Hall

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER GRANTING MOTION FOR EXTENSION OF TIME

THIS MATTER having come before the Court upon Plaintiff's unopposed motion for extension of time to file a Statement of Reasons and the court finding good cause therefor and noting that the Motion is unopposed

IT IS ORDERED that Plaintiff shall have until September 6, 2002 to file a Statement of Reasons in the above-captioned matter.

_____
DISTRICT COURT JUDGE

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

By_____

J. Scott Hall
Attorneys for Plaintiff
Post Office Box 1986
Santa Fe, New Mexico 87504-19086
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(505) 989-9857 fax

Concurrence by:

KELLAHIN & KELLAHIN

Telephonic Approval August 7, 2002
W. Thomas Kellahin, Esq.
117 North Guadalupe Street
Santa Fe, New Mexico 87501

NEW MEXICO OIL CONSERVATION COMMISSION

Telephonic Approval August 7, 2002
Steve Ross, Esq.
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

TMBR/SHARP DRILLING, INC.
RESPONSE TO
ARRINGTON'S MOTION FOR TEMPORARY STAY
PENDING CONSOLIDATION

TMBR/Sharp Drilling, Inc. ("TMBR/Sharp") the prevailing party appearing before the New Mexico Oil Conservation Commission ("Commission") opposes the motion of David H. Arrington Oil and Gas, Inc. ("Arrington") to stay Arrington's appeal of Commission Order R-11700-B pending the Commission's decision in four (4) New Mexico Oil Conservation Division ("Division") cases still pending before the Division's hearing examiner, and in support of its opposition states:

ARRINGTON'S MOTION IS AN ATTEMPTING TO PREEMPT THE APPELLATE PROCESS

On four (4) prior occasions,[1] Arrington has sought and has been denied the consolidation of the TMBR/Sharp-Arrington dispute over the issuance by the Division of permits to drill ("the Permit Cases") with four subsequently filed compulsory pooling cases which were heard by the Division on May 17-18, 2002 and have not yet reached the Commission (the "Pooling Cases").

Arrington's appeal to this Court raises three (3) issues[2] with the core issue being its contention that the Commission cannot separately hear and decide the Permit Cases from the Pooling Cases.

Instead of pursuing its appeal, Arrington's motion attempts to have the Court delay the appeal of the Permit Cases until such time, if and when, an appeal of the Commission's Order in the four Pooling Cases reaches the Court. What Arrington is attempting to do with this motion is to delay the appeal of the Permit Cases and thereby consolidated of the Permit Cases with the Pooling Cases.

---

[1] On March 26, 2002 in Case 12731 and 12744 (DeNovo) Arrington argued that the Permit Cases should be consolidated with the Pooling Cases (see Finding (32) Order R-11700-B). On May 15, 2002, Arrington filed an Application for Rehearing before the Commission which argued this same issue (Denied by Commission's failure to grant within 10 days of filing). On March 21, 2001, Arrington filed a motion to continue the Commission's hearing of the Permit Cases until the Division had decided the Pooling Cases (denied by the Commission). On May 9, 2001, Arrington filed a response in the Pooling Cases contending that they should be joined with the Permit cases.

[2] Arrington's issues are: (a) that on July 31, 2001, when it filed for its APDs, Arrington had a working interest ownership in the W/2 of Section 25 separate from the Hamilton/Stokes disputed leases; (b) that the Commission committed error by not consolidating the Permit cases with the Pooling cases; (c) that the Permit Cases involve a ministerial act which should have been decided in connection with the Pooling Cases.

SUMMARY OF PROCEEDINGS

While the facts of this case can be made complex and confusing, the legal issues are simple: The Commission and its Division are creatures of statute, expressly defined, limited and empowered by laws creating it. Continental Oil Co. v. Oil Conservation commission, 70 N.M. 310 (1962). In accordance with New Mexico's Oil & Gas Act,[3] the Commission has acted to separately hear and decide the Permit case from the Pooling Cases. It is not up to the Court to substitute its judgment about this complex case for that of the Commission. In Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451 (1983) the New Mexico Supreme Court declared "Special weight is given to the experience, technical competence and specialized knowledge of the Oil Conservation Commission, and court's review is limited to the evidence presented to the Commission." That evidence demonstrates the following:

THE PERMIT CASES:

This dispute involves the permitting of a gas well ("APD") to be drilled in Section 25, T16S, R36E, Lea County, New Mexico for gas production from the Townsend-Morrow Gas Pool, (created by Order R-4114 dated September 1, 1970) and from the Townsend-Mississippi Gas Pool (created by Order R-6328 dated May 1, 1980).

This dispute arose when TMBR/Sharp filed two applications for permit to drill ("APDs") in an attempt to drill two additional wells in accordance with the provisions of Paragraph 12 of the Original Stoke Lease, but was denied those APDs by the OCD-Hobbs only because the OCD had already issued approvals for APDs to Arrington for two wells whose designated spacing units included the disputed leasehold properties and were in conflict with TMBR/Sharp's APDs.

Section 70-2-17(A) and (B) of New Mexico's Oil & Gas Act, requires that in order to **prevent waste and correlative rights** (emphasis added) the Division must establish

[3] Section 70-2-1 through 70-2-38.

spacing units for each pool including the size of those units and the number of wells per spacing unit. In accordance with these sections, the Division has determined that wells drilled in these two pools shall be governed by Division Rule 104 which provides, in part, that Spacing units shall contain 320-acres (being half of a standard section) and that no more than two wells be drilled.[4]

The Division, for the pools involved in this dispute, allows the Operator to select the orientation of the spacing unit.[5] Section 70-2-18(A) provides in part that:

> "Whenever the operator of any oil or gas well shall dedicate lands comprising a standard spacing or proration unit to an oil or gas well, it shall be the obligation of the Operator....to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands..."

The Division requires (19 NMAC 15.M.1101.A) that "before commencing drilling or deepening operations, or before plugging a well back to another zone, the operator must file a permit to do so." (This is Form C-101 and it **must** be accompanied by Form C-102 **Well Location and Acreage Dedication Plat**) Rule 19 NMAC 15.N.1102.A is the Division rule which states "Form C-102 is a dual purpose form used to show the exact location of the well **and the acreage dedicated thereto**" (emphasis added). **See Finding (33) and (35) Order R-11700-B.**

This Division Rule, as well as all Division rules, are authorized by NMSA, 1979, Section 70-2-11.A which states:

> "The division is hereby empowered and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce

---

[4] See Finding (12) Order R-11700-B.

[5] The Division allows the Operator to chose to dedicate the N/2, S/2, E/2 or W/2 of a section to the well. The Division does not require that the Operator submit geologic evidence to establish the orientation selected as a pre-condition for obtaining the Division's approval of an APD. **See Finding (34) Order R-11700-B**

rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof." **See Finding (13) Order R-11700-B.**

On August 6, 2001 and August 7, 2001, respectively, TMBR/Sharp filed two APD's with the Hobbs Office of the Division requesting approval to drill:

(a) its Blue Fin "25" Well No. 1 in Unit E and to dedicate it to the N/2 of Section 25, T16S, R35E.

(b) its Leavelle "23" Well No. 1 in Unit G and to dedicate it to the E/2 of Section 23, T16S, R35E.

On August 8, 2001, the Hobbs Office of the Division denied the TMBR/Sharp permits because Arrington already had conflicting permits on the acreage.

On December 13, 2001, the Division entered Order R-11700, refusing to approve TMBR/Sharp's APD because on July 17 and July 30, 2001, respectively, the Division approved an APD for Arrington for its:

(a) Triple Hackle Dragon "25" Well No. 1 for a spacing unit consisting of the W/2 of Section 25

(b) Blue Drake "23" Well No. 1 for a spacing unit consisting of the E/2 of Section 23

The Division based its decision on Arrington's "claim of colorable title" to the Hamilton/Stokes top leases, and stated that:

(a) "(22) that "Arrington has demonstrated at least a colorable claim of title that would confer upon it a right to drill its proposed wells, no basis exists to reverse or overrule the action of the District Supervisor in approving the Arrington APDs."

(b) "(21) The Oil Conservation Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico."

On December 27, 2001, the Lea County District Court, had exercised that jurisdiction and ruled that TMBR/Sharp's Hamilton/Stokes leases are still valid and in effect and Arrington's Hamilton/Stokes top leases are not in effect.

On March 26, 2002, the Commission held a De Novo hearing concerning Order R-11700. On April 26, 2002, the Commission entered Order R-11700-B which rescinded the Division's approval of Arrington's APD's and ordered that the Division's district supervisor approve TMBR/Sharp's two APD's filed in August 6 and 7, 2001.

On May 1, 2002, Chris Williams, Supervisor of the Hobbs Office of the Division, voided the W/2 and E/2 APDs of Arrington and granted the two APDs requested by TMBR/Sharp in August of 2001. On May 7, 2002, TMBR/Sharp, having voluntarily consolidated 82% of the working interest ownership in the N/2 of Section 25, commenced drilling its Blue Fin "25" Well No. 1 in Unit E dedicated to the N/2 of Section 25, T16S, R35E. While TMBR/Sharp had been granted an order by the Lea County District Court[6] that an event of force majeure under Paragraph 9 of the Stokes/Hamilton leases existed which prevented it from complying with the 180-day continuous drilling clause, once the permits to drill were granted, time was of the essence to drill the next well in order to be in compliance with the leases.

THE COMPULSORY POOLING CASES:[7]

TMBR/Sharp's compulsory pooling case:

TMBR/Sharp was the first working interest owner to propose a well in Section 25. At the time of filing its compulsory pooling application, neither Ocean or Arrington had an interest of record in the NW/4 of Section 25.

In accordance with Section 70-2-18(A), TMBR/Sharp filed a dedication of lands comprising a standard spacing unit N/2 Section 25 (Division Form C-102). NMSA 1978

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[6] Order of the Honorable Gary Clingman dated December 27, 2001.

[7] A description of the four compulsory pooling cases is attached is Exhibit "A"

Section 17-2-17(A) provides that if the Operator who has drilled or proposes to drill a well on said unit is unable to obtain a voluntary agreement, then it may have the Division pool all interest within the "spacing or proration unit as a unit".

On January 25, 2001, TMBR/Sharp filed an application for compulsory pooling for the remaining working interest owners in the N/2 of Section 25. In accordance with NMSA 1978 Section 70-2-17, and Order R-11700-B, on May 7, 2002, TMBR/Sharp spudded the Blue Fin 25 Well No. 1 after filing an application for compulsory pooling of the remaining working interest owners in the N/2 of Section 25.

At the time of the hearing, TMBR/Sharp controlled 82% of the working interest ownership, Arrington controlled 16% and two parties who could not be located controlled 2% of the N/2 of Section 25. TMBR/Sharp compulsory pooling case is necessary in order to consolidate certain owners in the NE/4 of Section 25 to form a 320-acre spacing unit consisting of the N/2 of Section 25. At the hearing, TMBR/Sharp presented geological and geophysical evidence which demonstrated that the appropriate development of Section 25 is best accomplished by orientation of the spacing units N/2 and S/2.

TMBR/Sharp originally developed the concept for the exploration of Section 23, 24, 25 and 26. (Big Tuna prospect). The project started in 1991 and over time, over $7 million was spent on land, geological and geophysical analysis, and drilling. Prior to commencing the Blue Fin 24 Well No. 1 in the SW/4 of Section 24, TMBR/Sharp offered to Ocean a share of the Big Tuna Prospect on three different occasions, including a January 31, 2001 meeting in Ocean's office in Houston, Texas.

After being afforded an opportunity for a detailed review of TMBR/Sharp's geology, including its 3-D seismic data, Ocean declined to participate based on its belief that the Chester formation would be structurally too low and therefore too wet (water saturation too high to allow for commercial production of hydrocarbons.)

By lease dated March 27, 2001, Arrington top leased the TMBR/Sharp's Hamilton/Stokes leases which cover lands in Section 23, 24, and 25, among others.

Arrington was aware that TMBR/Sharp had obtained a drilling permit for the Blue Fin 24 Well No. 1 in November of 2000. On March 29, 2001, TMBR/Sharp spudded its Blue Fin 24 Well No. 1 in the SW/4 of Section 24. On June 29, 2002, TMBR/Sharp completed the Blue Fin "24" Well No .1 for production from the Chester Formation.

On July 24, 2002, David H. Arrington personally told Jeff Phillips, President of TMBR/Sharp, that TMBR/Sharp would not be able to timely drill wells in Section 23 or 25 necessary to perpetuate the Stokes/Hamilton leases. These leases have a 180 day continuation drilling clause between wells. On July 19, 2001, Arrington obtained an approved APD from the Division for its well to be drilled in Unit E and dedicated to the W/2 Section 25. Arrington had no intention of drilling a well but obtained its permit because it wanted to block TMBR/Sharp from obtaining a competing permit which was denied on August 8, 2001.

Ocean's farm-ins are confined to the SW/4 of Section 25 and Arrington did not receive an interest in Ocean's various farm-ins in the SW/4 of Section 25 until November 14, 2001.

Ocean's two compulsory pooling cases:

On July 19, 2001, Arrington obtained an approved APD for its Triple Hackle Dragon 25 Well No.1 dedicated with the W/2 of Section 25. On January 24, 2002, Arrington proposed the well to TMBR/Sharp. Some six months after the Permit Case dispute on February 2, 2001 and again on April 9, 2002, Ocean filed a compulsory pooling application with the Division. These cases were heard by the Division on May 16-17, 2002 and no order has yet been entered by the Examiner.

Ocean's compulsory pooling applications were an attempt by Ocean to substitute itself for Arrington on the APD approved by the Division on July 19, 2001. Ocean has failed to take any reasonable action to preclude its farm-ins from expiring on July 1, 2002. Its farm-ins contain force majeure clauses which arguably could offer protection from expiration in appropriate circumstances.

Arrington's compulsory pooling case

On December 17, 2001, Arrington, without notice to TMBR/Sharp, obtained an approved APD for his Glass-Eye Midge 25 Well No.1 dedicated with the E/2 of Section 25. On December 17, 2001, Arrington held no interest in the NE/4 of Section 25. It obtained its interest from Huff by assignment recorded on February 4, 2001. The SE/4 of Section 25 is controlled by Yates Petroleum Corporation. On March 26, 2002, the Commission held a hearing concerning Arrington's APD for the W/2 of Section 25 and TMBR/Sharp's APD for the N/2 of Section 25.

At no time during that hearing, did Arrington inform the Commission that Arrington claimed an approved APD for the E/2 of Section 25 which would be in conflict with the APD for the N/2 (TMBR/Sharp) then being decided by the Commission. Arrington has waived any claim for a spacing unit consisting of the E/2 of Section 25 by its failure to raise this issue at the time of the Commission hearing. Moreover, once the Commission determined Arrington's Triple Hackle Dragon Well No. 1 permit should be voided, TMBR/Sharp's application for its Blue Fin 25 Well No. 1 was granted.

More than nine (9) months after the Permit Case dispute, on May 21, 2002, Arrington filed a compulsory pooling application for the E/2 of Section 25 with the Division which was set for hearing on May 16, 2002. On May 1, 2001, the Division canceled its approval of Arrington's APD for its Glass Eye Midge 25 Well No.1 dedicated with the E/2 of Section 25.

POINTS AND AUTHORITIES

Arrington's motion is premised upon its misunderstanding of the Oil & Gas Act and its refusal to accept the fact that the Commission has separated its well permitting process from the compulsory pooling process. **See NMSA 1978 Section 70-2-17.**

Arrington attempts to complicate the current proceedings before this Court by claiming the Commission was in error the four (4) previous times it denied Arrington's attempts to join the Pooling Cases with the Permit Cases.

The drilling activity presently being undertaken by TMBR/Sharp is the culmination of an arduous administrative process that has gone through at almost every level of decision making authority of the Division, the Commission and now the Court.

At every opportunity Arrington asserts that the Permit Case dispute and the Pooling Case dispute must be heard contemporaneously and has yet to demonstrate any statutory basis for its assertions. In fact, there are none. The Oil & Gas Act authorizes the Division to separate Pooling Cases from Permit Cases. There are issues involved in the Permit Cases which are separate from the waste and correlative rights issues involved in the Pooling Cases. **See Finding (32-33) Order R-11700-B for an example.**

Arrington's reliance upon Simms v. Mechem, 72 N.M. 186 (1963), is misplaced. The fact that Simms v. Mechem, (supra), required the Commission to make waste and correlative rights findings in a compulsory pooling case does not mean that a order entered in the Permit Cases was "improvidently issued." Arrington also argues that the issuance of the Division's approval for an application for permit to drill ("APD") is a ministerial act. The Court need only refer to the Commission's order in this case to see that approving an APD is part of the Division's regulatory system established to "present waste and correlative rights". **See Order R-11700-B.**

CONCLUSION

Arrington takes every opportunity to try and confuse the waste and correlative rights issues addressed in compulsory pooling cases with those found in the Permit Cases. Arrington does not like the four (4) prior decisions by which the Division and Commission which rejected Arrington attempts to consolidate the Permit Cases with the Pooling Cases. Arrington is apparently intent on rearguing this core issue of pooling in whatever forum it can find. And now, without benefit of allowing the Court the appropriate time to deal with this core issue during the appeal process, Arrington seeks to have the Court issue a stay order that allows Arrington to wins on appeal simply by postponing the appeal of the Permit Case.

Wherefore, Arrington's motion to stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by facsimile to counsel of record this 7th day of August 2002, as follows:

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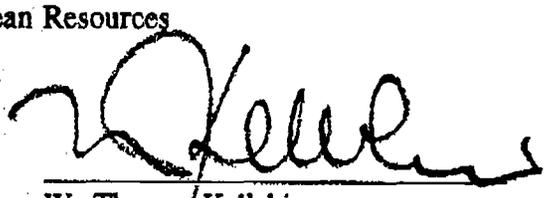

W. Thomas Kellahin

EXHIBIT "A"

The following four (4) compulsory pooling applications which involved Section 25, T16S, R35E, were set for an Examiner Hearing in May 2, 2002 but then continued until May 16, 2002 to be heard after the Commission entered it Order R-11700-B on April 26, 2002:

(a) TMBR/Sharp's application for compulsory pooling of the N/2 of Section 25 for its Blue Fin 25 Well No. 1 in Unit E of that section. Cases 12816 filed January 25, 2002

(b) Ocean Energy, Inc. ("Ocean") application for compulsory pooling of the W/2 of Section 25 for its Triple Hackle Dragon 25 Well No. 1 in Unit E of that section. Case 12841 filed February 2, 2002

(c) Ocean Energy, Inc. ("Ocean") application for compulsory pooling of the W/2 of Section 25 for its Triple Hackle Dragon 25 Well No. 2 in Unit K of that section. Case 12860 filed April 9, 2002

(d) Arrington's application for compulsory pooling of the E/2 of Section 25 for its Glass-Eyed Midge 25 Well No. 1 in Unit A of that section. Cases 12859 filed April 9, 2002

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

RECORD ON APPEAL CONTENTS

COMES NOW Appellee, the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, pursuant to Rule 1-074(H) NMRA (2002), and files the following documents with the Clerk of the Court as the Record on Appeal in the above-captioned matter:

1. Order No. R-11700-B of the Commission, dated April 26, 2002 (Record on Appeal at 001-008)[1];

2. Transcript of proceedings before the Commission of February 15, 2002, stenographically recorded (RA at 009-013);

3. Transcript of proceedings before the Commission of April 26, 2002, stenographically recorded (RA at 014-021);

4. Transcript of the evidentiary hearing of March 26, 2002, stenographically recorded (RA at 022-138);

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[1] Each page of each document bears a unique number between 1 and 696.

5. Exhibits introduced during the hearing of March 26, 2002 (RA at 139-395);

6. Copies of the below-listed papers and pleadings filed in the proceedings of the agency:

a. Application for Hearing *de novo* (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated January 8, 2002 (RA at 396-97);

b. Motion to Re-Open Cases 12731 and 12744 and Amend Order R-11700 (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated January 24, 2002 (RA at 398-406);

c. Letter of Stephen C. Ross (the Commission) dated January 25, 2002 (RA at 407);

d. Docket of the Commission Hearing of February 15, 2002 (RA at 408-11);

e. Letter of W. Thomas Kellahin (TMBR/Sharp) dated March 15, 2002 (RA at 412);

f. Motion to Vacate the Commission Hearing of March 26, 2002 (David H. Arrington) and cover letter of Suzette Johnson, dated March 15, 2002 (RA at 413-18);

g. Response to TMBR/Sharp Drilling's Motion to Re-Open Cases and Amend Division Order (David H. Arrington), dated March 15, 2002 (RA at 419-33);

h. Pre-Hearing Statement (David H. Arrington) and proposed exhibits, dated March 18, 2002 (RA at 434-55);

i. Pre-Hearing Statement (TMBR/Sharp), proposed exhibits and cover letter of W. Thomas Kellahin, dated March 18, 2002 (RA at 456-548);

j. Letter of Stephen C. Ross (the Commission) dated March 19, 2002 (RA at 549);

k. Response to the Motion to Continue (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated March 21, 2002 (RA at 550-55);

l. Order No. R-11700-A of the Division Director concerning the Motion to Stay, issued March 21, 2002 (RA at 556-57);

m. Motion to Vacate the Commission Hearing of March 26, 2002 (David H. Arrington) and cover memorandum of Suzette Johnson, dated March 21, 2002 (RA at 558-63);

n. Letter of Suzette Johnson (David H. Arrington) dated March 22, 2002 (RA at 564);

o. Supplement to Pre-hearing Statement (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated March 25, 2002 (RA at 565-66);

p. Entry of Appearance of James Bruce on behalf of Ocean Energy, dated March 25, 2002 (RA at 567-70);

q. Docket of the Commission Hearing of March 26, 2002 (RA at 571-73);

r. Motion to Supplement the Record (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated April 15, 2002 (RA at 574-80);

s. Letter of Stephen C. Ross (the Commission) dated April 16, 2002 (RA at 581);

t. Response to Motion to Supplement the Record and Response to the April 26, 2002 Request (David H. Arrington) and cover letter of Christie Troublefield, dated April 17, 2002 (RA at 582-612);

u. Letter of James Bruce (Ocean Energy) dated April 20, 2002 (RA at 613-14);

v. Entry of Appearance of J. Scott Hall on behalf of David H. Arrington, dated April 23, 2002 (RA at 615-16);

w. Docket of the Commission Hearing of April 26, 2002 (RA at 617-18);

x. Application for Rehearing and Motion to Stay Order (Ocean Energy) and cover letter of James Bruce, dated May 15, 2002 (RA at 619-39);

y. Application for Rehearing and Motion to Stay Order (David H. Arrington) and cover letter of J. Scott Hall, dated May 15, 2002 (RA at 640-658);

z. Letter of W. Thomas Kellahin (TMBR/Sharp) dated May 16, 2002 (RA at 659-60);

aa. Consolidated Response to Applications for Rehearing and Motions to Stay (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated May 22, 2002 (RA at 661-68); and

bb. Notice of Appeal (Arrington), filed June 25, 2002 (RA at 669-96).

Respectfully Submitted.

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Certificate of Service

I, Stephen C. Ross, hereby certify that a copy of the foregoing pleading was mailed to counsel listed below, this 25th day of July, 2002:

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Stephen C. Ross

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

TITLE PAGE

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, pursuant to Rule 1-074(H) NMRA (2000), and states that the following are the attorneys who represent the parties in this appeal:

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Stephen C. Ross

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

02 JUL 23 PM 3:23

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

REQUEST FOR SETTING

1. Jury: ___ Non-Jury: X

2. Judge to whom assigned: Division V

3. Disqualified Judges: None

4. Specific matter(s) to be heard: Plaintiff's Motion for Temporary Stay Pending Consolidation

5. Estimated time for hearing all parties and witnesses: 30 minutes

6. Date Pre-trial order was filed or date of pre-trial conference: N/A

7. There (are/**are not**) any hearings presently set; and if so when: _____

8. Names, addresses, and telephone numbers of all counsel or parties pro se entitled to notice:

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Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

By _____
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I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was hand delivered to counsel of record this 24th day of July, 2002.

_____
J. Scott Hall

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

FILED
02 JUL 24 PM 3:23

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

MOTION FOR TEMPORARY STAY PENDING CONSOLIDATION

Appellant, David H. Arrington Oil and Gas, Inc., ("Arrington"), through its attorneys, Miller Stratvert & Torgerson, P.A., (J. Scott Hall), moves the Court enter its order temporarily staying this appeal of an order issued by the New Mexico Oil Conservation Commission. ("NMOCC" or "Commission") until the completion of the administrative hearing process involving four related applications pending before the New Mexico Oil Conservation Division. ("NMOCD" or "Division") involving the same subject matter presently before the Court in this matter. Those four cases were consolidated into a single proceeding by the agency on May 16. 2002 due to their commonality and a single order is expected to be issued by the Division soon. The agency's order in those related cases will have a direct effect on this proceeding. The ownership and operation of a $1,600,000.00 uncompleted gas well is at stake. Because it is unavoidable that the pending order will have an adverse effect on the non-prevailing parties, it is a certainty that those four consolidated cases will be taken to the Commission on *de novo* appeal[1]

[1] Pursuant to NMSA 1978 Section 70-2-25.

and, subsequently, to the 1st Judicial District Court.[2] The pending consolidated cases and this case all involve the same issues, the same parties and the same subject matter. Due to the earlier consolidations, the related matters are effectively presented in two proceedings, which may be conveniently consolidated by the District Court into a single, unified appeal.

BACKGROUND FACTS

1. Three oil operators, Arrington, TMBR/Sharp Drilling, Inc., ("TMBR/Sharp"), and Ocean Energy, Inc., ("Ocean"), have been competing for NMOCD regulatory approval to drill wells to the Mississippian formation on certain lands in Lea County.

2. Each of the wells involved must be located on a 320-acre "drilling unit", also referred to as "spacing units" or "proration units", established by the NMOCD as "...being the area that can be efficiently and economically drained and developed by one well." NMSA 1978 Section 70-2-17 (B).

3. Initially, on July 17, 2001, the Division approved Arrington's Application for Permit to Drill (often referred to as an "APD" or "drilling permit") for the Triple-Hackle Dragon 25 Well No. 1 on a drilling unit consisting of the **W/2** of Section 25[3], followed by the approval on July 30, 2001 of the APD for Arrington's Blue Drake 23 Well No. 1 for a drilling unit consisting of the **E/2** of Section 23. (Sections 25 and 23 adjoin one another in Township 16 South, Range 35 East.)

4. Applications filed in August, 2001 by TMBR/Sharp for permits to drill its Leavelle 23 No. 1 well and the Blue Fin 25 No. 1 well in Sections 23 and 25, respectively, had been denied by the Division's Hobbs district office due to the previous approval of the Arrington drilling permits for the same lands.

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[2] Pursuant to NMSA 1978 39-3-1.1 and NMRA 1978 1-074.

[3] Arrington and Ocean Energy have since agreed that Ocean will drill the well in the W/2 of Section 25 under a "Farmout" agreement.

5. TMBR/Sharp filed administrative applications in **Case Nos. 12731 and 12744** seeking review by the Division's hearing examiners of the denial of its drilling permits and the approval of Arrington's APD's and to prevent Arrington from commencing drilling operations. The cases were consolidated for hearing. On December 13, 2001, the Division, through its Director,[4] determined in Order No. R-11700 that Arrington's drilling permits had been properly approved. Dissatisfied with that result, TMBR/Sharp pursued a *de novo* appeal with the New Mexico Oil Conservation Commission.

6. On December 17, 2001, the Division approved Arrington's Application for Permit to Drill for its Glass-Eyed Midge 25 Well No. 1 to be drilled in the NE/4 of Section 25. Arrington planned to dedicate a 320-acre drilling unit consisting of the **E/2** of Section 25 to the well.

7. On April 26, 2002, following a hearing in TMBR/Sharp's *de novo* appeal in **Case Nos. 12731 and 12744**, the Commission issued Order No. R-11700-B which found, among other things, that the Division's District I Supervisor should issue an APD to TMBR/Sharp for its proposed Blue Fin 25 Well No. 1 in the NW/4 of Section 25 to which TMBR/Sharp proposes to dedicate a drilling unit consisting of the **N/2** of the same section. The Order also directed that a drilling permit should be approved for TMBR/Sharp's Blue Drake 23 Well No. 1 to which it proposed to dedicate the **E/2** of Section 23. In addition, the Commission expressly retained jurisdiction over the matter, noting that separate court proceedings in the Fifth Judicial District Court to resolve title issues could affect the outcome the pending administrative cases.

8. In the interim. on January 28, 2002, TMBR/Sharp filed an Application for Compulsory Pooling[5] in **Case No. 12816** seeking and order consolidating separately-owned oil

[4] The Director of the NMOCD is also the Chairperson of the three-member NMOCC.
[5] "Compulsory pooling" is the regulatory consolidation of separately-owned interests within a drilling unit, the size of which is prescribed by the Division's rules, to allow for the drilling of a well by a single operator. *See* NMSA 1978 Section 70-2-17.

and gas leasehold working interests to form a 320-acre drilling unit consisting of the **N/2** of Section 25 for its Blue Fin 25 Well No. 1, and naming TMBR/Sharp as operator of the well.

9. Ocean Energy, Inc. also filed separate Compulsory Pooling Applications (**Case No. 12841** and **Case No. 12860**) seeking to pool a drilling unit comprised of the **W/2** of Section 25 for two alternative proposed Mississippian formation well locations in the NW/4 and SW/4, respectively, and naming itself as operator.

10. More recently, on April 9, 2002, Arrington filed its Application for Compulsory Pooling in **Case No. 12859** to create an **E/2** drilling unit in Section 25 for its Glass-Eyed Midge 25 No. 1 well. As indicated in Paragraph 6, above, Arrington's drilling permit for the Glass-Eyed Midge 25 No. 1 well was approved by the Division on December 17, 2001.

11. The **N/2** 320-acre drilling unit proposed by TMBR/Sharp in Section 25 overlaps, and is in obvious conflict with the **E/2** and **W/2** drilling units proposed by Arrington and Ocean Energy in the same section.

12. NMOCD rules allow only one operator per each 320-acre drilling unit. *See* 19 NMAC 15.C.104(C)(2)(c).

13. On May 7, 2002, before the four competing compulsory pooling cases could be heard, TMBR/Sharp began drilling its Blue Fin 25 Well No. 1 in the NW/4 of Section 25 without allowing the Division to first determine the final configuration of the drilling units in the section (e.g., a **N/2** unit versus an **E/2** and a **W/2** unit) based on prevailing geologic and engineering considerations and evidence.

14. On May 16, 2002, after TMBR/Sharp began drilling, **Case Nos. 12816, 12859, 12860 and 12841** were heard by the Division's examiner as a single, consolidated case. An order is due to be issued any day.

15. In **Case Nos. 12816, 12859, 12860 and 12841**, Arrington asserted that the well could not be drilled or produced unless the operator first consolidated all the interests in the drilling unit by way of a voluntary agreement or pursuant to a compulsory pooling order. TMBR/Sharp contended that compulsory pooling was unnecessary and filed a motion to dismiss all of the competing compulsory pooling cases. TMBR/Sharp's motion was denied.

16. At the hearing, TMBR/Sharp's witnesses testified that it would cost approximately $1,600,000.00 to drill and complete the Blue Fin 25 No. 1 Well.

17. TMBR/Sharp's well has since been drilled to its planned total depth, but it remains uncompleted while the parties await the Division's order in the consolidated compulsory pooling cases.

18. The Division's order will determine (1) whether TMBR/Sharp's application to establish a **N/2** drilling unit, or (2) whether Ocean Energy's application to establish a **W/2** drilling unit and Arrington's application to establish an **E/2** drilling unit, will be approved.

19. The Division's order will also determine whether TMBR/Sharp or Ocean Energy will be the operator of the Blue Fin 25 Well No. 1 drilled by TMBR/Sharp.

20. The Division's order in **Case Nos. 12816, 12859, 12860 and 12841** will obviate the central issue in this appeal from **Case Nos. 12731 and 12744**: Whether the Division's Hobbs district office should have approved Arrington's Application for Permit to Drill the Triple-Hackle Dragon 25 Well No. 1, or TMBR/Sharp's Application for Permit to Drill the Blue Fin 25 Well No. 1.

21. On June 25, 2002, Arrington timely filed its Notice of Appeal to this Court from Order No. R-11700-B issued by the Commission in **Case Nos. 12731 and 12744**.

Points and Authorities

The issues presented in this appeal in **Case Nos. 12731 and 12744** obviously overlap and are inextricably bound with those in the four consolidated compulsory pooling cases (**Case Nos. 12816, 12859, 12860 and 12841**). The interests of judicial economy and efficiency dictate that the proceedings in this case be temporarily stayed until the administrative process in the case pending before the agency is complete and both cases can be consolidated in a unified appeal to the District Court.

The narrow scope of the TMBR/Sharp applications in **Case Nos. 12731 and 12744** was limited only to which party, Arrington or TMBR/Sharp, should have had its drilling permits approved.

The scope of the Compulsory Pooling cases is much broader, but will *also* determine which party is entitled to be operator of the wells in Section 25. Thus, the dispute over the approval of the drilling permits will be subsumed by the outcome of the Compulsory Pooling cases. In addition, the Compulsory Pooling cases will determine the proper configuration of the drilling units for the section: Two "stand-up" 320 acre drilling units consisting of the **E/2** and **W/2** as advocated by Arrington and Ocean; or "lay-down" 320 acre drilling units consisting of the **N/2** and, by default, the **S/2**, as advocated by TMBR/Sharp. The agency will make its determination based on geologic, and engineering evidence that the proposed drilling and development will prevent waste, avoid the drilling of unnecessary wells and that the correlative rights of the affected parties will be protected. By so doing, there is a substantial likelihood that the drilling permits issued to TMBR/Sharp will be nullified. Arrington and Ocean Energy both presented compelling evidence establishing that their E/2 and W/2 drilling units represented the best means for developing the section.

In a compulsory pooling proceeding under NMSA 1978 Sections 70-2-17 and 70-2-18, where, as here, there are multiple owners have not agreed to pool their interests and one of the owners proposes to drill a well, on application, the agency is obliged to convene a hearing and consider evidence probative of whether pooling is necessary "...to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste". NMSA 1978 Section 70-2-17(C). See Simms v. Mechem 72 N.M. 186, 188, 382 P.2d 183, 184 (1963). ("Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties[.]") Where the evidence presented substantially supports affirmative findings and conclusions on any one of these issues, then the statute directs that the Division "***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit. ...Each order shall ***describe the lands included in the unit*** designated thereby, identify the pool or pools to which it applies ***and designate an operator*** for the unit." *Id.*, (emphasis added).

In considering an operator's application for compulsory pooling, under long-standing practice,[6] the agency will consider evidence relating to, among other matters: (1) the presence or absence of a voluntary pooling agreement; (2) whether a reasonable and good-faith effort was made to obtain the voluntary participation of others; (3) reasonableness of well costs; (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of correlative rights, including the drilling of unnecessary wells; (5) the assessment of a risk penalty; and (6) whether a proposal is otherwise in the interests of conservation.

Importantly, the agency will also consider the appointment of the applicant as operator of the proposed well.

Except to the extent the APD's may incidentally identify one or the other of the parties as "operator", none of these other matters were considered by the agency in **Case Nos. 12731 and**

12744; Only TMBR/Sharp's challenge to the ministerial approval of Arrington's drilling permits was at issue there.[7]

This appeal in **Case Nos. 12731 and 12744** should be ultimately consolidated with the eventual appeal of **Case Nos. 12816, 12859, 12860 and 12841**. Rule 1-042 NMRA provides the court with considerable discretion and flexibility in consolidating cases where the matters involve a common question of law and fact and consolidated proceedings may tend to avoid unnecessary costs or delays. Whether to grant or deny a motion to consolidate falls within the trial court's discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion. *Five Keys, Inc. v. Pizza Inn, Inc.*, 99 N.M. 39, 41, 653 P.2d 870, 872 (N.M. 1982) (upholding trial court's consolidation on its own motion of two cases based on the exact same operative facts).

In deciding a motion to consolidate, the court first determines if there are common issues of law and fact, and then, if such common issues exist, the court should balance considerations of judicial economy against the potential for delay, expense, confusion, or prejudice resulting from the consolidation. *Servants of the Paraclete*, 866 F.Supp. 1560, 1572 (D.N.M. 1994); *In Re Consolidated Parlodel Litigation*, 182 F.R.D. 441, 444 (D.N.J. 1998). As demonstrated above, there is more than adequate commonality to justify consolidation here. Moreover, consolidation will serve to eliminate, rather than add to, any expense or confusion.

CONCLUSION

For the reasons outlined above, Arrington respectfully requests the Court immediately enter its Order of Temporary Stay until the completion of the administrative hearing process in **Case Nos. 12816, 12859, 12860, and 12841**. At such time, the Court may consider whether the

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[6] *See* Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963).

consolidation of all the pending matters is warranted or whether they should proceed as separate appeals. Until such time, however, because there is a substantial likelihood that the outcome of **Case Nos. 12816, 12859, 12860 and 12841** will obviate the central issue in this appeal in **Case Nos. 12731 and 12744**, this matter should be temporarily stayed. The interests of judicial economy will be served and no party can demonstrate that any prejudice will result.

Arrington is joined by Ocean Energy, Inc. in its concurrence with this motion. The Commission and TMBR/Sharp Drilling, Inc. are opposed.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By _____
J. Scott Hall
Attorneys for David H. Arrington Oil & Gas, Inc.
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was hand delivered to counsel of record on this the 24th day of July, 2002, as follows:

James Bruce, Esq.
324 McKenzie Street
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W. Thomas Kellahin, Esq.
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Santa Fe, New Mexico 87501

Steve Ross, Esq.
New Mexico Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

William F. Carr, Esq.
Holland and Hart, LLP and
Campbell and Carr
110 North Guadalupe Street, No. 1
Santa Fe, New Mexico 87501

_____
J. Scott Hall

[7] Order No. R-11700-B, Par. 33. ("An application for a permit to drill serves different objectives than an application of compulsory pooling and the two proceedings should not be confused.")

FIRST JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

vs. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

TMBR/SHARP DRILLING INC.
ENTRY OF APPEARANCE AND
MOTION FOR DESIGNATION AS AN APPELLEE

The undersigned enter their appearance herein on behalf of TMBR/SHARP DRILLING, INC. and move that it appear as an Appellee in support of The New Mexico Oil Conservation Commission, and state:

1. TMBR/Sharp Drilling, Inc. is a party of record in this case having obtained Order R-11700-B from the New Mexico Oil Conservation Commission ("Commission") which is now the subject of this appeal by David H. Arrington Oil and Gas Inc.'s ("Arrington").

2. Arrington's appeal is taken against the Commission and TMBR/Sharp Drilling, Inc.

3. TMBR/Sharp Drilling Inc, is the prevailing party before the Commission and now seeks to have the Court affirm the Commission's decision in Order R-11700-B.

4. This motion is unopposed.

WHEREFORE, TMBR/Sharp Drilling, Inc. moves that its motion to granted as requested.

Respectfully submitted,

W. Thomas Kellahin
Kellahin & Kellahin
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Santa Fe, New Mexico 87504
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(505) 982-2047 (Facsimile)

Susan R. Richardson
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(915) 682-3672 (Facsimile)

Attorneys for TMBR/Sharp Drilling Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was mailed to opposing counsel this 15th day of July 2002 as follows:

J. Scott Hall, Esq.
Miller, Stratvert & Torgerson, P.A.
P. O. Box 1986
Santa Fe, New Mexico 87504
Attorneys for Appellant

Stephen C. Ross, Esq.
Oil Conservation Commission
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505
Attorney for the Commission

W. Thomas Kellahin

FIRST JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

vs. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

ORDER

This matter comes before the Court upon the unopposed motion of TMBR/Sharp Drilling, Inc. to appear in this case as an Appellee in support of the New Mexico Oil Conservation Commission; there being good grounds for doing so;

IT IS THEREFORE ORDERS THAT:

TMBR/Sharp Drilling Inc. is hereby designated as an Appellee and the caption of this case shall reflect the same.

_____
District Judge

submitted by:

_____
W. Thomas Kellahin
Kellahin & Kellahin

P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285 (Telephone)
(505) 982-2047 (Facsimile)

Attorneys for TMBR/Sharp Drilling Inc.

Approved:

telephonically by
J. Scott Hall, Esq.
Miller, Stratvert & Torgerson, PA
Attorneys for Appellant

telephonically by
Stephen C. Ross, Esq.
Oil Conservation Commission, Appellee

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was mailed to opposing counsel this 16th day of July 2002 as follows:

J. Scott Hall, Esq.
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Attorneys for Appellant

Stephen C. Ross, Esq.
Oil Conservation Commission
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505
Attorney for the Commission

W. Thomas Kellahin

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

DAVID H. ARRINGTON OIL & GAS, INC.,

Appellant,

v. No. D-0101-CV-2002-1391

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

ENTRY OF APPEARANCE

James Bruce hereby enters his appearance on behalf of Ocean Energy, Inc.

Respectfully submitted,

James Bruce
Post Office Box 1056
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(505) 982-2043

Attorney for Ocean Energy, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following counsel of record via United States Mail this 15th day of July, 2002:

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J. Scott Hall
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Santa Fe, New Mexico 87504

James Bruce

COPY

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

ENDORSED
First Judicial District Court

THE NEW MEXICO OIL CONSERVATION COMMISSION

JUL 0 1 2002

Appellee.

Santa Fe, Rio Arriba & Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

ENTRY OF APPEARANCE

COMES NOW Stephen C. Ross, Special Assistant Attorney General, and hereby enters his appearance in this matter on behalf of Appellee the New Mexico Oil Conservation Commission.

Respectfully Submitted.

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Department
1220 S. St. Francis Drive
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(505) 476-3462 (facsimile)

Certificate of Service

I, Stephen C. Ross, hereby certify that a copy of the foregoing pleading was mailed to counsel listed below, this 1st day of July, 2002:

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

Stephen C. Ross

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v.

No. D-101-2002-CV-1391

NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

IN RE:

APPLICATION OF TMBR/SHARP DRILLING, INC., FOR AN ORDER STAYING DAVID H. ARRINGTON OIL AND GAS, INC., FROM COMMENCING OPERATIONS, LEA COUNTY, NEW MEXICO — **CASE NO. 12731**

APPLICATION OF TMBR/SHARP DRILLING, INC. APPEALING THE HOBBS DISTRICT SUPERVISOR'S DECISION DENYING APPROVAL OF TWO APPLICATIONS FOR PERMIT TO DRILL FILED BY TMBR/SHARP DRILLING, INC., LEA COUNTY, NEW MEXICO — **CASE NO. 12744**

Order No. R-11700-B *De Novo*

NOTICE OF APPEAL

David H. Arrington Oil and Gas, Inc., ("Appellant"), through its counsel of record, Miller, Stratvert & Torgerson, P.A. (J. Scott Hall), pursuant to NMSA 1978 Section 70-2-25 of the New Mexico Oil and Gas Act and Section 39-3-1.1 (Repl. Pamp. 1995), hereby files this Notice of Appeal from Order No. R-11700-B issued by the New Mexico Oil Conservation Commission on April 26, 2002 and from the Commission's disposition of Appellants'

Application For Rehearing and Request for Partial Stay of Order No. R-11700-B filed pursuant thereto.

Appeal is made to the District Court for the County of Santa Fe, New Mexico. The Appeal is taken against the Commission and against TMBR/Sharp Drilling, Inc. Copies of Order No. R-11700-B and the Application For Rehearing and Request for Partial Stay are attached hereto.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, PA.

By _____

J. Scott Hall, Esq.
Post Office Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614

ATTORNEYS FOR DAVID H. ARRINGTON OIL AND GAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Rehearing was mailed on this 25th day of June, 2002 to the following:

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Attorneys for Ocean Energy, Inc.

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Kellahin & Kellahin
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Attorneys for TMBR/Sharp Drilling, Inc.

J. Scott Hall, Esq.

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:

APPLICATION OF TMBR/SHARP DRILLING, INC. FOR AN ORDER STAYING DAVID H. ARRINGTON OIL & GAS, INC. FROM COMMENCING OPERATIONS, LEA COUNTY, NEW MEXICO. **CASE NO. 12731**

APPLICATION OF TMBR/SHARP DRILLING, INC. APPEALING THE HOBBS DISTRICT SUPERVISOR'S DECISION DENYING APPROVAL OF TWO APPLICATIONS FOR PERMIT TO DRILL FILED BY TMBR/SHARP DRILLING, INC., LEA COUNTY, NEW MEXICO. **CASE NO. 12744**

ORDER NO. R-11700-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") on March 26, 2002, at Santa Fe, New Mexico, on application of TMBR/Sharp Drilling Inc. (hereinafter referred to as "TMBR/Sharp"), *de novo*, and opposed by David H. Arrington Oil and Gas Inc. (hereinafter referred to as "Arrington") and Ocean Energy Inc. (hereinafter referred to as "Ocean Energy") and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 26th day of April, 2002,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. In Case No. 12731, TMBR/Sharp seeks an order voiding permits to drill obtained by Arrington and awarding or confirming permits to drill to TMBR/Sharp concerning the same property.

3. In Case No. 12744, TMBR/Sharp appeals the action of the Supervisor of District I of the Oil Conservation Division denying two applications for permit to drill.

4. Arrington and Ocean Energy oppose[1] both applications.

5. The cases were consolidated by the Division for purposes of hearing and remain so before the Commission.

6. Still pending before the Division are two applications for compulsory pooling. They are: Case No. 12816, Application of TMBR/Sharp for compulsory pooling, Lea County, and Case No. 12841, Application of Ocean Energy Inc. for compulsory pooling, Lea County.

7. The Commission conducted an evidentiary hearing on March 26, 2002, heard testimony from witnesses called by TMBR/Sharp, and accepted exhibits. The Commission also accepted pre-hearing statements from TMBR/Sharp and Arrington and heard opening statements from TMBR/Sharp, Arrington and Ocean Energy and accepted brief closing statements from TMBR/Sharp and Arrington.

8. Following the hearing, TMBR/Sharp filed a Motion to Supplement the Record to include the April 10, 2002 letter of Arrington to the Oil Conservation Division's Hobbs District Office and a portion of Arrington's Supplemental Response to Plaintiff's Motion for Reconsideration in Lea County Cause No. CV-2001-315C. Ocean filed a response to that motion that argued the items add nothing to the record, and Arrington filed a response arguing that the supplemental material is not new or inconsistent. The Motion to Supplement the Record should be granted as no party seems to object to review of the documents; the objections seem to relate only to the significance of the documents to this matter.

9. Applications for permit to drill were filed with the Division in Sections 23 and 25 by Arrington and TMBR/Sharp. The applications filed by TMBR/Sharp and Arrington both proposed a well in the NW/4 of in Section 25. In Section 23, the application for permit to drill filed by TMBR/Sharp proposed a well in the NE/4, and the application of Arrington proposed a well in the SE/4.

10. Arrington's application in Section 25 was filed on July 17, 2001 and sought a permit to drill its proposed "Triple-Hackle Dragon "25" Well No. 1." This application was approved on July 17. On or about August 7, 2001, TMBR/Sharp filed its application for a permit to drill its proposed "Blue Fin "25" Well No. 1" in the same section. That application was denied on August 8, 2001.

11. Arrington's application in Section 23 was filed on July 25, 2001 and sought a permit to drill its proposed "Blue Drake "23" Well No. 1." This application was

[1] On April 10, 2002 Arrington agreed to release its permit to drill to TMBR/Sharp. A dispute may no longer therefore exist concerning Section 23 although the parties apparently do not agree with this assessment.

approved on July 30, 2001. On or about August 6, 2001, TMBR/Sharp filed its application for a permit to drill its proposed "Leavelle "23" Well No. 1" in the same section. That application was denied on August 8, 2001.[2]

12. TMBR/Sharp's applications in Sections 23 and 25 were denied on the grounds of the permits previously issued to Arrington for the "Triple-Hackle Dragon "25" Well No. 1" and the "Blue Drake "23" Well No. 1." The Townsend Mississippian North Gas Pool, the pool from which the wells are to produce, is governed by the spacing and well density requirements of Rule 104.C(2) [19 NMAC 15.C.104.C(2)]. That rule imposes 320-acre spacing on wells producing from that pool. TMBR/Sharp's applications were denied because, if granted, more than one well would be present within a 320-acre spacing unit, in violation of Rule 104.C(2).

13. Before an oil or natural gas well may be drilled within the State of New Mexico, a permit to drill must be obtained. See NMAC 19.15.3.102.A, 19 NMAC 15.M.1101.A. Only an "operator" may obtain a permit to drill, 19 NMAC 15.M.1101.A, and an "operator" is a person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." NMAC 19.15.1.7.O(8).

14. The central issue in this case is whether Arrington was eligible to become the operator of the wells in question. If not, Arrington should not have received the permits to drill. If Arrington was eligible to become the operator, then the permits were properly issued to Arrington.

15. A dispute exists concerning the validity of Arrington and TMBR/Sharp's mineral leases in Sections 23 and 25. As will be seen below, resolution of this dispute in favor of Arrington or TMBR/Sharp determines which party is eligible to be the operator and thus, who should receive the permits to drill.

16. TMBR/Sharp is the owner of oil and gas leases comprising the NW/4 of Section 25 and the SE/4 of Section 23 (along with other lands) pursuant to leases dated August 25, 1997 granted by Madeline Stokes and Erma Stokes Hamilton. TMBR/Sharp Exhibit 6. The leases were granted to Ameristate Oil & Gas, Inc. (hereinafter referred to as "Ameristate") and were recorded respectively in Book 827 at Page 127 and in Book 827 at Page 124 in Lea County, New Mexico.

17. TMBR/Sharp and Ameristate entered into a Joint Operating Agreement along with other parties on July 1, 1998 and TMBR/Sharp was designated as the operator in Section 25. See TMBR/Sharp Exhibit 7.

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[2] Apparently TMBR/Sharp reapplied for the permits to drill that were previously denied, and the Division approved those permits on March 20, 2002.

18. Although the primary terms of the TMBR/Sharp leases have apparently expired, TMBR/Sharp alleges that the leases were preserved by the drilling of the "Blue Fin 24 Well No. 1" and subsequent production from that well. The Blue Fin 24 Well No. 1 is located in the offsetting section 24.

19. Subsequent to Stokes and Hamilton's execution of leases in favor of Ameristate Oil & Gas Inc., they granted leases in the same property to James D. Huff on March 27, 2001. See TMBR/Sharp Exhibit 9. The leases to Mr. Huff were recorded in Book 1084 at Page 282 and in Book 1084 at Page 285 in Lea County, New Mexico. The parties referred to these leases as "top leases," meaning that according to their terms, they would not take effect until the prior or "bottom" leases became ineffective. See TMBR/Sharp Exhibit 9, ¶ 15.

20. Arrington alleges Mr. Huff is an agent of Arrington but presented nothing to support that contention.

21. In July and August 2001, Ocean acquired a number of farm-out agreements in Section 25. See TMBR/Sharp Exhibit 10, Schedule 1. By an assignment dated September 10, 2001, Ocean assigned a percentage of the farm out agreements to Arrington under terms that require Arrington to drill a test well in Section 25 known as the Triple Hackle Dragon "25" Well No. 1 in the NW/4 of that section.

22. On August 21, 2001, after receiving the denials of the applied-for permits to drill from the District office, TMBR/Sharp filed suit against Arrington and the lessors of its mineral interests in the Fifth Judicial District Court of Lea County, New Mexico. In that case, styled "TMBR/Sharp Drilling, Inc. v. David H. Arrington Oil & Gas, Inc., *et al.*", TMBR/Sharp alleged that its leases were still effective and the Arrington top leases were ineffective. The District Court, in its Order Granting Partial Summary Judgment, dated December 24, 2001, agreed with TMBR/Sharp's contention. See TMBR/Sharp's Exhibit No. 12,

23. During the hearing of this matter, TMBR/Sharp argued that because the Fifth Judicial District Court found that Arrington's "top leases" had failed, TMBR/Sharp was entitled to permits to drill in Sections 23 and 25 and Arrington was not entitled to permits to drill and its permits should be rescinded. TMBR/Sharp also argued that Arrington had filed applications to prevent TMBR/Sharp from being able to drill and to place its obligations under the continuous drilling clauses of the oil and gas leases in jeopardy. TMBR/Sharp argued that Ocean Energy's letter agreement with Arrington could not revive Arrington's claim of title and that Ocean Energy's pending pooling application with the Division is essentially irrelevant to the question of whether TMBR/Sharp should have been granted a permit to drill.

24. Arrington argued in response that the title issue ruled upon by the District Court with respect to section 25 is irrelevant because Arrington acquired an independent

interest in that section by virtue of a farm out agreement in September of 2001. Arrington also argued it was willing to assign the disputed acreage in Section 23 to TMBR/Sharp in order to resolve the present controversy. Arrington also argued that it doesn't intend to actually drill at the present time under either approved permit to drill and argued, citing Order No. R-10731-B, that the Commission's practice has not been to rely on "first in time, first in right" principles in deciding competing applications on compulsory pooling, but instead on geological evidence. Arrington seemed to argue that a compulsory pooling proceeding is the place to present such geologic evidence. Arrington argues that these proceedings are unnecessary and that the Commission should rely upon the Division's pending pooling cases to decide who of the various parties should properly possess the permit to drill.

25. Ocean Energy argued that since its farm out agreement terminates on July 1, 2002 time is of the essence and that the matters at issue here should be resolved in the pending compulsory pooling proceeding instead of this proceeding. Ocean Energy argued that the permit to drill is meaningless in this context, that TMBR/Sharp is essentially asking the Commission to determine pooling in the context of the permit to drill, and that the dedication of acreage on the acreage dedication plat should not determine what acreage would be pooled to the well. If the Commission were to adopt this approach, Ocean Energy argues, the compulsory pooling statutes would be written out of existence.

26. The parties seem to agree that in a situation where the bottom lease has not failed, a person owning a top lease is not a person duly authorized to be in charge of the development of a lease or the operation of a producing property, and is therefore not entitled to a permit to drill. NMAC 19.15.1.7(O)(8). See also 1 Kramer & Martin, The Law of Pooling and Unitization, 3rd ed., § 11.04 at 11-10 (2001). Moreover, because only an "owner" may seek compulsory pooling, it seems that a person owning a top lease where the bottom lease has not failed might not be entitled to compulsory pooling either. See NMSA 1978, § 70-2-17(C).

27. When an application for permit to drill is filed, the Division does not determine whether an applicant can validly claim a real property interest in the property subject to the application, and therefore whether the applicant is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico. The Division so concluded in its Order in this matter. See Order No. R-11700 (December 13, 2001).

28. It is the responsibility of the operator filing an application for a permit to drill to do so under a good faith claim to title and a good faith belief that it is authorized to drill the well applied for. It appears to this body that Arrington had such a good faith belief when it filed its application, but subsequently the District Court found otherwise.

It is not within the purview of this body to question that decision and it should not do so in this case.

29. As of the date of this order, TMBR/Sharp, by Court declaration, is the owner of an oil and gas lease in both Section 23 and Section 25, and Arrington, also by Court declaration, is not an owner in those sections. Therefore, Arrington, who the Court has now decreed has no authority over the property, should not have been granted permits to drill in those sections and TMBR/Sharp should have been granted a permit.

30. Both Arrington and Ocean Energy imply that an appeal will be filed of the District Court's decision. Until the issue of title in Sections 23 and 25 is finally resolved by the courts or by agreement of the parties, the outcome of this proceeding is therefore uncertain. As of the present time, TMBR/Sharp has prevailed on the title question and this Order reflects that (present) reality. However, as an appeal could change that conclusion, jurisdiction of this matter should therefore be retained until matters are finally resolved.

31. The permits to drill issued by the Division in July 2001 to Arrington were issued erroneously and should be rescinded *ab initio*. The applications to drill submitted by TMBR/Sharp in August 2001 should have been processed within a few days of receipt. Arrington's later acquisition of an interest in section 23 and 25 through a farm out agreement doesn't change this analysis; Arrington had no interest by virtue of farm out as of the date of TMBR/Sharp's applications.

32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending the resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.

33. Arrington and Ocean Energy's conclusion does not necessarily follow. An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused. The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights. NMSA 1978, § 70-2-17(C).

34. It has long been the practice in New Mexico that the operator is free to choose whether to drill first, whether to pool first, or whether to pursue both contemporaneously. The Oil and Gas Act explicitly permits an operator to apply for compulsory pooling after the well is already drilled. See NMSA 1978, § 70-2-17(C) (the compulsory pooling powers of the Division may be invoked by an owner or owners "... who has the right to drill *has drilled* or proposes to drill a well [sic] ..."). Issuance of the permit to drill does not prejudge the results of a compulsory pooling proceeding, and any suggestion that the acreage dedication plat attached to an application to drill somehow "pools" acreage is expressly disavowed. If acreage included on an acreage dedication plat is not owned in common, it is the obligation of the operator to seek voluntary pooling of the acreage pursuant to NMSA 1978, § 70-2-18(A) and, if unsuccessful, to seek compulsory pooling pursuant to NMSA 1978, § 70-2-17(C).

35. Thus, where compulsory pooling is not required because of voluntary agreement or because of common ownership of the dedicated acreage, the practice of designating the acreage to be dedicated to the well on the application for a permit to drill furthers administrative expedience. Once the application is approved, no further proceedings are necessary. An operator may first apply for a permit to drill a well and may thereafter pool (on a voluntary or compulsory basis) separately owned tracts to the well. Alternatively, the operator may first pool and later seek a permit to drill. The two are not mutually exclusive, and there is no preferred methodology.

36. Thus, the process fosters efficiency by permitting a simple approach in cases where ownership is common and pooling, voluntary or compulsory, is not necessary.

37. Ocean's expiring farm-outs present a difficult problem because the delay occasioned by this proceeding and any delay that might occur in the pending compulsory pooling cases may place Ocean's interests in jeopardy. It is worth noting that Ocean's interests seem to be free of the title issues plaguing the other parties, but since Ocean Energy intended that Arrington drill and become operator, Ocean isn't planning on preserving its rights by drilling a well itself and hasn't applied for a permit to drill. Unfortunately, this body is without authority to stay expiration of the farm-outs; Ocean should petition the District Court for relief if the expiring farm-outs are a concern.

CONCLUSION OF LAW:

The Oil Conservation Commission has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico.

IT IS THEREFORE ORDERED:

1. The portion of TMBR/Sharp's application in Case No. 12731 seeking to void permits to drill obtained by Arrington is granted. The permits to drill awarded to

Arrington shall be and hereby are rescinded *ab initio* and the applications originally filed by TMBR/Sharp in August, 2001 shall be and hereby are remanded to the District Office for approval consistent with this Order provided the applications otherwise meet applicable Division requirements.

2. TMBR/Sharp's application in Case No. 12744, appealing the decision of the Supervisor of District I of the Oil Conservation Division, is granted and the decision shall be and hereby is overruled.

3. The motions of Arrington and Ocean to continue this proceeding until after the decision in Cases No. 12816 and No. 12841 shall be and hereby are denied.

4. The motion of TMBR/Sharp to Supplement the Record is hereby granted.

5. Jurisdiction of this case is retained for the entry of such further orders as may be necessary given subsequent proceedings in TMBR/Sharp Drilling, Inc. v. David H. Arrington Oil & Gas, Inc., *et al.*

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

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

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

APPLICATION OF TMBR/SHARP DRILLING, INC. FOR AN ORDER STAYING DAVID H. ARRINGTON OIL AND GAS, INC. FROM COMMENCING OPERATIONS, LEA COUNTY, NEW MEXICO — CASE NO. 12731

APPLICATION OF TMBR/SHARP DRILLING, INC., APPEALING THE HOBBS DISTRICT SUPERVISOR'S DECISION DENYING APPROVAL OF TWO APPLICATIONS FOR PERMIT TO DRILL FILED BY TMBR/SHARP DRILLING, INC., LEA COUNTY, NEW MEXICO — CASE NO. 12744

ORDER NO. R-11700-B

APPLICATION FOR REHEARING
AND
REQUEST FOR PARTIAL STAY OF ORDER NO. R-11700-B

David H. Arrington Oil and Gas, Inc., ("Arrington"), through its attorneys, Miller Stratvert & Torgerson, P.A., (J. Scott Hall), moves pursuant to NMSA 1978 Section 70-2-25 of the New Mexico Oil and Gas Act and 19 NMAC 15.N.1222 for rehearing on the issuance of Order No. R-11700-B issued by the Commission on April 26, 2002. Arrington also moves pursuant to 19 NMAC 15.N.1220.B for entry of an order staying Order No. R-11700-B

BACKGROUND FACTS

Case Nos. 12731 and 12744 involve consolidated applications filed by TMBR/Sharp Drilling, Inc., ("TMBR/Sharp"), challenging and APD issued on July 17, 2001 to Arrington for its Triple-Hackle Dragon 25 Well No. 1 covering lands in the W/2 of Section 25[1] as well as the

[1] All referenced lands are located in Township 16-South, Range 35-East, NMPM in Lea County.

permit approved on July 30, 2001 for Arrington's Blue Drake 23 Well No. 1 covering lands in the E/2 of Section 23. Applications filed in August, 2001 by TMBR/Sharp for permits to drill its Leavelle 23 No. 1 well and the Blue Fin 25 No. 1 well in Sections 23 and 25, respectively, had been denied by the Division's District I office due to the previous approval of the Arrington drilling permits for the same lands.

The consolidated administrative cases ultimately resulted in the issuance by the New Mexico Oil Conservation Commission of Order No. R-11700-B on April 26, 2002, which found, among other things, that the Division's District I Supervisor should issue an APD to TMBR/Sharp for its proposed Blue Fin 25 Well No. 1 in the NW/4 of Section 25 to which TMBR/Sharp proposes to dedicate a N/2 spacing and proration unit. The Order also directed that a drilling permit should be approved for TMBR/Sharp's Blue Drake 23 Well No. 1 to which it proposed to dedicate the E/2 of Section 23. In addition, the Commission expressly retained jurisdiction over the matter, noting that separate court proceedings to resolve title issues could affect the outcome these pending administrative cases. At issue in that collateral litigation presently pending before the 5th Judicial District Court in Lovington is whether the filing of a C-102 form with the Division's District I office in Hobbs for TMBR/Sharp's Blue Fin 24 No. 1 well in Section 24, T-16-S, R-35-E, was sufficient to perpetuate TMBR/Sharp's leases from Madeline Stokes and Erma Stokes Hamilton to Ameristate Oil and Gas (and, by assignment, to TMBR/Sharp) that covered portions of lands in Sections 23 and 25 identified in the APD's filed both by TMBR/Sharp and Arrington. In that litigation, the lessors and Arrington, the owner of top-leases executed by the Stokes family (by way of farmouts through Ocean Energy, Inc.), contend that the leases held by TMBR/Sharp had lapsed.

In the interim, on January 28, 2002, TMBR/Sharp had filed an application for compulsory pooling in Case No. 12816 seeking to consolidate the working interests in the N/2 of Section 25

for its Blue Fin 25 Well No. 1. Ocean Energy, Inc. also filed separate compulsory pooling applications (Case No. 12841 and Case No. 12860) seeking to pool the W/2 of Section 25 for two alternative proposed Mississippian formation well locations in the NW/4 and SW/4, respectively. More recently, Arrington has filed its application for compulsory pooling in Case No. 12859 to create an E/2 unit in Section 25 for its Glass-Eyed Midge 25 No. 1 Atoka/Morrow/Mississippian well to be drilled in the NE/4. Arrington's C-101 APD for the Glass-Eyed Midge 25 No. 1 well was issued by the Division on December 17, 2001 and its C-102 reflecting an E/2 unit was filed on November 29, 2001. The N/2 TMBR/Sharp unit is in obvious conflict with the E/2 and W/2 units proposed by Arrington and Ocean Energy. Case Nos. 12816, 12859, 12860 and 12841 are all scheduled to be heard by the Division's examiner on May 16, 2002.

Significantly, Arrington's Application does not present a title issue like TMBR/Sharp's Applications in Case Nos. 12731 and 12741 did, and the lands under its proposed E/2 unit were not involved in those two cases. Arrington's lease interests are wholly independent from the lease title currently in dispute in the 5th Judicial District Court litigation.

On March 15, 2002, without notice to the Applicant and ***before*** the issuance of Order R-11700-B, TMBR/Sharp Drilling, Inc. filed another C-101 APD with the Division's District I office for its Blue Fin 25 Well No. 1 (API No. 30-025-35865) which was also proposed to be drilled to the Mississippian formation in the NW/4 of Section 25. The C-102 acreage dedication plat which accompanied the filing of the TMBR/Sharp Drilling, Inc. APD proposed to dedicate the N/2 of said Section 25 to the Blue Fin 25 Well No. 1.

On March 20, 2002, again without notice to Arrington and ***before*** the issuance of Order No. R-11700-B, the Division's District I office approved the APD for the Blue Fin 25 Well No. 1. As a consequence of the actions of the Division's District I office, there existed two

simultaneously approved APD's with attached C-102's that both operators proposed to dedicate the NE/4 of Section 25 to their respective wells.

At the time of the filing of the APD's, there were owners of other interests in the N/2 and E/2 of Section 25, respectively, who had not voluntarily agreed to participate in the drilling of the proposed wells. Neither the Arrington nor TMBR/Sharp compulsory pooling cases had been heard and neither operator had consolidated the interests of all the non-participating owners either by way of a voluntary agreement, communitization agreement, or otherwise. Although TMBR/Sharp, Ocean Energy and Arrington now all have compulsory pooling applications pending before the Division to consolidate the unjoined interests, TMBR/Sharp moved to continue its own pooling case (Case No. 12816) and to dismiss Cases 12859, 12860 and 12841. The Division's examiner denied the TMBR/Sharp motion at a hearing on May 14, 2002.

To date, however, no geologic, engineering or equitable evidence having a bearing on the development of Section 23 and 25 has been presented to the Division or the Commission.

Significantly, it was learned on May 14th that TMBR/Sharp began drilling its Blue Fin 25 Well No. 1 on May 7, 2002, without having consolidated the unjoined interests and without allowing the Division to determine the final configuration of the spacing and proration units in Section 25.

On May 15, 2002, Arrington filed with the Division its *Application To Reinstate Drilling Permit* whereby it seeks an order directing the Division's District I office to reinstate the drilling permit for its Glass-Eye Midge 25 Well No. 1 previously approved on December 17, 2001. (A copy of the Application is attached as Exhibit "A".)

THE REQUEST FOR REHEARING

Arrington respectfully submits that Case Nos. 12731 and 12744 should be reheard for the reasons that (1) Order R-11700-B is based, in part, on error, (2) was improvidently issued, and (3) its operation allows a ministerial act to supersede the agency's statutory functions.

Order R-11700-B Is Based On Error.

In Order No. R-11700-B, the Commission, citing to the separately pending litigation in the district court involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands and had "no authority over the property". (Order R-11700-B, Par. 29.) This finding was the primary basis for the Commission's determination. This finding is clearly based on error. Arrington established that it had the right to drill and operate as the owner of lease interests in the W/2 of Section 25 separate and apart from the oil and gas leases involved in the district court litigation.

In addition, at the time it filed the APD for its Glass Eye Midge 25 No. 1 Well, Applicant owned separate oil and gas lease interests in the E/2 of Section 25 that were independent from the conflicting leases that are the subject of the district court litigation cited by the Commission in Order No. R-11700-B. As such, Applicant was eligible to become the operator of that well and the permit to drill that was issued to it on December 17, 2001 should have been undisturbed. In this regard, the findings in Paragraph 14 of Order No. R-11700-B are telling:

> *"14. The central issue in this case is whether Arrington was eligible to become the operator of the wells in question...If Arrington was eligible to become the operator, then the permits were properly issued to Arrington."*

In its findings at Paragraph 29 of Order R-11700-B, the Commission erroneously assumed that the rulings issued by the 5th Judicial District Court served to adjudicate all of the title owned by Arrington. Instead, the scope of the district court rulings affected only the lands encumbered

by the Stokes/Hamilton base lease claimed by Ameristate and TMBR/Sharp and the top-lease claimed by Arrington. The interests separately owned by Arrington remained unaffected, and as such, Arrington continued to be eligible to become operator throughout.

The agency's determination of the geologic and economic waste issues before it should determine the outcome of these disputed cases, not resolution of collateral title issues. Accordingly, the Division should discharge its statutory function and resolve these matters at the earliest opportunity.

Order R-11700-B Was Improvidently Issued.

Order No. R-11700-B was improvidently issued, failing to completely resolve the dispute before the agency or accord full relief to the affected parties. The initial determination of Cases 12731 and 12744 has allowed the permitting issue to unduly influence events and has pre-empted proper consideration by the agency's of its statutory mandates to prevent waste, protect correlative rights and avoid the drilling of unnecessary wells. As a further consequence of its issuance, Order No. R-11700-B has precipitated more problems for the parties, including the Division, that have become manifest in the frustrated efforts of Arrington to develop the E/2 of Section 25, acreage that should not have been affected by the proceedings.

Through no fault of the Commission, the scope of the TMBR/Sharp applications in Case Nos. 12731 and 12744 was limited to the issuance of drilling permits for its two proposed wells. That circumstance was the product of one single act of neglect on the part of TMBR/Sharp: That is, TMBR/Sharp's failure to abide by the terms of one of its oil and gas leases and properly file a pooled unit designation in the county records for their Blue Fin 24-1 well. That single failure or omission has consequently determined all of TMBR's actions, legal positions and arguments ever since, both in court and before the Division and Commission. That same omission has, by necessity, caused TMBR/Sharp to argue that it is not necessary to file a unit designation in the

county to perpetuate its lease interests. Rather, TMBR/Sharp has been compelled by events to assert that the mere filing of a C-102 with the Division is sufficient to perpetuate their lease on Section 25.

As a further consequence, TMBR/Sharp has placed itself in the position of having to argue to the Division that compulsory pooling is unnecessary altogether. (*See* April 29, 2002 Motion of TMBR/Sharp Drilling, Inc. To Continue Case No. 12816 And To Dismiss Cases 12859, 12860, and 12841.) As TMBR/Sharp asserts, the C-102 is sufficient to "consolidate" interests and that is enough to determine the unit configuration which will, in turn, determine the ultimate development of the entirety of Section 25.

It is apparent that issues of waste, correlative rights, and unnecessary drilling are inextricably bound with the issue of which operator may be entitled to drilling permits. These interrelated disputes cannot be resolved separately until the agency discharges its statutory obligations to consider the pooling applications and make its determinations, based on geologic, and engineering evidence that the resulting development will prevent waste and protect correlative rights.

The Operation Of Order R-11700-B Allows A Ministerial Act To Supersede The Agency's Statutory Functions.

The determination, first, that TMBR/Sharp may have been entitled to have its drilling permits approved before issues of correlative rights and waste are considered exalts a mere ministerial act over the substantive and discretionary quasi-judicial function that the Division is *mandated* to perform under N.M. Stat. Ann. 1978 Sections 70-2-17 and 70-2-18.[2]

[2] Compulsory Pooling proceedings are identified as adjudicatory matters at 19 NMAC 15N.1207.A(1).

In a situation such as this, where multiple owners have not agreed to pool their interests, under the Division's compulsory pooling statutes, on application, the agency is obliged to convene a hearing and consider evidence probative of whether pooling is necessary "...to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste". N. M. Stat. Ann. 1978 Section 70-2-17(C). See Simms v. Mechem 72 N.M. 186, 188, 382 P.2d 183, 184 (1963). ("Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties[.]") Where the evidence presented substantially supports affirmative findings and conclusions on any one of these issues, then the statute directs that the Division "***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit." *Id.*, (emphasis added). Even under this statutory hearing process, depending on the evidence, the issuance of a compulsory pooling order is discretionary and is by no means an entitlement. This quasi-judicial function is expressly reserved to the Commission and the Director or her duly appointed examiners (N. M. Stat. Ann. 1978 sec. 70-2-13) and ***no part*** of it may be delegated by fiat under the guise of a ministerial approval of a drilling permit. *See* Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct. App. 1981). In Kerr-McGee, the Court of Appeals held that duties which are quasi-judicial in nature, and which require the exercise of judgment cannot be delegated. Id. As Kerr-McGee was a case of first impression in New Mexico, the Court of Appeals relied on Oklahoma case law. The Supreme Court of Oklahoma in Van Horn Oil Co. v. Okla. Corp. Com'n., 753 P.2d 1359, 1363 (1988) cited to the same authority relied on the New Mexico Court of Appeals when it quoted:

> Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they

> cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Citing, Anderson v. Grand River Dam Authority, 446 JP.2d 814 (1968). The Anderson Court also quoted with approval from American Jurisprudence and Corpus Juris Secundum:

> In 2 Am. Jur. 2nd Administrative Law, Section 222, it is said: It is a general principal of law, expressed in the maxim "delegates no protest delegare", that a delegated power may not be further delegated by the person to whom such power is delegated and than in all cases of delegated authority, or personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment and discretion, the authority is purely personal and cannot be delegated to another***. A commission charged by law with power to promulgate rules, cannot in turn, delegate that power to another."

Because New Mexico has expressly adopted Oklahoma law, it is the law in this state that an administrative body may not delegate a statutory function, particularly in the manner that TMBR/Sharp advocates.

In making any determination under the compulsory pooling statute, under long-standing practice,[3] the Division will consider evidence relating to, among other matters: (1) the presence or absence of a voluntary pooling agreement; (2) whether a reasonable and good-faith effort was made to obtain the voluntary participation of others; (3) reasonableness of well costs; (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of correlative rights, including the drilling of unnecessary wells; (5) the assessment of a risk penalty; and (6) whether a proposal is otherwise in the interests of conservation. The mere approval of a drilling permit and the filing of an acreage dedication plat serve to do none of these things and neither have any of the functions enumerated above been delegated outside the Division's regular hearing process.[4]

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[3] *See* Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963).

[4] N. M. Stat. Ann. 1978 Section 70-2-17(C): "All orders effecting such pooling shall be made after notice and hearing[.]"

It is inappropriate to allow any portion of the pooling process to be subsumed by the mere processing of an APD. Order No. R-11700-B, Par. 33. ("An application for a permit to drill serves different objectives than an application of compulsory pooling and the two proceedings should not be confused.") Moreover, the issuance of a drilling permit does not constitute any determination of a property right. *See* Gray v. Helmerich & Payne, Inc., et al. 843 S.W. 2d 579 (Tex. 2000).

Whether intentional or not, the practical effect of Order R-11700-B was to allow a ministerial event to dictate events to the exclusion of the statutory adjudicatory functions that ought first be performed by the Division and the Commission.

THE REQUEST FOR PARTIAL STAY

Arrington requests that Order No. R-11700-B be stayed to the extent it operates to prevent the reinstatement of its drilling permit and otherwise prevents it from commencing the drilling of it Glass-Eye Midge 25 Well No. 1 in the NE/4 of Section 25.

Further stay of Order R-11700-B is requested to the extent it approves, by implication or otherwise, the creation of a N/2 spacing and proration unit for TMBR/Sharp's Blue Fin 25 Well No. 1 pending the agency's consideration of geologic and engineering evidence and the issuance of an order determining the proper orientation of the 320 acre units in Section 15.

A proposed Order of Partial Stay is attached hereto as Exhibit "B".

CONCLUSION

For the reasons outlined above, Arrington respectfully requests the Commission immediately enter its Order of Partial Stay and then set all these matters for rehearing at the next regularly scheduled Commission hearing docket set for June 21, 2002.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By _____

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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 15th day of May, 2002, as follows:

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J. Scott Hall

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

IN THE MATTER OF THE APPLICATION OF
DAVID H. ARRINGTON OIL AND GAS, INC.
TO REINSTATE DRILLING PERMIT,
LEA COUNTY, NEW MEXICO CASE No. _____

APPLICATION

DAVID H. ARRINGTON OIL AND GAS, INC., by its undersigned attorneys, Miller, Stratvert & Torgerson, P.A. (J. Scott Hall), hereby makes application pursuant to Section 70-2-11 N.M.S.A. (1978) for an order reinstating its previously approved C-101 and C-102 drilling permit for Applicant's proposed Glass-Eyed Midge 25 Well No. 1 (API No. 30-025-35787) to be drilled at a standard 320-acre spacing and proration unit gas well location 803 feet from the North line and 902 feet from the East line in E/2 of Section 25, Township 16-South, Range 35-East, NMPM, Lea County, New Mexico. Applicant, in support thereof would show the Division:

1. Applicant owns a substantial portion of the working interest in and under the E/2 of Section 25, and Applicant has the right to drill thereon.
2. Applicant first acquired its lease interests in the E/2 of Section 25 in approximately January, 2001.
3. On November 29, 2001, Applicant filed with the Division's District I office in Hobbs its C-101 Application for Permit to Drill, ("APD"), for the Glass Eye Midge 25 Well No. 1 which it proposed to drill to the Townsend-Mississippian Gas pool. Applicant simultaneously filed a C-102 acreage dedication plat form proposing to dedicate the E/2 of said Section 25 to the subject well.

EXHIBIT 1

4. On December 17, 2001, the Division's District I office approved Applicant's permit to drill the subject well.

5. On March 15, 2002, without notice to the Applicant, TMBR/Sharp Drilling, Inc. filed another C-101 APD with the Division's District I office for its Blue Fin 25 Well No. 1 (API No. 30-025-35865) which was also proposed to be drilled to the Mississippian formation in the NW/4 of Section 25, T-16-S, R-35-E, NMPM in Lea County. The C-102 acreage dedication plat which accompanied the filing of the TMBR/Sharp Drilling, Inc. APD proposed to dedicate the N/2 of said Section 25 to the Blue Fin 25 Well No. 1.

6. On March 20, 2002, without notice to the Applicant, the Division's District I office approved the APD for the Blue Fin 25 Well No. 1.

7. As a consequence of the actions of the Division's District I office, there existed two simultaneously approved APD's with attached C-102's that both proposed to dedicate the NE/4 of Section 25 in violation of, *inter alia*, 19 NMAC 15.C.104(C)(2)(c).

8. At the time of the filing of the APD's, there were owners of other interests in the N/2 and E/2 of Section 25, respectively, who had not voluntarily agreed to participate in the drilling of the proposed wells. Neither Applicant nor TMBR/Sharp Drilling, Inc. had consolidated the interests of all the non-participating owners either by way of a voluntary agreement, communitization agreement, or compulsory pooling order. Both Applicant and TMBR/Sharp Drilling, Inc. subsequently initiated separate compulsory pooling proceedings before the Division seeking to consolidate those interests.

9. On April 26, 2002, the New Mexico Oil Conservation Commission issued Order No. R-11700-B in Case Nos. 12731 and 12744. In Order No. R-11700-B, the Commission, citing to separately pending litigation in the district court involving conflicting leases, found that APD's previously issued to Arrington for wells in the S/2 of Section 23 and the W/2 of Section 25, T-16-S, R-35-E should not have been granted because Arrington was not an owner in those lands.

10. At the time it filed the APD for its Glass Eye Midge 25 No. 1 Well, Applicant owned separate oil and gas lease interests independent from the conflicting leases that are the subject of the district court litigation cited by the Commission in Order No. R-11700-B. As such, Applicant was eligible to become the operator of the subject well and should have received the permit to drill that was issued to it on December 17, 2001.

11. On May 1, 2002, the Division's District I office notified Applicant that its approved APD was canceled. Applicant received the notification on May 7, 2002.

12. Applicant continues to own lease interests underlying the E/2 of said Section 25 and continues to be eligible to be operator.

13. The cancellation of Applicant's permit by the Division's District I office was arbitrary, capricious and otherwise unreasonable.

14. Geological, engineering and equitable considerations mandate that development occur by way of a 320 acre spacing and proration unit located in the E/2 of said Section 25 dedicated to Applicant's proposed well in order to avoid the drilling of unnecessary wells, prevent waste and protect correlative rights.

WHEREFORE, Applicant prays that this application be set for hearing before a duly appointed examiner of the Oil Conservation Division no later than June 13, 2002, and that after notice and hearing as required by law, the Division enter its order reinstating the drilling permit for Applicant's proposed well and making such other and further provisions as may be proper in the premises.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By _____

J. Scott Hall
Post Office Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614

ATTORNEYS FOR DAVID H. ARRINGTON OIL AND GAS, INC.

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

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

APPLICATION OF TMBR/SHARP DRILLING, INC.
FOR AN ORDER STAYING DAVID H. ARRINGTON
OIL AND GAS, INC. FROM COMMENCING
OPERATIONS, LEA COUNTY, NEW MEXICO — CASE NO. 12731

APPLICATION OF TMBR/SHARP DRILLING, INC., — CASE NO. 12744
APPEALING THE HOBBS DISTRICT SUPERVISOR'S
DECISION DENYING APPROVAL OF TWO
APPLICATIONS FOR PERMIT TO DRILL FILED BY
TMBR/SHARP DRILLING, INC.,
LEA COUNTY, NEW MEXICO

ORDER OF PARTIAL STAY
OF ORDER NO. R-11700-B

THIS MATTER, having come before the Commission on the Application For Rehearing And Request For Partial Stay Of Order No. R-11700-B filed by David H. Arrington Oil and Gas, Inc., and the Commission, being duly advised, ORDERS as follows:

1. Order No. R-11700-B is stayed to the extent it may operate to prevent the reinstatement of the drilling permit previously issued to David H. Arrington Oil and Gas, Inc. on December 17, 2001 for the drilling of the Glass-Eye Midge 25 Well No. 1 (API No.30-025-35787) 803' from the north line and 962' from the east line in the NE/4 of Section 25, Township 16-South, Range 35-East, NMPM, Lea County, New Mexico. Order No. R-11700-B is

EXHIBIT B

further stayed to the extent it prevents Arrington from commencing drilling operations for the referenced well.

2. Order No. R-11700-B is further stayed to the extent it may be regarded as approving, by implication or otherwise, the establishment of a spacing and proration unit consisting of the N/2 of Section 25, Township 16-South, Range 35-East, NMPM, Lea County, New Mexico, for the TMBR/Sharp Drilling, Inc. Blue Fin 25 Well No. 1 located in the NW/4 of said Section 25.

3. Jurisdiction over these cases is retained for the entry of such further orders as may be necessary.

DONE at Santa Fe, New Mexico, on this ____day of May, 2002.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

By:_____
Lori Wrotenbery, Chair.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER OF TEMPORARY STAY PENDING CONSOLIDATION

THIS MATTER, having come before the Court pursuant to the Motion For Temporary Stay Pending Consolidation filed on behalf of the Appellant, David H. Arrington Oil and Gas, Inc., and the Court being duly advised, FINDS:

1. There are presently pending in a consolidated proceeding before the New Mexico Oil Conservation Division, ("NMOCD"), four administrative applications that seek the compulsory pooling of oil and gas leasehold working interests in Section 25, Township 16 South, Range 35 East, NMPM, in Lea County. Those lands in Section 25 also constitute a portion of the same lands that are the subject, in part, of New Mexico Oil Conservation Commission Order No. R-11700-B appealed from here pursuant to NMRA 1978 1-074. Both the instant appeal and the pending compulsory pooling cases involve the same agency and the same parties. ~~Moreover the pending compulsory pooling cases will determine the issue of well operatorship, a matter that is also the subject of this appeal.~~

2. There is a substantial likelihood that the non-prevailing party in the pending compulsory pooling proceedings will pursue an appeal *de novo* to the New Mexico Oil Conservation Commission, and subsequently, to the District Court.

3. ~~Temporarily staying this appeal pending the completion of the administrative and appellate processes for the compulsory pooling cases will serve the interests of judicial economy and efficiency.~~ Temporarily staying this appeal may permit completion of the administrative process and an appeal to the District Court, permitting consolidation if otherwise appropriate.

4. A temporary stay does not operate as a determination on the merits of this appeal. Neither does a stay determine the issue of well operations.

~~5. A determination on the propriety of consolidating the other cases with this appeal can be made at such time as the pending compulsory pooling cases are appealed to the District Court.~~

~~6~~5. This appeal should be temporarily stayed for a period of six months from the date of this Order~~,~~ ~~at which time the parties may request an extension of the stay should circumstances warrant.~~

WHEREFORE, IT IS ORDERED that this appeal shall be temporarily stayed for six months from the date of entry hereof.

DISTRICT COURT JUDGE

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall, Esq.
Attorneys for Plaintiff
Post Office Box 1986
Santa Fe, New Mexico 87504-19086

(505) 989-9614
(505) 989-9857 fax

Concurrence by:

Telephonic Approval October , 2002
Kellahin & Kellahin
W. Thomas Kellahin, Esq.
Attorney for TMBR/Sharp Drilling, Inc.
117 North Guadalupe Street
Santa Fe, New Mexico 87501

Telephonic Approval October , 2002
Steve Ross, Esq.
Attorney for New Mexico Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Telephonic Approval October , 2002
James Bruce, Esq.
Attorney for Ocean Energy, Inc.
Post Office Box 1056
Santa Fe, New Mexico 87504

Telephonic Approval October , 2002
Phillip T. Brewer, Esq.
Attorney for TMBR/Sharp Drilling, Inc.
Post Office Box 298
117 North Guadalupe Street
Roswell, New Mexico 88202

Ross, Stephen

From: Ross, Stephen
Sent: Wednesday, September 18, 2002 8:26 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. OCC

Hi Scott and Thanks,

I think 74(N) restricts me to 15 pages. I'll whip up a motion and order. Don't you wish you were also writing a brief right now?

Steve

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Wednesday, September 18, 2002 8:23 AM
To: sross@state.nm.us
Subject: RE: Arrington v. OCC

Steve: I think the page limitation applies only to the "argument" portion, but I would agree to a motion to extend a page limit in any event.

-----Original Message-----
From: Ross, Stephen [mailto:sross@state.nm.us]
Sent: Tuesday, September 17, 2002 6:08 PM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. OCC

Hi Scott,

I've looked through the Statements of Issues (very good). I think I have to respond in 15 pages. Will you approve a motion and order giving me a page extension to 20 pages? I just can't write as succinctly as you can!

Thanks. Let me know.

Steve

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Wednesday, September 11, 2002 10:20 AM
To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net; ccbspa@ix.netcom.com
Subject: Case No. 12622 (Nearburg)

Steve:

Oct. 21 and 22 are o.k. with me.

Scott

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505
(505) 476-3451

Ross, Stephen

From: Ross, Stephen
Sent: Tuesday, September 17, 2002 6:08 PM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. OCC

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Thanks. Let me know.

Steve

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
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To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net; ccbspa@ix.netcom.com
Subject: Case No. 12622 (Nearburg)

Steve:

Oct. 21 and 22 are o.k. with me.

Scott

Ross, Stephen

From: Ross, Stephen
Sent: Friday, October 25, 2002 11:16 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Partially.

I don't agree that paragraph 3 should remain as written. I'd suggest it be replaced with the following:

"3. Temporarily staying this appeal may permit completion of the administrative process and an appeal to the District Court, permitting consolidation if otherwise appropriate."

Paragraph 6 should remain up to the comma. He did say he'd defer ruling for six months.

If it's revised in this manner, I'll agree to the form.

I just ran these proposals by Tom and he agrees as well, but also thinks that the order should somewhere refer also to Rule 1-074, which I don't have any problem with. The reference to that rule could be made in the first paragraph or in the ordering provision.

Let me know. Thanks.

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Thursday, October 24, 2002 2:19 PM
To: SRoss@state.nm.us
Cc: tkellahin@aol.com
Subject: Arrington v. NMOCC

Steve:

Tom's 10/24 mark-up changes to the draft Order of Temporary Stay are ok with me. Do you agree?

Scott

Ross, Stephen

From: Ross, Stephen
Sent: Friday, September 20, 2002 4:00 PM
To: 'shall@mstLAW.com'
Subject: RE: Nearburg De Novo

Scott,

Well, Tom said those dates won't work either. We're back the with the dates I specified.

Thanks.

Steve

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Friday, September 20, 2002 10:35 AM
To: SRoss@state.nm.us
Subject: Nearburg De Novo

Steve: I note that the Division hearings skip a week with the next one set for October 10th. It looks like holding the Nearburg De Novo on the 10th and 11th won't work.

What is the plan, now?

Scott

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505
(505) 476-3451

Ross, Stephen

From: shall@mstLAW.com
Sent: Thursday, October 31, 2002 8:34 AM
To: SRoss@state.nm.us
Subject: Arrington v. NMOCC

Steve:

I was planning on drafting Arrington's Reply Pursuant To Its Statement of Issues today, but I think I'll just substitute Bill Carr's filing in the Nearburg/Redrock case instead.

Scott

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505
(505) 476-3451

Ross, Stephen

From: shall@mstLAW.com
Sent: Wednesday, October 30, 2002 4:42 PM
To: SRoss@state.nm.us; tkellahin@aol.com; jamesbruc@aol.com
Subject: Arrington v NMOCC (TMBR/Sharp)

Order of Temporary Stay Pendin...

Steve, Tom, Jim: This draft Order of Temporary Stay incorporates the changes requested in Steve's Oct. 25th e-mail and Tom's Oct. 24th fax. Let me know if this form is agreeable.

Tom, I assume you can speak for Phil Brewer on this.

Thanks.

Scott <<Order of Temporary Stay Pending Consolidation.doc>>

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505
(505) 476-3451

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PLEASE REPLY TO SANTA FE

FACSIMILE TRANSMISSION COVER SHEET

DATE: January 9, 2003

TO: Steve Ross FAX NO.: (505)476-3462

FROM: Scott Hall OPERATOR: ginny

MESSAGE: Please see attached.

NUMBER OF PAGES INCLUDING COVER SHEET: 3

IF YOU DO NOT RECEIVE THE ENTIRE DOCUMENT, PLEASE CALL OUR SANTA FE OFFICE AS SOON AS POSSIBLE AT (505) 989-9614.

* * * * * * * *

FIFTH JUDICIAL DISTRICT COURT
COUNT OF SANTA FEA
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

STIPULATION OF DISMISSAL

Appellant, DAVID H. ARRINGTON OIL & GAS, INC. and Appellee, THE NEW MEXICO OIL CONSERVATION COMMISSION, through their counsel of record, hereby stipulate to the dismissal of Appellant's appeal against said Appellee in this cause with prejudice.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By: _____

J. Scott Hall
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

ATTORNEYS FOR APPELLANT, DAVID H. ARRINGTON OIL & GAS, INC.

and

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

ATTORNEYS FOR APPELLEE, THE NEW MEXICO OIL CONSERVATION COMMISSION

P. 01

TRANSACTION REPORT

JAN-09-2003 THU 11:20 AM

FOR:

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
JAN-09	11:19 AM	99822047	56″	3	SEND	OK	139	

TOTAL : 56S PAGES: 3

01/09/2003 THU 10:43 FAX

MILLER STRATVERT P. A.

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PLEASE REPLY TO SANTA FE

FACSIMILE TRANSMISSION COVER SHEET

DATE: January 9, 2003

TO: Steve Ross FAX NO.: (505)476-3462

FROM: Scott Hall OPERATOR: ginny

MESSAGE: Please see attached.

Ross, Stephen

From: Ross, Stephen
Sent: Friday, October 25, 2002 11:16 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Partially.

I don't agree that paragraph 3 should remain as written. I'd suggest it be replaced with the following:

"3. Temporarily staying this appeal may permit completion of the administrative process and an appeal to the District Court, permitting consolidation if otherwise appropriate."

Paragraph 6 should remain up to the comma. He did say he'd defer ruling for six months.

If it's revised in this manner, I'll agree to the form.

I just ran these proposals by Tom and he agrees as well, but also thinks that the order should somewhere refer also to Rule 1-074, which I don't have any problem with. The reference to that rule could be made in the first paragraph or in the ordering provision.

Let me know. Thanks.

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Thursday, October 24, 2002 2:19 PM
To: SRoss@state.nm.us
Cc: tkellahin@aol.com
Subject: Arrington v. NMOCC

Steve:

Tom's 10/24 mark-up changes to the draft Order of Temporary Stay are ok with me. Do you agree?

Scott

Ross, Stephen

To: shall@mstLAW.com
Subject: RE: Arrington v. NMOCC

Partially.

I don't agree that paragraph 3 should remain as written. I'd suggest it be replaced with the following:

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Scott

KELLAHIN & KELLAHIN
ATTORNEY AT LAW

W. THOMAS KELLAHIN
NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

P.O. BOX 2265
SANTA FE, NEW MEXICO 87504
117 NORTH GUADALUPE
SANTA FE, NEW MEXICO 87501

TELEPHONE 505-982-4285
FACSIMILE 505-982-2047
TKELLAHIN@AOL.COM

FACSIMILE COVER SHEET

DATE: October 24, 2002
TIME: 2:00 PM

NUMBER OF PAGES: 3

***

TO: Steve Ross, Esq.
OF: OCC
FAX: (505) 476-3462

TO: J. Scott Hall, Esq.
OF: Miller Law Firm
FAX: (505) 989-9857

RE: TMBR/Sharp-Arrington dispute

Dear Steve and Scott:

I have received Scott proposed order for consolidation motion hearing and it is not consistence with my recollection but I did not have a copy of the motion hearing tape.

I have noted on the attached copy of Scott's draft items that should be changes. I have send this to Phil Brewer and Susan Richardson for comment but because of the San Juan Coal hearing next week I do not know when I can get back to this.

Regards,

CfX: Susan Richardson 915-682-3672

Phil Brewer 505-623-0299

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER OF TEMPORARY STAY PENDING CONSOLIDATION

THIS MATTER, having come before the Court pursuant to the Motion For Temporary Stay Pending Consolidation filed on behalf of the Appellant, David H. Arrington Oil and Gas, Inc., and the Court being duly advised, FINDS:

1. There are presently pending in a consolidated proceeding before the New Mexico Oil Conservation Division, ("NMOCD"), four administrative applications that seek the compulsory pooling of oil and gas leasehold working interests in Section 25, Township 16 South, Range 35 East, NMPM, in Lea County. Those lands in Section 25 also constitute a portion of the same lands that are the subject, in part, of New Mexico Oil Conservation Commission Order No. R-11700-B appealed from here. Both the instant appeal and the pending compulsory pooling cases involve the same agency and the same parties. Moreover the pending compulsory pooling cases will determine the issue of well operatorship, a matter that is also the subject of this appeal.

2. There is a substantial likelihood that the non-prevailing party in the pending compulsory pooling proceedings will pursue an appeal *de novo* to the New Mexico Oil Conservation Commission, and subsequently, to the District Court.

3. Temporarily staying this appeal pending the completion of the administrative and appellate processes for the compulsory pooling cases will serve the interests of judicial economy and efficiency.

4. A temporary stay does not operate as a determination on the merits of this appeal. Neither does a stay determine the issue of well operations.

5. A determination on the propriety of consolidating the other cases with this appeal can be made at such time as the pending compulsory pooling cases are appealed to the District Court.

6. This appeal should be temporarily stayed for a period of six months from the date of this Order, at which time the parties may request an extension of the stay should circumstances warrant.

WHEREFORE, IT IS ORDERED that this appeal shall be temporarily stayed for six months from the date of entry hereof. Pending Further Order of the Court

DISTRICT COURT JUDGE

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall, Esq.
Attorneys for Plaintiff
Post Office Box 1986
Santa Fe, New Mexico 87504-19086
(505) 989-9614
(505) 989-9857 fax

P.01

TRANSACTION REPORT

OCT-24-2002 THU 02:21 PM

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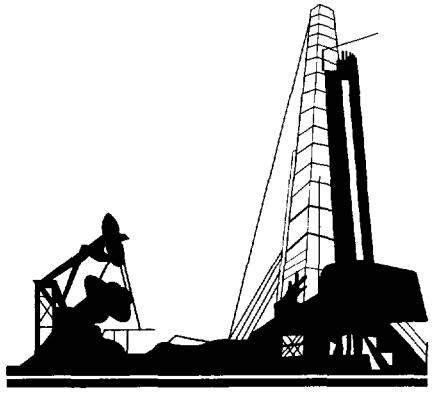
DATE	START	SENDER	RX TIME	PAGES	TYPE	NOTE	M#	DP
OCT-24	02:20 PM	5059822047	1'25"	3	RECEIVE	OK		



TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: Tom

FROM: Steve

DATE: 10-24

PAGES: 2

SUBJECT: Tom - I haven't replied to Sc.H's email. Attached is how I propose to respond. Would you agree to these modifications at your marked up version?

IF YOU HAVE TROUBLE RECEIVING THIS FAX, PLEASE CALL THE OFFICE NUMBER ABOVE.

Ross, Stephen

To: shall@mstLAW.com
Subject: RE: Arrington v. NMOCC

Partially. I don't agree that paragraph 3 should remain as written. I'd suggest it be replaced with the following:

"3. Temporarily staying this appeal may permit completion of the adminstrative process and an appeal to the District Court, permitting consolidation if otherwise appropriate."

Paragraph 6 should remain up to the comma. He did say he'd defer ruling for six months.

If it's revised in this manner, I'll agree to the form.

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Thursday, October 24, 2002 2:19 PM
To: SRoss@state.nm.us
Cc: tkellahin@aol.com
Subject: Arrington v. NMOCC

Steve:

Tom's 10/24 mark-up changes to the draft Order of Temporary Stay are ok with me. Do you agree?

Scott

P.01

TRANSACTION REPORT

OCT-24-2002 THU 05:48 PM

FOR:

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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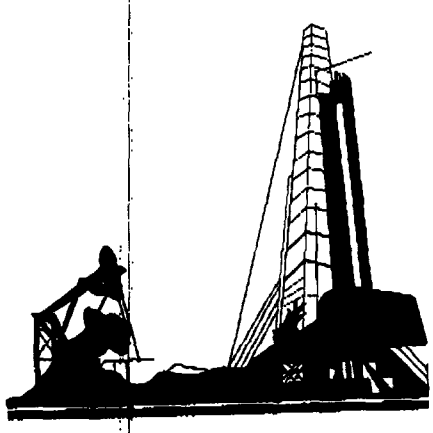

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PLEASE DELIVER THIS FAX:

TO: Tom

FROM: Steve

TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

cc: Susan Richardson

PLEASE DELIVER THIS FAX:

TO: Counsel, Amigston

FROM: Stephen C. Ross

DATE: 10-24-02

PAGES: 2

SUBJECT: Amigston v. NMOCD

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NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

October 24, 2002

Via Facsimile and First Class Mail

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Scott,

I have reviewed the proposed draft order concerning the hearing in the matter and have several problems with it.

The first three paragraphs of the proposed order refer in great detail to the pending administrative proceedings and the possibility of consolidation of those matters with this matter. However, as I understood Judge Sanchez' ruling, he agreed to defer deciding this matter for six months; I don't believe the Judge Sanchez accepted the invitation to consolidate this matter "pending consolidation" because of the obvious jurisdictional difficulties with such a decision. You cited the Court to Rule 19 in support of your arguments, not Rule 42. I recall that you stated to the Court during the hearing of this matter that a motion to consolidate would be filed later, and that the issue of consolidation was not before the Court. So, if consolidation is not before the Court, it is inappropriate to make findings on that issue in this order.

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I don't believe that Judge Sanchez authorized "an extension of the stay" beyond six months as described in paragraph 6.

I can't agree to the proposed form of order for these reasons. If you redraft the order to address my concerns, I will be happy to consider another form of order.

Sincerely,

Stephen C. Ross
Assistant General Counsel

P. 01

TRANSACTION REPORT

OCT-24-2002 THU 02:09 PM

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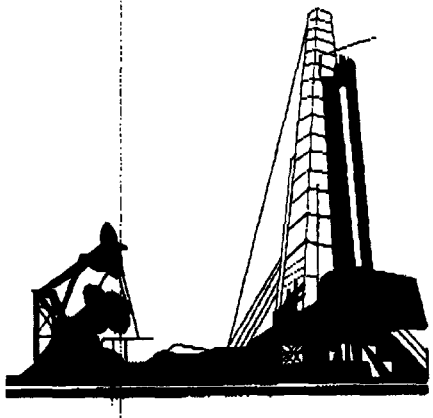

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cc: Susan Richardson

PLEASE DELIVER THIS FAX:

TO: Counsel, Arrington

FROM: Stephen C. Ross

P. 01

TRANSACTION REPORT

OCT-24-2002 THU 02:11 PM

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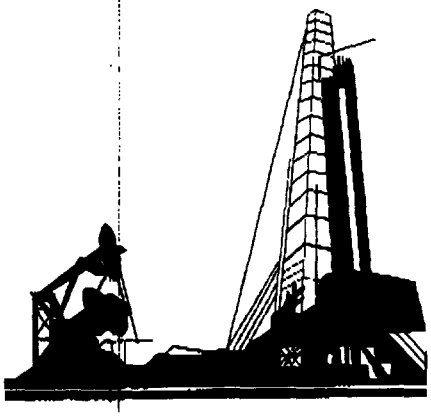

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FROM: Stephen C. Ross

P. 01

TRANSACTION REPORT

OCT-24-2002 THU 02:07 PM

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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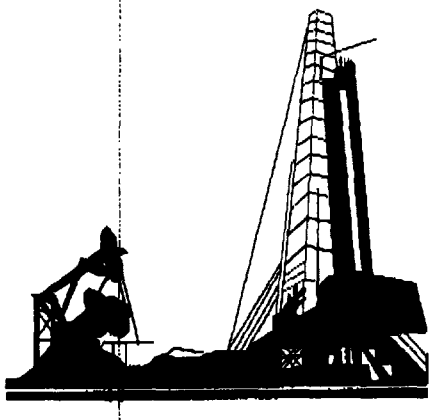

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TO: Counsel, Amigston

FROM: Stephen C. Ross

P. 01

TRANSACTION REPORT

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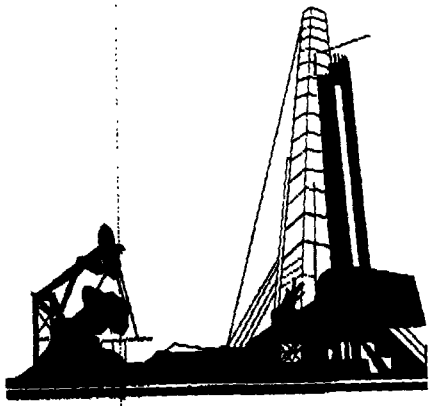

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(505)476-3462 (Fax)

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FROM: Stephen C. Ross

P. 01

TRANSACTION REPORT

OCT-24-2002 THU 02:05 PM

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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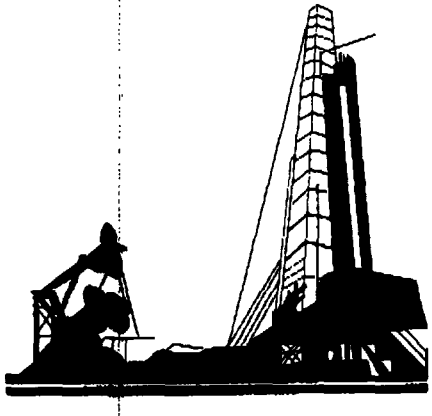

TRANSMITTAL COVER SHEET

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1220 S. ST. FRANCIS DRIVE
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PLEASE DELIVER THIS FAX:

TO: Consul, Amiston

FROM: Stephen C. Ross

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

October 24, 2002

Via Facsimile and First Class Mail

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

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Sincerely,

Stephen C. Ross
Assistant General Counsel

MILLER, STRATVERT & TORGERSON, P. A.

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ALICE T. LORENZ
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WILLIAM K. STRATVERT
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LAS CRUCES, NM 88005
TELEPHONE: (505) 523-2481
FACSIMILE: (505) 526-2219

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FACSIMILE TRANSMISSION COVER SHEET

DATE: October 17, 2002

TO: Thomas Kellahin (505) 982-2047
Steve Ross (505)476-3462
James Bruce (505)982-2151
Phillip Brewer (505)625-0299

FROM: J. Scott Hall OPERATOR: Ginny

MESSAGE: Please see attached.

NUMBER OF PAGES INCLUDING COVER SHEET: 4

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* * * * * * * *

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER OF TEMPORARY STAY PENDING CONSOLIDATION

THIS MATTER, having come before the Court pursuant to the Motion For Temporary Stay Pending Consolidation filed on behalf of the Appellant, David H. Arrington Oil and Gas, Inc., and the Court being duly advised, FINDS:

1. There are presently pending in a consolidated proceeding before the New Mexico Oil Conservation Division, ("NMOCD"), four administrative applications that seek the compulsory pooling of oil and gas leasehold working interests in Section 25, Township 16 South, Range 35 East, NMPM, in Lea County. Those lands in Section 25 also constitute a portion of the same lands that are the subject, in part, of New Mexico Oil Conservation Commission Order No. R-11700-B appealed from here. Both the instant appeal and the pending compulsory pooling cases involve the same agency and the same parties. Moreover the pending compulsory pooling cases will determine the issue of well operatorship, a matter that is also the subject of this appeal.

2. There is a substantial likelihood that the non-prevailing party in the pending compulsory pooling proceedings will pursue an appeal *de novo* to the New Mexico Oil Conservation Commission, and subsequently, to the District Court.

3. Temporarily staying this appeal pending the completion of the administrative and appellate processes for the compulsory pooling cases will serve the interests of judicial economy and efficiency.

4. A temporary stay does not operate as a determination on the merits of this appeal. Neither does a stay determine the issue of well operations.

5. A determination on the propriety of consolidating the other cases with this appeal can be made at such time as the pending compulsory pooling cases are appealed to the District Court.

6. This appeal should be temporarily stayed for a period of six months from the date of this Order, at which time the parties may request an extension of the stay should circumstances warrant.

WHEREFORE, IT IS ORDERED that this appeal shall be temporarily stayed for six months from the date of entry hereof.

DISTRICT COURT JUDGE

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall, Esq.
Attorneys for Plaintiff
Post Office Box 1986
Santa Fe, New Mexico 87504-19086
(505) 989-9614
(505) 989-9857 fax

Concurrence by:

Telephonic Approval October , 2002
Kellahin & Kellahin
W. Thomas Kellahin, Esq.
Attorney for TMBR/Sharp Drilling, Inc.
117 North Guadalupe Street
Santa Fe, New Mexico 87501

Telephonic Approval October , 2002
Steve Ross, Esq.
Attorney for New Mexico Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Telephonic Approval October , 2002
James Bruce, Esq.
Attorney for Ocean Energy, Inc.
Post Office Box 1056
Santa Fe, New Mexico 87504

Telephonic Approval October , 2002
Phillip T. Brewer, Esq.
Attorney for TMBR/Sharp Drilling, Inc.
Post Office Box 298
117 North Guadalupe Street
Roswell, New Mexico 88202

bring a case to determination in three years. Dunham-Bush, Inc. v. Palkovic, 84 N.M. 547, 505 P.2d 1223 (1973).

And where only action in three years submission of interrogatories, etc. — Where, in the course of three years, only action taken by plaintiffs was the submission of interrogatories and a hearing on defendant's motion to be relieved of filing any answers, and the trial court determined that plaintiffs' complaint should be dismissed with prejudice, there was no abuse of discretion. Carter Farms Co. v. Hoffman-LaRoche, Inc., 91 N.M. 132, 571 P.2d 124 (Ct. App. 1977).

When appellants' motion for judgment on pleadings properly denied. — Appellants' motion for judgment on the pleadings, or in the alternative, summary judgment on the ground that no action had been taken by appellees to bring the action or proceeding to a final determination within two years (now three years) after the action was filed, was denied where although two years had elapsed since appellees' last motion, two years (three years) had not elapsed since appellants' response thereto, thus it was beyond appellees' control to bring case to a close until the response was filed. Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955).

1-042. Consolidation; separate trials.

A. **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. **Separate trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving the right of trial by jury given to any party as a constitutional right.

Cross references. — For joinder of claims and remedies, see Rule 1-018 NMRA. For separate trial upon permissive joinder, see Rule 1-020 NMRA. For separation of claims upon misjoinder, see Rule 1-021 NMRA. For sanction against unnecessarily splitting actions, see 39-2-3 NMSA 1978. For consolidation of actions on mechanics' liens, see 48-2-14 NMSA 1978. For consolidation of actions on oil and gas well and pipeline liens, see 70-4-9 NMSA 1978.

Compiler's notes. — Paragraph A is deemed to have superseded 105-828, C.S. 1929, which was substantially the same.

Paragraph B together with Rule 1-015 NMRA, are deemed to have superseded 105-604, C.S. 1929, relating to amended pleadings and separation of misjoined causes.

Counterclaim or cross-claim to quiet title allowed in mortgage foreclosure action. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Consolidation is within the discretion of the trial court. Kassel v. Anderson, 84 N.M. 697, 507 P.2d 444 (Ct. App. 1973), overruled on other grounds, Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); Bloom v. Lewis, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980).

Exercise of such discretion not overturned absent abuse. — The consolidation of causes of action is a matter vested solely within the discretion of the trial court and the exercise of such discretion will not be disturbed on appeal absent a showing of abuse of discretion. Hanratty v. Middle Rio Grande Conservancy Dist., 82 N.M. 275, 480 P.2d 165 (1970), cert. denied, 404 U.S. 841, 92 S. Ct. 135, 30 L. Ed. 2d 75 (1971); Five Keys, Inc. v. Pizza Inn, Inc., 99 N.M. 39, 653 P.2d 870 (1982).

If there are questions common to two cases at the time consolidation is ordered, the order is reviewable only if the court abused its discretion in entering the order. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

District court did not have power to compel consolidated arbitration over party's objection. — While district court may have thought consolidation of arbitration proper in interests of judicial economy, under Arbitration Act the court had power to compel only two separate arbitration proceedings according to terms of two contracts and did not have power to compel consolidated arbitration over objection of party. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

Consistent results in consolidated cases not required. — There is no legal requirement of consistency of result where separate cases are consolidated for trial. In the trial of consolidated cases, absent error in the pleading, proof or submission of the action, each case retains its distinctive characteristics and remains separate in respect of verdicts, findings, judgments and all other matters except the one of joint trial. Aragon v. Kasulka, 68 N.M. 310, 361 P.2d 719 (1961).

Successful prosecution of one claim dependent on outcome of another. — There was no error in bifurcating the trial and in subsequently denying the second trial where the bifurcation separated the civil rights claims against the city and the police chief from the claims against a police officer: the claims against the city and the police chief for inadequate training and supervision were secondary to, and dependent upon, successful prosecution of the complaint against the police officer, and the trial court determined that a successful defense by plaintiff in the first trial prevented a second trial. Baum v. Orosco, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Single judgment from consolidated cases reviewed singly. — Where pleadings are filed as though but one case is pending, and the court enters a single judgment from which one appeal is prosecuted and one supersedeas bond executed, it is but fair to treat the case in the supreme court as presenting but a single appeal. Palmer v. Town of Farmington, 25 N.M. 145, 179 P. 227 (1919) (decided under former law).

Separate judgments from consolidated cases

to try to keep the case from slipping through the cracks. Town of Bernalillo v. Garcia, 118 N.M. 610, 884 P.2d 501 (Ct. App. 1994).

Appeal from hearing officer's decision. — "Inferior tribunals," as used in this section, does not include a county personnel board or hearing officer; county was not entitled to de novo review of an adverse personnel decision by a hearing officer. Board of County Comm'rs v. Harrison, 1998-NMCA-106, 125 N.M. 406, 964 P.2d 56.

39-3-1.1. Appeal of final decisions by agencies to district court; application; scope of review; review of district court decisions.

A. The provisions of this section shall apply only to judicial review of agency final decisions that are placed under the authority of this section by specific statutory reference.

B. Upon issuing a final decision, an agency shall promptly:

(1) prepare a written decision that includes an order granting or denying relief and a statement of the factual and legal basis for the order;

(2) file the written decision with the official public records of the agency; and

(3) serve a document that includes a copy of the written decision and the requirements for filing an appeal of the final decision on:

(a) all persons who were parties in the proceeding before the agency; and

(b) every person who has filed a written request for notice of the final decision in that particular proceeding.

C. Unless standing is further limited by a specific statute, a person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days of the date of filing of the final decision. The appeal may be taken to the district court for the county in which the agency maintains its principal office or the district court of any county in which a hearing on the matter was conducted. When notices of appeal from a final decision are filed in more than one district court, all appeals not filed in the district court in which the first appeal was properly filed shall be dismissed without prejudice. An appellant whose appeal was dismissed without prejudice pursuant to the provisions of this subsection shall have fifteen days after receiving service of the notice of dismissal to file a notice of appeal in the district court in which the first appeal was properly filed.

D. In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:

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

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

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

E. A party to the appeal to district court may seek review of the district court decision by filing a petition for writ of certiorari with the court of appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court.

F. The district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal shall then be decided by the court of appeals.

G. The procedures governing appeals and petitions for writ of certiorari that may be filed pursuant to the provisions of this section shall be set forth in rules adopted by the supreme court.

H. As used in this section:

(1) "agency" means any state or local public body or officer placed under the authority of this section by specific statutory reference;

(2) "final decision" means an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted. The determination of whether

there is a final decision by an agency shall be governed by the law regarding the finality of decisions by district courts. "Final decision" does not mean a decision by an agency on a rule, as defined in the State Rules Act [Chapter 14, Article 4 NMSA 1978]; and

(3) "hearing on the matter" means a formal proceeding conducted by an agency or its hearing officer for the purpose of taking evidence or hearing argument concerning the dispute resolved by the final decision.

History: 1978 Comp., § 39-3-1.1, enacted by Laws 1998, ch. 55, § 1; 1999, ch. 265, § 1.

Cross references. — For appeal of refusal to register voter, see 1-4-21 NMSA 1978. For appeal of determinations relating to incorporation of territories, see 3-2-9 NMSA 1978. For appeal of order or decision of planning commission, see 3-19-8 NMSA 1978. For appeal of decision of joint municipal-county zoning authority, see 3-21-4 NMSA 1978. For appeal of zoning authority decision, see 3-21-9 NMSA 1978. For appeals relating to improvement districts, see 3-33-13, 3-33-16, 3-33-22 and 3-33-35 NMSA 1978. For appeal of provisional order relating to fire-fighting facilities, see 3-35-3 NMSA 1978. For appeal of order relating to repair, closing and demolition of dwellings, see 3-46-43, NMSA 1978. For appeal of provisional order relating to parking improvements, see 3-51-12 NMSA 1978. For appeal of disallowance of claims against county, see 4-45-5 NMSA 1978. For appeal of reassessment of improvement district assessment by county board, see 4-55A-31 NMSA 1978. For appeal of decision by administrator under Uniform Unclaimed Property Act, see 7-8A-16 NMSA 1978. For appeal from order of the secretary of taxation and revenue or county valuation protests board, see 7-38-28 NMSA 1978. For appeal of board decision under Personnel Act, see 10-9-18 NMSA 1978. For appeal of final decision of retirement board, see 10-11-120 NMSA 1978. For appeal of final agency order or decision in an adjudicatory proceeding, see 12-8-16 NMSA 1978. For judicial review authorized under Procurement Code, see 13-1-183 NMSA 1978. For appeal of appeals board decisions under Public Works Minimum Wage Act, see 13-4-15 NMSA 1978. For appeal of game commission decision revoking license, see 17-3-34 NMSA 1978. For appeal of decision by commissioner fixing value of improvements or in collecting costs, see 19-7-17 NMSA 1978. For appeal of commissioner's decision relating to sale or lease of state lands, see 19-7-67 NMSA 1978. For appeal of order by commissioner affecting appellant's interest in oil or gas leases, see 19-10-23 NMSA 1978. For appeal of final determination relating to registration of proprietary school, see 21-24-8 NMSA 1978. For appeal of suspension or revocation of teaching certificate, see 22-10-22 NMSA 1978. For appeal of final decision relating to health facility, see 24-1-5 NMSA 1978. For appeal of denial, suspension or revocation of food service permit, see 25-1-11 NMSA 1978. For appeal of board decision relating to imported meats, see 25-3-12 NMSA 1978. For appeal of decision relating to renewal, suspension or revocation of state meat inspection service or establishment license, see 25-3-19 NMSA 1978. For appeal of dairy establishment denial, suspension or revocation, see 25-7B-9 NMSA 1978. For appeal of decision under Public Assistance Appeals Act, see 27-3-4 NMSA 1978. For appeal of order affecting hospital or ambulance service, see 27-5-12.1 NMSA 1978. For appeal of civil penalty for interference with the office of long-term care ombudsman or retaliatory actions, see 28-17-19 NMSA 1978. For appeal of disciplinary action against state police officer, see 29-2-11 NMSA 1978. For appeal of law enforcement agency refusal to correct arrest record information, see 29-10-8 NMSA 1978. For appeal of administrative decisions relating to detention facility standards and inspections, see 32A-2-4 NMSA 1978. For appeal of decision relating to dismissal, demotion or suspension of covered employee under District Attorney Personnel and Compensation Act, see 36-1A-9 NMSA 1978. For appeal of decision relating to child placement agency or foster home, see 40-7A-6 NMSA 1978. For appeal of decision relating to payments under the Relocation Assistance Act, see 42-3-14 NMSA 1978. For appeal of decision of board of county commissioners approving or disapproving a preliminary or final plat, see 47-6-15 NMSA 1978. For appeal of commission order pursuant to Occupational Health and Safety Act, see 50-9-17 NMSA 1978. For appeal of revocation of certificate to conduct affairs in New Mexico of a foreign corporation, or of certificate of incorporation of a domestic corporation, see 53-8-91 NMSA 1978. For appeal of failure by corporation commission (now public regulation commission) to approve articles of incorporation or other document, or of revocation of certificate of foreign corporation, see 53-18-2 NMSA 1978. For appeal of notice of disapproval of documents required under Limited Liability Company Act, see 53-19-67 NMSA 1978. For appeal of decisions relating to administrative penalty under Petroleum Products Standards Act, see 57-19-36 NMSA 1978. For appeal of director's order under Banking Act, see 58-1-45 NMSA 1978. For appeal of supervisor's refusal of savings and loan charter, see 58-10-13 NMSA 1978. For appeal of supervisor's decision after hearing under Savings and Loan Act, see 58-10-84 NMSA 1978. For appeal of order issued pursuant to Model State Commodity Code, see 58-13A-21 NMSA 1978. For appeal of order under New Mexico Securities Act, see 58-13B-56 NMSA 1978. For appeal of act or order of director pursuant to the New Mexico Small Loan Act of 1995, see 58-15-25 NMSA 1978. For appeal of revocation or suspension of license under Motor Vehicle Sales Finance Act, see 58-19-4 NMSA 1978. For appeal of final order issued under Mortgage Loan Company and Loan Broker Act, see 58-21-16 NMSA 1978. For appeal of final order issued under Escrow Company Act, see 58-22-29 NMSA 1978. For appeal from order of superintendent of insurance made after informal or administrative hearing, see 59A-4-20 NMSA 1978. For appeal of revocation of, suspension of or refusal to grant insurance consultant license, see 59A-11A-4 NMSA 1978. For appeal from insurance board order relating to action of superintendent, see 59A-17-35 NMSA 1978. For appeal of decision by superintendent relating to action or decision of FAIR plan administrators, see 59A-29-6 NMSA 1978. For judicial review of order promulgating rates under New Mexico Title Insurance Law, see 59A-30-9 NMSA 1978. For appeal of superintendent's decision relat-

1-074. Administrative appeals; statutory review by district court of administrative decisions or orders.

A. **Scope of rule.** This rule governs appeals from administrative agencies to the district courts when there is a statutory right of review to the district court, whether by appeal, right to petition for a writ of certiorari or other statutory right of review. This rule does not create a right to appeal. For purposes of this rule, an "agency" means any state or local government administrative or quasi-judicial entity.

B. **Constitutional review by writ of certiorari.** This rule does not apply to:

(1) reviews from administrative agencies when there is no statutory right. If there is no statutory right of appeal or statutory right to writ of certiorari, an aggrieved person may be entitled to a constitutional review of an administrative decision or order pursuant to Rule 1-075 of these rules;

(2) appeals under the Human Rights Act [28-1-1 NMSA 1978 et seq.]. These appeals are governed by Rule 1-076 of these rules;

(3) the review of decisions relating to unemployment compensation claims under the Unemployment Compensation Law. Appeals from decisions involving unemployment compensation claims are governed by Rule 1-077 of these rules.

C. **Filing appeal.** When provided or permitted by law, an aggrieved party may appeal a final decision or order of an agency by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the agency a copy of the notice of appeal which has been endorsed by the clerk of the district court.

D. **Content of the notice of appeal.** The notice of appeal shall specify:

(1) each party taking the appeal;

(2) each party against whom the appeal is taken;

(3) the name and address of appellate counsel if different from the person filing the notice of appeal; and

(4) any other information required by the law providing for the appeal to the district court.

A copy of the order or decision of the agency appealed from, showing the date of the order or decision, shall be attached to the notice of appeal filed in the district court.

E. **Time for filing appeals.** Unless a specific time is provided by law or local ordinance, an appeal from an agency shall be filed in the district court within thirty (30) days after the date of the final decision or order of the agency. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set forth in this paragraph. A notice of appeal filed after the announcement of a decision by an agency, but before the decision or order is issued by the agency, shall be treated as timely filed.

F. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or such party's attorney in the administrative proceedings with a copy of the notice of appeal in accordance with Rule 1-005 NMRA;

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 1-005 NMRA; and

(3) file a certificate in the district court that satisfactory arrangements have been made with the agency for preparation and payment for the transcript of the proceedings.

G. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court. Notwithstanding any other provision of this rule, no docket fee

or other cost shall be imposed upon a state agency or a political subdivision of the state in any such appeal.

H. **Record on appeal.** Unless a different period is provided by law, within thirty (30) days after the filing of the notice of appeal with the agency pursuant to Paragraph B of this rule, the agency shall file with the clerk of the district court the record on appeal taken in the proceedings. For purposes of this rule the record on appeal shall consist of:

(1) a title page containing the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the proceedings of the agency;

(3) a copy of the final decision or order sought to be reviewed with date of issuance noted thereon;

(4) any exhibits; and

(5) the transcript of the proceedings, if any. If the transcript of the proceedings is an audio or audio-video recording, the agency shall prepare and file with the district court a duplicate of the tape and index log. If the proceedings were stenographically recorded, the agency shall transcribe and file with the court those parts of the record specified by any party.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The agency shall give prompt notice to all parties of the filing of the record on appeal with the court.

I. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

J. **Statement of appellate issues.** A statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court;

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues; and

(3) if the appellee files a response, the appellant may file a reply to the appellee's response within fifteen (15) days after service of the appellee's response.

K. **Appellant's statement of appellate issues.** The appellant's statement of the appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings, which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the agency. The summary shall include a short recitation of all facts relevant to the issues presented for review, with appropriate references to the record on appeal showing how the issues were preserved in the proceedings before the agency;

(3) an argument, which shall contain the contentions of the appellant with respect to each issue presented in the statement of appellate issues, with citations to the authorities, statutes and parts of the record on appeal relied upon. New Mexico decisions, if any, shall be cited; and

(4) a statement of the precise relief sought.

L. **Appellee's statement of appellate issues; response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph K of this rule, except that a statement of the issues or summary of the proceedings shall not be made unless the appellant's statement of issues or a summary of the proceedings is disputed or is incomplete.

M. **References in statement of appellate issues.** References in the statement of appellate issues shall be to the pages of the record on appeal or, if the reference is to a tape recording, the approximate counter numbers of the tape as shown on the index log shall be

used. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the record on appeal at which the evidence was identified, offered, and received or rejected.

N. **Length of statements of appellate issues.** Except by permission of the court, the argument portion of the appellant's statement of appellate issues shall not exceed fifteen (15) pages. Except by permission of the court, the appellee's response shall not exceed fifteen (15) pages. Any reply to the appellee's response shall not exceed ten (10) pages.

O. **Briefs.** Briefs may be filed only by leave of the district court and upon such conditions as the court may direct.

P. **Oral argument.** Upon motion of a party or on the court's own motion, the court may allow oral argument.

Q. **Scope of review.** The district court may reverse the decision of the agency if:

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

(2) based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) the action of the agency was outside the scope of authority of the agency; or

(4) the action of the agency was otherwise not in accordance with law.

R. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

S. **Stay.** A party appealing a decision or order of an agency may petition the district court for a stay of enforcement of the order or decision of the agency. Upon notice and hearing, the district court may grant a stay of enforcement of the order or decision of the agency upon showing by the appellant that:

(1) it is likely that the appellant will prevail on the merits of the appeal;

(2) the appellant will suffer irreparable harm unless a stay is granted; and

(3) no substantial harm will result to other interested persons or the public if a stay is granted.

As a condition of granting a stay, the court may require the posting of a surety or other bond sufficient to assure the payment of any amount that may be owed to a party upon final determination of the appeal.

T. **Appeal.** An aggrieved party may seek review by filing a petition for writ of certiorari in accordance with the Rules of Appellate Procedure.

U. **Conflict between statute authorizing appeal.** If there is a conflict between the time period for taking an appeal set forth in this rule and a statutory time period for taking an appeal, the statute granting the right to appeal to the district court shall control.

[Adopted, effective January 1, 1996; as amended, effective May 1, 2001.]

Cross references. — For the definition of "stenographic recording" or "stenographically recorded" see Rule 1-030.1 NMRA.

The 2001 amendment, effective May 1, 2001, in H(5), deleted "either stenographically recorded or tape recorded" following "if any" at the end of the first sentence, substituted "an audio or audio-video" for "a tape" in the second sentence, and added the third sentence; added J(3); substituted "fifteen (15) pages" for "eight (8) pages" in two places and added the last sentence in N; and rewrote T which formerly read, "An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure".

Compiler's notes. — For scope of review of the district court, see *Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d 182 (1995).

Correction or modification of record. — Paragraph I does not allow the addition of material to the record that was never presented to the administrative agency in the first instance. Martinez v. State Eng'r Office, 2000-NMCA-074, 129 N.M. 413, 9 P.3d 657, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Equity jurisdiction. — This rule did not deprive the district court of equitable jurisdiction to hear and issue an injunction in the context of an annexation appeal. State v. City of Sunland Park, 2000-NMCA-044, 129 N.M. 151, 3 P.3d 128, cert. denied, 129 N.M. 207, 4 P.3d 35 (2000).

Speculative ef ct not considered on appeal. — Even if trial court erred in denying plaintiffs' motions for summary judgment and for an instructed verdict on liability, plaintiffs were not harmed since jury found for plaintiffs on liability; assertion that an unnecessary battle by the jury on the question of liability led it to compromise on the award is pure speculation. Phillips v. Smith, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled on other grounds, Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

No reversible error where substantial evidence on both sides. — Where evidence is conflicting, refusal to make findings and conclusions favorable to unsuccessful party cannot be sustained as error. Thus where requested findings would have been supported by substantial evidence, but trial court adopted contrary findings also supportable by substantial evidence, there was no reversible error. Grants State Bank v. Pouges, 84 N.M. 340, 503 P.2d 320 (1972).

Where reasons in record, failure to specify not reversible error. — Although trial court did not state of record reasons for modification of a uniform jury instruction on damages as is required by Rule 51(c) (see now Rule 1-051 NMRA), nonetheless there was evidence in the record to support modification, and defendant failed to show any prejudice resulting therefrom; thus modification was not reversible error. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 562 et seq.; 58 Am. Jur. 2d New Trial §§ 83 to 86.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

5 C.J.S. Appeal and Error § 470 et seq.; 66 C.J.S. New Trial § 17.

1-062. Stay of proceeding to enforce a judgment.

A. **Stay; in general.** Except as provided in these rules, execution may issue upon a judgment and proceedings may be taken for its enforcement upon the entry thereof unless otherwise ordered by the court. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period of its entry and until an appeal is taken or during the pendency of an appeal. The provisions of Paragraph C of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

B. **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 1-059, or of a motion for relief from a judgment or order made pursuant to Rule 1-060, or of a motion for judgment in accordance with a motion for a directed verdict pursuant to Rule 1-050, or of a motion for amendment to the findings or for additional findings made pursuant to Paragraph B of Rule 1-052.

C. **Injunction and certain special proceedings.** When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. In all actions of contested elections, mandamus, removal of public officers, quo warranto or prohibition, it shall be discretionary with the court rendering judgment to allow a supersedeas of the judgment, and if the appeal is allowed to operate as a supersedeas it shall be upon such terms and conditions as the court deems proper.

D. **Stay upon appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in Paragraphs A and C of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the district court. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the district court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net

worth at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest and damages for delay. In any event, in determining the sufficiency of the surety and the extent to which such surety shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with such judgment.

E. **Stay in special instances.** When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall, except as provided in Paragraphs A and C of this rule, operate as a stay.

F. **Special rule for fiduciaries.** Where an appeal is taken by a fiduciary on behalf of the estate or beneficiary which the fiduciary represents, the amount of the bond and type of security shall be fixed by the court and, in fixing the same, due regard shall be given to the assets under the control of the fiduciary and any bond given by such fiduciary.

G. **Writs of error.** Upon allowance of a writ of error, the district court which adjudged or determined the cause shall, unless the Supreme Court or the justice thereof issuing the writ shall otherwise order, have the same powers, authority and duties with reference to the supersedeas and stay as in the case of an appeal. The time within which supersedeas bond may be filed shall be the same as in the case of appeals, and shall run from the date the writ of error is allowed in lieu of the date notice of appeal is filed. The authority of the district court to extend such time shall be the same, and subject to the same limitations, as in case of appeal.

H. **Stay of judgment as to multiple claims or multiple parties.** When final judgment has been entered under the conditions stated in Paragraph C of Rule 1-054, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[As amended, effective August 1, 1989; January 1, 1996.]

I. General Consideration.
II. Stay Upon Appeal.

I. GENERAL CONSIDERATION.

Cross references. — For execution on judgment, see 39-4-1 NMSA 1978. For supersedeas and stay, see Rule 12-207 NMRA. For writs of error, see Rule 12-503 NMRA.

The 1996 amendment, effective January 1, 1996, made stylistic changes in Paragraphs A and C, substituted the second sentence of Paragraph D for "The bond may be given at any time within thirty (30) days after taking the appeal, except that the district court for good cause shown may grant the appellant not to exceed thirty (30) days' additional time within which to file such bond", and made a gender neutral change in Paragraph F.

Action during pendency of appeal. — The district court may act on matters of supersedeas and stay during the pendency of an appeal. In re Estate of Gardner, 112 N.M. 536, 817 P.2d 729 (Ct. App. 1991).

A bond or security is not mandatory when an application for a stay of execution is made and there has been no notice of appeal or motion to vacate. Trial court has inherent power under this rule to stay execution of a judgment temporarily in order to prevent injustice. Segal v. Goodman, 115 N.M. 349, 851 P.2d 471 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 146 et seq.; 30 Am. Jur. 2d Executions § 57 et seq.; 42 Am. Jur. 2d Injunctions § 348.

Prohibition as proper remedy to prevent enforcement of judgment which has been reversed or modified on appeal, or from which an appeal, with supersedeas or stay, is pending, 70 A.L.R. 105.

Right to have enforcement of judgment for costs enjoined or stayed pending final determination of case, 78 A.L.R. 359.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee, or other fiduciary who represents interests of other persons, 119 A.L.R. 931.

Motion for new trial as suspension or stay of execution or judgment, 121 A.L.R. 686.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 A.L.R. 501.

Another state or country, stay of civil proceedings pending determination of action in, 19 A.L.R.2d 301.

Necessity that person acting in fiduciary capacity give bond to maintain appellate review proceedings, 41 A.L.R.2d 1324.

Federal court in same state, stay of civil proceedings pending determination of action in, 56 A.L.R.2d 335.

Arbitration disqualified by court or stay of arbitration proceedings prior to award, on ground of interest, bias,

We emphasize, however, that we do not disturb or modify the District Court's finding that returning Marie-Eline and François to Blondin's custody (either expressly or *de facto*) would expose them to a "grave risk" of harm, within the meaning of Article 13(b). Accordingly, if the District Court remains unable to find any reasonable means of repatriation that would *not* effectively place the children in Blondin's immediate custody, it should deny Blondin's petition under the Convention.

Conclusion

For the foregoing reasons, we vacate the judgment of the District Court and remand the cause for further proceedings consistent with this opinion, including the further consideration of remedies that would allow the children's safety to be protected pending a final adjudication of custody in France.

Editor's Note: The opinion of the United States Court of Appeals, Second Circuit, in *Local 97, I.B.E.W. v. Niagara Mohawk Power Corp.*, published in the advance sheet at this citation, 189 F.3d 250, was withdrawn from the bound volume. For superseding opinion, see 1999 WL 975711.

GLENCORE, LTD., Petitioner-Appellee,

v.

SCHNITZER STEEL PRODUCTS CO., Respondent-Appellant,

Halla Merchant Marine Co., Ltd., as deponent owner of the M/V Caravos Explorer, Respondent-Appellee.

No. 98-9649.

United States Court of Appeals, Second Circuit.

Argued June 11, 1999.

Decided Aug. 18, 1999.

Buyer of shredded steel scrap sought order granting consolidation of, or in the alternative a joint hearing of, arbitration between buyer and seller, and arbitration between buyer and owner of vessel hired to haul scrap, arising from grounding of vessel during loading. The United States District Court for the Southern District of New York, Wood, District Judge, ordered joint hearing. Seller appealed. The Court of Appeals, Sack, Circuit Judge, held that District Court lacked authority to order joint hearing where nothing in terms of agreements governing the two arbitrations provided for joint hearing.

Vacated and remanded.

1. Arbitration ⇐23.25

A district court's order that arbitration hearings must be held jointly is reviewed de novo.

2. Arbitration ⇐23.8

District court lacked authority to order joint hearing of arbitration between buyer and seller of steel scrap, and arbitration between buyer and owner of vessel hired to haul scrap, arising from grounding of vessel during loading, where nothing in terms of agreements governing the two arbitrations provided for such joint hearing. 9 U.S.C.A. § 1 et seq.; Fed.Rules Civ.Proc.Rules 42(a), 81(a)(3), 28 U.S.C.A.

3. Arbitration ⇐23.8

There is no source of authority in either the Federal Arbitration Act (FAA) or the Federal Rules of Civil Procedure for a district court to order consolidation

or a joint hearing of arbitration proceedings absent authority granted by the contracts giving rise to the arbitrations. 9 U.S.C.A. § 1 et seq.; Fed.Rules Civ.Proc. Rules 42(a), 81(a)(3), 28 U.S.C.A.

Bruce G. Paulsen, Seward & Kissel, LLP, New York, N.Y. (Laura M. Franco, of counsel), for Respondent–Appellant Schnitzer Steel Products Co.

Leo G. Kailas, Piper & Marbury L.L.P., New York, N.Y. (Michael R. Hepworth, of counsel), for Petitioner–Appellee Glencore, Ltd.,

Healy & Baillie, LLP, New York, N.Y. (LeRoy Lambert, Joseph Petersen, of counsel), for Respondent–Appellee Halla Merchant Marine Co., Ltd.

Before: WINTER, Chief Judge, SACK, Circuit Judge, and SPRIZZO, District Judge.*

SACK, Circuit Judge:

Glencore, Ltd. ("Glencore") sought an order in the United States District Court for the Southern District of New York (Wood, *J.*), pursuant to Fed.R.Civ.P. 42(a) and 81(a)(3), granting consolidation of or in the alternative a joint hearing with respect to two pending and related arbitrations between Glencore and Schnitzer Steel Products Co. ("Schnitzer Steel") and Glencore and Halla Merchant Marine Co., Ltd. ("Halla"). Schnitzer Steel moved to dismiss. The district court granted Schnitzer Steel's motion in part and denied it in part, finding that although it was without authority to order consolidation of the two arbitrations, a joint hearing of the arbitrations was both within its authority and warranted under the circumstances. The court entered an order mandating joint hearing. Schnitzer Steel appeals. Because we agree with Schnitzer Steel that the district court did not have the power to order a joint hearing, we vacate the order and remand the case to the district court.

BACKGROUND

The facts relating to this appeal are not in dispute. On or about October 18, 1996, Glencore entered into a contract for the purchase of shredded steel scrap from Schnitzer Steel (the "Purchase Contract"). The Purchase Contract contained an arbitration clause providing that:

> Any controversy or claim arising out of or relating to this contract or any alleged breach thereof, shall be determined by arbitration in New York City, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon any award rendered therein may be entered in the Supreme Court of the State of New York, or in any other court of appropriate jurisdiction.

On or about October 24, 1996, Glencore entered into a charter party agreement with Halla (the "Charter Party Agreement") which provided that a vessel owned by Halla (the "Vessel") would carry the cargo of steel scrap that Glencore purchased from Schnitzer Steel. The Charter Party Agreement also contained an arbitration clause. It provided:

> It is mutually agreed that should any dispute arise between [Halla] and [Glencore], the matter in dispute shall be referred to three persons at New York for arbitration, one to be appointed by each of the parties hereto and the third by the two so chosen. Their decision or that of any two of them shall be final, and for the purpose of enforcing any award this agreement may be made a rule of the court. The arbitrators shall be shipping men, should the two so chosen not be able to agree who the third arbitrator should be, then the Society of Marine Arbitrators Inc., New York, is to

* The Honorable John E. Sprizzo of the United States District Court for the Southern District of New York sitting by designation.

appoint such Arbitrator. Arbitration to be conducted under the rules of the Society of Marine Arbitrators Inc.

Halla was not a party to the Glencore–Schnitzer Steel Purchase Contract and Schnitzer Steel was not a party to the Glencore–Halla Charter Party Agreement. As noted, the arbitration clause in the Purchase Contract provided for arbitration in accordance with the rules then obtaining of the American Arbitration Association while the arbitration clause in the Charter Party Agreement instructed that the arbitration was to be conducted under the rules of the Society of Marine Arbitrators. Both agreements were silent as to consolidation of or joint hearing in related arbitrations.

On December 11, 1996, during the loading of the Vessel, the M/V Caravos Explorer, at Schnitzer Steel's dock in Oakland, California, the Vessel grounded and allegedly suffered damage. Glencore contends that liability for the alleged damage lies either with Schnitzer Steel for failing to advise of the actual depth of the berth or with Halla for overloading the Vessel. Pursuant to the arbitration clauses in the respective agreements, Glencore commenced an American Arbitration Association arbitration against Schnitzer Steel and a separate Society of Marine Arbitrators arbitration against Halla.

On July 31, 1997, fearing "duplication of expense and inevitable delay ... the possibility of inconsistent evidence or testimony ... and, above all, the risk of inconsistent decisions," Glencore petitioned the district court for an order consolidating the two arbitrations or, in the alternative, requiring a joint hearing. Schnitzer Steel filed a motion to dismiss the petition, arguing that the district court was without authority to order the relief requested by Glencore. Halla had no objection to consolidation or joint hearing provided that the arbitrators were appointed in accordance with the procedure set forth in the Charter Party Agreement.

The district court concluded that it was without authority to order consolidation of the two arbitrations and granted Schnitzer Steel's motion to dismiss the petition insofar as it requested consolidation. The court found, however, that "considering that the arbitrations between Glencore and Schnitzer [Steel], and Glencore and Halla, involve common questions of law and fact," a joint hearing was "warranted." It therefore denied Schnitzer Steel's motion to dismiss insofar as it related to that part of the petition and issued an order requiring joint hearing. Schnitzer Steel appeals, arguing that the district court was without authority to order a joint hearing and that its motion to dismiss should have been granted in its entirety.

DISCUSSION

[1] We review *de novo* the district court's order that the arbitration hearings be held jointly. *See Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir.1998) (district court's refusal to stay proceedings pending arbitration reviewed *de novo*).

In *Government of the United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir.1993), this Court held that the federal courts do not have the power to order consolidation of two or more arbitration proceedings "unless doing so would be 'in accordance with the terms of [an] agreement' " or agreements among the parties. *Id.* at 71 (quoting the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), at § 4). The Court based its conclusion substantially on a review of a trio of 1980's Supreme Court decisions, *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–21, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The *Boeing* Court quoted *Byrd*:

> The legislative history of the [FAA] establishes that the purpose behind its

passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims. The [FAA], after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. The House Report accompanying the [FAA] makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

. . . .

The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.

470 U.S. at 219–21, 105 S.Ct. 1238 (footnote omitted).

998 F.2d at 72.

[2] The district court in the present case denied Glencore's motion to consolidate as *Boeing* plainly required it to do. That ruling has not been appealed. The court observed, however, that the two arbitrations "involve common questions of law and fact." With little additional explanation or discussion, it ordered joint hearing in the two arbitrations, stating simply that it was "warranted" and citing *S.L. Sethia Liners Ltd. v. Egyptian Co. for Maritime Transp.*, 1988 A.M.C. 68, 68–69 (S.D.N.Y. 1983).

Sethia Liners is indeed strikingly similar to the present case. There Judge Haight, faced with separate agreements giving rise to two related arbitrations, one under American Arbitration Association rules and one under Society of Marine Arbitrators rules, denied the motion of a party to both arbitrations for consolidation but granted its motion for joint hearing. The court relied on the same provisions of the Federal Rules of Civil Procedure invoked by petitioner here, Fed.R.Civ.P. 42(a) and 81(a)(3).

[3] Neither *Sethia Liners* nor the decision below survives this Court's analysis in *Boeing* or the Supreme Court decisions upon which *Boeing* relies, however. *Boeing's conclusion that there is no source of* authority in either the FAA or the Federal Rules of Civil Procedure for the district court to order consolidation absent authority granted by the contracts giving rise to the arbitrations applies with equal force to a court's order of joint hearing.

"[T]he FAA 'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" *Boeing*, 998 F.2d at 72 (*quoting Volt Info. Sciences*, 489 U.S. at 478, 109 S.Ct. 1248.) There is nothing in the terms of the agreements before the district court that provided for joint hearing.

Federal Rule of Civil Procedure 42(a) states that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial . . .; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." But the arbitrations here are not "actions . . . pending before the court," and Rule 42(a) does not therefore by its own terms authorize either consolidation or joint hearing.

Rule 81(a)(3) provides that in proceedings under the FAA, the Federal Rules of Civil Procedure apply "to the extent that matters of procedure are not provided for" in the FAA. Fed.R.Civ.P. 81(a)(3). "It is only the judicial proceedings under the Arbitration Act . . . that are subject to the

[federal] rules. The federal rules do not govern the procedure in the hearings before the arbitrators...." 4 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1015, 66–67 (2d ed.1987) (footnote omitted); *see also Boeing,* 998 F.2d at 73 ("Rule 81(a)(3) clearly does not import the Federal Rules of Civil Procedure to the private arbitration proceedings that underlie the Title 9 proceedings pending before a court.") Rule 81(a)(3) does not itself or by importation of Rule 42(a) give the district court power to order either consolidation or joint hearing of two separate arbitrations where the arbitration provisions of the relevant agreements do not so provide. The district court thus was without the power to enter the order under appeal.

Glencore argues that if joint hearing is not granted, the parties are endangered by, among other things, duplication, delay, and the risk of inconsistent decisions. "Although these may be valid concerns ..., they do not provide us with the authority to reform the private contracts which underlie this dispute." *Boeing,* 998 F.2d at 74.

CONCLUSION

The district court's order is vacated insofar as it ordered joint hearing. Inasmuch as, under that order, the district court "retain[ed] jurisdiction to review and confirm the respective arbitration awards in accordance with 9 U.S.C. § 9," the case is remanded to the court for that purpose.

Stewart GINSBERG, Plaintiff–Appellant,

v.

HEALEY CAR & TRUCK LEASING, INC. and Michael P. Healey, Defendants–Appellees,

John Fitzgerald, Defendant.

Docket No. 98–9504

United States Court of Appeals, Second Circuit.

Argued June 10, 1999.

Decided Aug. 18, 1999.

Customer sued truck rental company under § 1983, alleging that company deprived him of property interest without due process of law. The United States District Court for the District of Connecticut, Dominic J. Squatrito, J., entered summary judgment for company. Customer appealed. The Court of Appeals, Winter, Chief Judge, held that: (1) customer could not survive summary judgment based on bare allegation that police department had custom, practice, or policy of dispatching police officers to company's premises when its customers were dissatisfied with their service, and (2) company did not act under color of state law, so as to render it liable under § 1983, by seeking assistance of police officer in quelling disturbance by customer in company's showroom and by not interfering with officer's efforts to collect debt from customer.

Affirmed.

1. Civil Rights ⇐198(4)

Though truck rental company was private party, it may nonetheless have acted under color of law for purposes of § 1983 if it acted "jointly" with police officer to deprive plaintiff of his property. 42 U.S.C.A. § 1983.

Supreme Court described § 1985(3) as "providing a civil cause action when some otherwise defined *federal* right ... is breached by a conspiracy ...". *Great American Federal Savings and Loan v. Novotny*, 442 U.S. 366, 376, 99 S.Ct. 2345, 2351, 60 L.Ed.2d 957 (1979) (emphasis added). The limitation of § 1985(3) to rights guaranteed by federal law or the Constitution has been clearly asserted by the Fourth Circuit as well. *McNutt v. Duke Precision Dental and Orthodontic Labs, Inc.*, 698 F.2d 676, 680 (4th Cir.1983). Accordingly, the claim under § 1985(3) must be dismissed insofar as it concerns the various state rights asserted.

Plaintiffs have failed to state a cause of action on any of the purported bases under § 1985(3). Count III of the complaint must accordingly be dismissed.

Counts IV–VI: State Law Claims

The remaining counts of the complaint allege violations of Maryland statutory and common law. Given the Court's dismissal of all federal claims, the pendent state claims must also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Although the motion to dismiss was filed on behalf of only one defendant it is obvious from the rulings contained herein that dismissal is appropriate as to the entire case against all defendants. Accordingly, for the reasons stated herein, it is this 22nd day of April, 1985, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant Remer's motion to dismiss is GRANTED; and,

2. That the action is DISMISSED as to all defendants; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

The ORE & CHEMICAL CORPORATION,
Petitioner,

v.

STINNES INTEROIL, INC. and Sergeant Oil & Gas Co., Inc.,
Respondents.

No. 84 Civ. 6553 (DNE).

United States District Court,
S.D. New York.

April 22, 1985.

On petition to consolidate arbitration and to appoint arbitrators, the District Court, Edelstein, J., held that district court lacked power to compel consolidated arbitration.

Petition denied.

1. Courts ⇐96(4)

Generally, federal district court is bound by rule of the circuit, but should not rely on older precedents that have been rejected in later decisions.

2. Arbitration ⇐31.5

District court does not have power under Federal Arbitration Act to compel consolidated arbitration, where parties did not provide for consolidated arbitration in arbitration agreement. 9 U.S.C.A. § 4.

3. Statutes ⇐188

Starting point in a case involving construction of statute is language of statute.

4. Arbitration ⇐31.5

Where seller only consented to arbitration with middleman and ultimate buyer only consented to arbitration with middleman, district court lacked power to compel consolidated arbitration. 9 U.S.C.A. § 4.

5. Arbitration ⇐31, 31.5

When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish right to certain procedural niceties which are normally associated with formal trial; one of these procedural nice-

ties is provision in Federal Rule of Civil Procedure for consolidation of related actions. Fed.Rules Civ.Proc.Rule 42(a), 28 U.S.C.A.

6. Federal Civil Procedure ⇐8

For court to consolidate cases, actions to be consolidated must both be pending before court for all purposes. Fed.Rules Civ.Proc.Rule 42(a), 28 U.S.C.A.

7. Arbitration ⇐31.5

Federal Rule of Civil Procedure providing for consolidation of related actions did not provide authority for court to order consolidation of arbitration proceedings, since arbitrations were not "pending before the court." Fed.Rules Civ.Proc.Rule 42(a), 28 U.S.C.A.

8. Arbitration ⇐31.5

Even if court had power to compel consolidated arbitration, it could refuse to do so in exercise of its discretion.

9. Arbitration ⇐31.5

Procedural matter of whether to consolidate arbitration was best suited for resolution by arbitrator.

10. Arbitration ⇐31.5

Under New York law, state courts have power to consolidate arbitrations.

11. Federal Courts ⇐403

Federal Arbitration Act and federal cases construing it control enforcement of arbitration agreements, even where agreement contains New York choice of law provision. 9 U.S.C.A. § 4.

Milgrim, Thomajan Jacobs & Lee, P.C., New York City, David P. Langlois, New York City, of counsel, for petitioner.

Parker, Auspitz, Neesemann & Delehanty, P.C., New York City, Jack C. Auspitz and Martin S. Himeles, Jr., New York City, of counsel, for respondent Stinnes Interoil, Inc.

Healy & Baillie, New York City, Raymond A. Connell, New York City, of counsel, for respondent Sergeant Oil & Gas Co., Inc.

OPINION AND ORDER

EDELSTEIN, District Judge:

The Ore & Chemical Corporation ("OCC") has petitioned this court to compel consolidated arbitration and to appoint arbitrators. Petitioners contend that this court has jurisdiction over the petition, pursuant to 9 U.S.C. § 4 and this court's diversity jurisdiction, 28 U.S.C. § 1332. Respondents Stinnes Interoil, Inc. ("Stinnes") and Sergeant Oil & Gas Co., Inc. ("SOG") contend that the petition should be dismissed because the court lacks the power to compel consolidated arbitration under 9 U.S.C. § 4, and that, in any event, consolidation is not warranted in this case. Because the court agrees with respondents, the petition to compel consolidated arbitration is denied.

FACTUAL BACKGROUND

For the purposes of this motion, the facts as stated in the petition and in plaintiff's supporting papers are taken as true. OCC is a trader of commodities, including petroleum products. On January 15, 1984, OCC purchased 220,000 barrels of gas oil, plus/minus ten per cent buyer's option, from SOG. The contract provided for delivery at Trinidad during the period February 5 through 10 (the "lifting period") and that OCC was to nominate a vessel to receive the gas oil. The initial OCC–SOG sales agreement did not contain an arbitration clause.

On January 20, 1984, OCC entered into a contract, through a broker, with Stinnes for the sale of the 220,000 barrels of gas oil for delivery during the same "lifting period." The contract was confirmed by a telex from the broker, which provided: "Laws of the State of New York to govern with arbitration in New York." Stinnes also agreed to provide a vessel to load the gas oil, the Tanja Jacobs.

Stinnes's vessel arrived on February 11, 1985, outside the lifting period. OCC contends that SOG did not make the oil available at this point. Stinnes, taking the position that OCC had breached the contract

because it could not produce the contractual amount of the gas oil, sold the cargo for account of OCC in a fallen market, obtaining $1.2 million less than OCC was to have received under the contract. OCC contends that either Stinnes or SOG is liable to it for $1.2 million. If OCC did not breach the OCC-Stinnes contract, then Stinnes is liable to it. If, on the other hand, there was a breach of the OCC-Stinnes contract, OCC contends that SOG is liable to it, because any breach was caused by SOG's failure to make the gas oil available as it was obligated to do under the SOG–OCC contract.

In the weeks following the lifting period, SOG negotiated with OCC for payment under the original sales agreement. On March 5, 1985, the parties entered into an agreement which provided, *inter alia*, "Laws of the State of New York to Apply with Arbitration in New York."

OCC made demands for arbitration under the two contracts. Both Stinnes and SOG have agreed to arbitrate in New York, but they will not agree to consolidated arbitration.

DISCUSSION

OCC contends that the court should consolidate arbitration because common issues of law and fact between the three parties "predominate" in this action and that OCC would be prejudiced by having to arbitrate separately with SOG and Stinnes, in that it would be subject to the risk of inconsistent verdicts. The Federal Arbitration Act, 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect or refusal or another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

In *Compania Espanola de Pet., S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir.1975), *cert. denied*, 426 U.S. 936, 96 S.Ct. 2650, 49 L.Ed.2d 387 (1976), the Court of Appeals for the Second Circuit held that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage consolidation of arbitration proceedings in proper cases." *Id.* at 936, 96 S.Ct. at 2650. Since the *Nereus* decision, courts in this circuit "have frequently ordered consolidated arbitration proceedings when the 'interests of justice' so require either because the issues in dispute are substantially the same and/or because a substantial right might be prejudiced if separate arbitration proceedings are conducted." *Matter of Czarnikow-Rionda Co., Inc.*, 512 F.Supp. 1308, 1309 (S.D.N.Y. 1981).

[1, 2] Respondents urge this court to reject *Nereus* on the ground that it is no longer good law. The general rule is that a federal district court is bound by the rule of the circuit. *United States v. Posner*, 549 F.Supp. 475, 476–77 n. 1 (S.D.N.Y. 1982); *Bolf v. Berklich*, 401 F.Supp. 74, 76 (D.Minn.1975). A district court, however, should not rely on older precedents that have been rejected in later decisions. *C.D.R. Enterprises, Ltd. v. Board of Educ. of City of New York*, 412 F.Supp. 1164, 1170 (S.D.N.Y.1976), *aff'd, sub nom., Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031, 97 S.Ct. 721, 50 L.Ed.2d 742 (1977). The *Nereus* decision has been rejected by a district court and Court of Appeals for the Ninth Circuit, *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 568 F.Supp. 1220 (N.D.Cal.1983), *aff'd*, 743 F.2d 635 (9th Cir.), *cert. denied*, — U.S. ——, 105 S.Ct. 544, 83 L.Ed.2d 431 (1984), and is contrary to recent Supreme Court pronouncements on the scope of the Federal Arbitration Act, *see, e.g., Dean Witter Reynolds Inc. v. Byrd*, — U.S. ——, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). Accordingly, this court opines that if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *Nereus*, and hold that a district court does not

have the power under 9 U.S.C. § 4 to compel consolidated arbitration, where the parties did not provide for consolidated arbitration in the arbitration agreement.

[3] The starting point in any case involving the construction of a statute is the language of the statute. *See Byrd, supra,* — U.S. at ——, 105 S.Ct. at 1241. Section four of the act, by its terms, does not empower the court to compel consolidated arbitration. It only authorizes the district court to order the parties to arbitrate "in the manner provided for in [the arbitration] agreement." As the court stated in *Weyerhaeuser, supra,* "[t]his provision comports with the statute's underlying premise that arbitration is a creature of contract, and that '[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.'" *Weyerhaeuser, supra,* 743 F.2d at 637 (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974)). Thus, when the parties themselves have not placed a provision for consolidated arbitration into their arbitration agreement, 9 U.S.C. § 4 does not provide any authority for a court order compelling consolidated arbitration.

Petitioner contends that separate arbitrations exposes OCC to the risk of inconsistent awards, and that consolidated proceedings would be more expeditious. Assuming, *arguendo,* that this is so, the court, nevertheless, does not have the authority to compel consolidated arbitration, absent a provision for consolidation in the contract. In *Byrd, supra,* the Supreme Court "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." —— U.S. at ——, 105 S.Ct. at 1242. The Court in *Byrd* held that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums. *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 20, 103 S.Ct. 927, 939, 74 L.Ed.2d 765 (1983) (affirming an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings, "because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original). The Court stated that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Byrd, supra,* — U.S. at ——, 105 S.Ct. at 1242. Thus, the Second Circuit's reliance in *Nereus* on the "liberal purposes" of the Arbitration Act was misplaced. 9 U.S.C. § 2 "is a congressional declaration of a liberal policy favoring arbitration agreements," *Moses, supra,* 460 U.S. at 24, 103 S.Ct. at 941, not of reforming them.

The court in *Nereus* also relied on Rules 81(a)(3) and 42(a) of the Federal Rules of Civil Procedure, as support for the statutory authority of federal courts to order consolidated arbitration, when the arbitration agreement does not provide for consolidated arbitration. *Nereus, supra,* 527 F.2d at 975; *accord Robinson v. Warner,* 370 F.Supp. 828, 829–31 (D.R.I.1974). Rule 81(a)(3) provides that in "proceedings under Title 9, U.S.C., relating to arbitration, ... [the Federal Rules of Civil Procedure] apply only to the extent that matters of procedure are not provided for in those statutes." Rule 42(a) provides for consolidation of actions, "when actions involving a common question of law or fact are pending before the court, ..." These rules, however, do not provide sufficient basis for a court, in effect, to reform the parties' contracts and force them to arbitrate their disputes in a manner not provided for in the arbitration agreements. *See Weyerhaeuser, supra,* 568 F.Supp. at 1222 ("agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing necessary for reformation of an ordinary contract.").

[4] Rule 81(a)(3), by its express terms, does not apply when matters of procedure are provided for in the Arbitration Act. Under 9 U.S.C. § 4, the court is empowered "only [to] determine whether a written arbitration agreement exists, and if it does, to enforce it 'in accordance with its terms.'" *Weyerhaeuser, supra,* 743 F.2d at 637. Thus, 9 U.S.C. § 4 precludes the use of the Federal Rules in a manner that would alter the terms of the arbitration agreements. The court could only compel consolidated arbitration if the arbitration agreements provided for consolidation. *See id.* ("only issue properly before [the district court] is whether [petitioner and respondents] are parties to a written agreement providing for consolidated arbitration."). In this case, SOG only has consented to arbitration with OCC and Stinnes only has consented to arbitration with OCC. Both SOG and Stinnes contend that they were not aware of the other's involvement in the transaction.[1] As the middleman, OCC could have required both Stinnes and SOG to consent to consolidated arbitration. It did not do so.[2] *See Egyptian Co. For Maritime Transfer v. Hamlet Shipping Co., Inc.,* 1982 A.M.C. 874, 877 (S.D.N.Y. 1981) (although court recognized that consolidated proceedings would be costly to petitioners and could result in inconsistent findings, and that a consolidated proceeding would be cheaper and fairer for all concerned, court refused to consolidate arbitrations, because petitioners "were in the best position to have avoided this situation," and should have "negotiated for the arbitration panels that it seeks this Court to compel when it initially entered into these contracts."). This court is powerless to force the parties to arbitrate other than in the manner provided in the arbitration agreements.

[5–7] Moreover, it is well established that "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial." *Burton v. Bush,* 614 F.2d 389, 390 (4th Cir.1980). One of those "procedural niceties" is Rule 42(a)'s provision for consolidation of related actions. Indeed, Rule 42(a) by its express terms only applies to "actions pending before the court." For the court to consolidate cases, the actions to be consolidated must both be pending before the court for all purposes. *Pan Am. World Airways, Inc. v. U.S. Dist. Ct.,* 523 F.2d 1073, 1080 (9th Cir.1975); *In re Penn Central Commercial Paper Litig.,* 62 F.R.D. 341, 344 (S.D.N.Y.1974), *aff'd without opinion, sub nom., Shulman v. Goldman, Sachs & Co.,* 515 F.2d 505 (2d Cir.1975). The "actions" which petitioners seek to consolidate are the arbitrations, which are not now "pending before the court." [3] Accordingly, Rule 42(a) does not provide authority for the

1. Petitioner has not submitted any direct evidence to refute these contentions. By affidavit submitted November 8, 1984, on behalf of OCC, petitioner's attorney contends that "these statements are untrue by omission. Each party knew that OCC was a trader of commodities and neither a user nor a producer of gas oil. By necessity, the gas oil had to come from another party and had to be sold to another. This cannot be surprising to either Stinnes or [SOG]."

2. Respondent SOG has submitted evidence which shows that OCC attempted to insert a provision for consolidated arbitration into the agreement, but SOG would not allow it. By telex dated March 1, 1984, OCC stated that it would pay SOG approximately $6.5 million for the gasoil, on the condition that SOG "agrees in writing to the following:

   -arbitration in New York, NY pursuant to the laws of the State of New York.

   -a consolidated arbitration if ordered by a New York judge."

   The final arbitration agreement did not provide for consolidated arbitration, but only "laws of the State of New York to apply to arbitration in New York." OCC does not dispute this evidence but contends that it is irrelevant. Indeed, OCC has conceded that it was SOG's intent not to have consolidated arbitration. Affidavit of David P. Langlois at ¶ 8 ("[SOG's] attempts to put in language *excluding* consolidation were specifically rejected.") (emphasis in original).

3. If two arbitration proceedings are completed and separate actions are brought in federal court to confirm the arbitration awards, these confirmation proceedings would be "actions pending before the court," and thus could be consolidated under Rule 42(a), provided the court found common issues of law or fact.

court to order consolidation of the arbitration proceedings.

[8, 9] Even if this court had the power to compel consolidated arbitration, it may refuse to do so in the exercise of its discretion. Procedural matters such as this are best suited for resolution by the arbitrator. *Local 469 International Brotherhood of Teamsters v. Hess Oil & Chem. Corp.*, 226 F.Supp. 452, 455–56 (D.N.J.1964); *see Stewart M. Muller Constr. Co., Inc. v. Clement Ferdinand & Co.*, 36 A.D.2d 814, 320 N.Y.S.2d 277 (N.Y.App.1971). The issue as to whether these arbitrations should be arbitrated together involves an analysis, not only of the transaction, but of custom and usage in the industry. Petitioner contends that common questions of law "predominate" in this case. Respondents SOG and Stinnes, on the other hand, each contend that their disputes with OCC each contain legal and factual issues that are not applicable to the other. For example, Stinnes contends that OCC's claims against it are barred by OCC's waiver of the delivery date in the contract and OCC's failure to provide adequate assurances of performance under Section 2–609 of the Uniform Commercial Code. Stinnes also contends that these issues are not applicable to SOG. OCC contends that it passed to Stinnes the assurances received from SOG. It is more efficient to let the arbitrators, the ones who will be deciding the merits of the matter, decide how the issues are to be adjudicated.[4] *See John Wiley & Sons v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 918, 11 L.Ed.2d 898 (1964) ("Once it is determined, ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

This case is distinguishable from other cases in which courts have consolidated arbitration, in that the arbitration clauses do not reflect an intent to agree to consolidation. The arbitration clauses were silent as to an arbitration panel. *Cf. Farr Man Suplicy, Inc. v. Van Ekris & Stoett, Inc.*, 101 A.D.2d 756, 475 N.Y.S.2d 73, 74 (N.Y.App.1984) (both contracts contained a provision for arbitration between the Green Coffee Association). Moreover, the arbitration clause did not provide for arbitration of all disputes arising out of the purchase and sale of the gas oil. *Cf. Nereus, supra*, 527 F.2d at 970 (contract provided that "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration ..."). The court cannot infer from these arbitration clauses an intent to consent to consolidated arbitration.

[10, 11] Petitioner has submitted a list of consolidated arbitrations conducted under the auspices of the Society of Maritime Arbitrators, Inc. in New York. Exhibit 6 to Affidavit of David P. Langlois, April 8, 1984. Based on this list, petitioner contends that "consolidation is so common and expected that commercial parties impliedly consent by force of controlling law when they adopt arbitration and New York law in their contracts." [5] Langlois Affidavit at

4. Arbitrators have a broad range of procedural powers, aside from ordering consolidation, to effectuate the fair and efficient resolution of arbitrable disputes. Arbitrators, for example, may grant continuances and order split hearings. The court should not deprive the arbitrators of this discretion.

Pursuant to Rule 81(a)(3), some courts have allowed the regulation of discovery during the arbitration proceedings by the Federal Rules. However, this is only permitted "upon a showing of a true necessity because of an exceptional situation." *Penn Tanker Co. of Del. v. C.H.Z. Rolimpex, Warszawa*, 199 F.Supp. 716, 718 (S.D.N.Y.1961). Petitioners have not convinced the court of any necessity for the application of Rule 42(a) in this case. They have only asserted that it would be more convenient to have the arbitrations consolidated.

5. Under New York State law, state courts have the power to consolidate arbitrations. *Sullivan County v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 397 N.Y.S.2d 371, 366 N.E.2d 72 (1977). However, New York law does not apply. It is well settled that The Federal Arbitration Act and the federal cases construing it control enforcement of arbitration agreements, even where, as here, the agreement contains a New York choice of law provision. *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854, 856 (S.D.N.Y.1982). Thus, petitioner's discussion of New York law on pages ten through twelve of its reply memorandum is inapposite.

¶ 12. This argument proves too much. If consolidated arbitration is so common and expected, in the industry, then the industry's participants should make consolidation provisions standard in their arbitration clauses. Under 9 U.S.C. § 4, arbitration cannot be compelled based on implied, or even oral consent, but only on the basis of a written agreement. *Garnac Grain Co., Inc. v. Nimpex Int'l, Inc.*, 249 F.Supp. 986 (S.D.N.Y.1964). Moreover, there is no person better suited to determine whether consolidated arbitration is "common and expected" in the industry, or warranted in this case, than an arbitrator familiar with industry practice.

OCC also requests the court to order arbitration before the American Arbitration Association ("AAA") and to direct appointment of neutral arbitrators through the AAA. Respondents contend that the issue of appointment of arbitrators is premature until the court rules on the issue of consolidation. Respondents request the court to give the parties an opportunity to reach agreement on the issue of appointment of arbitrators after the court decides the consolidation issue. Accordingly, the parties are given until May 13, 1985 to reach agreement on the issue of appointment of arbitrators. If no agreement has been reached at that point, the court will reconsider the exercise of its authority, pursuant to 9 U.S.C. § 5, to appoint arbitrators.

CONCLUSION

The petition to compel consolidated arbitration and to appoint arbitrators is denied. The parties are hereby given until May 13, 1985, to reach agreement on the selection of arbitrators.

SO ORDERED.

Arthur WICHERT, Plaintiff,

v.

Bruce D. WALTER, Jose Fuentes, Joseph Bonnaci, Charles Baldini, Carlos Perez, Louis Fusco, Genevieve Ghignone, Louis Merchesani, and Frank Clark, Defendants.

Civ. A. No. 85–1313.

United States District Court, D. New Jersey.

April 22, 1985.

Tenured teacher, against whom local school board had raised tenure charges based on teacher's criticizing the board at political rally, moved, by order to show cause, for preliminary relief preventing board from proceeding with the tenure charges. The District Court, Sarokin, J., held that: (1) abstention was not required where it was clear that tenure charges were brought only for purpose of harassment and retaliation, and (2) statement made by teacher at the political rally, criticizing the board's allegedly politically motivated decision to transfer another teacher, was protected free speech and thus could not form basis for disciplinary action.

Motion granted.

1. Injunction ⇐138.45

Where preliminary relief requested is injunction against state disciplinary proceedings, litigant must demonstrate, in addition to ordinary elements required for preliminary relief, that threatened harm to him is egregious enough to preclude abstention.

2. Federal Courts ⇐62

Fact that tenure charges against teacher for criticizing local school board at political rally had not yet been certified did not preclude application of *Younger* abstention principles in teacher's action seeking preliminary relief against school board's continuing proceedings on the charges where charges, although not certi-

Advisory Committee Notes

See Appendix C in Volume 12 and its Supplement for the Advisory Committee Notes to the original Rule and its amendments.

§ 2381. History and Purpose of Rule

Rule 42 provides two wholly different procedures that are designed to achieve a common end. That objective is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties.[1] To promote this end, Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases;[2] Rule 42(b) allows the trial court to order separate trial of particular issues within a single case.[3] These procedures have proven extremely useful over the years; this has been particularly true ever since the tremendous growth in multi-party and multi-claim litigation in the federal courts.

Rule 42(b) was amended in 1966 as a part of the unification of the procedure in admiralty and civil cases. Although that amendment appears to have had a rather limited purpose, it has implications for all civil actions.[4] Otherwise Rule 42 has not been changed since it originally was adopted in 1938.

§ 2382. Consolidation—When Permissible

Rule 42(a) allows a district judge to order consolidation of

§ 2381

1. Broad discretion

Dussouy v. Gulf Coast Inv. Corp., C.A.5th, 1981, 660 F.2d 594, **citing Wright & Miller**.

Wilson v. Johns-Manville Sales Corp., D.C.Tex.1985, 107 F.R.D. 250, 252, **citing Wright & Miller**.

Federal Election Comm'n v. Florida for Kennedy Committee, D.C.Fla.1980, 492 F.Supp. 587, **citing Wright & Miller**.

See also

Schwartz v. Western Power & Gas Co., 1972, 494 P.2d 1113, 208 Kan. 844, **citing Wright & Miller**.

Compare

U.S. for Use of Owens Corning Fiberglass Corp. v. Brandt Constr. Co., C.A.7th, 1987, 826 F.2d 643, certiorari denied 108 S.Ct. 751, 484 U.S. 1026, 98 L.Ed.2d 764 (federal district court did not acquire ancillary jurisdiction over improperly removed case by consolidating it with related and properly filed case).

See §§ 2383, 2388.

2. Consolidation

See §§ 2382–2386.

3. Separate trial

See §§ 2387–2392.

4. All civil actions

See the discussion of the amendment in § 2388.

actions pending before the court [1] that involve a common question of law or fact. It was based on a prior federal statute as well as statutes in some of the code states.[2] The former federal statute, however, allowed consolidation of "causes of a like nature or relative to the same question"; the federal rule substitutes for this ambiguous language the now familiar test of a common question of law or fact. The rule is a valid rule of procedure and has been held not to infringe the jury trial right guaranteed by the Seventh Amendment.[3]

In the context of legal procedure, "consolidation" is used in three different senses: [4]

§ 2382

1. Pending before the court

Rule 42(a) does not provide authority for the court to order consolidation of arbitration proceedings because they are not "pending before the court." Ore & Chem. Corp. v. Stinnes Interoil, Inc., D.C.N.Y.1985, 606 F.Supp. 1510.

2. Prior statutes

The Advisory Committee Note to the original Rule 42 said in part: "Subdivision (a) is based upon USC, Title 28, § 734 (Orders to save costs; consolidation of causes of like nature) but in so far as the statute differs from this rule, it is modified.

"For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) § 1081; Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.M.Stat.Ann. (Courtright, 1929) §§ 105–828; N.Y.C.P.A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV, (1919) Art. 26."

The federal statute referred to in the Advisory Committee Note had its origin in the Act of July 22, 1813, c. 14, § 3, 3 Stat. 21. It was repealed in the 1948 revision of the Judicial Code, Act of June 25, 1948, c. 646, § 39, 62 Stat. 992.

The Note is reprinted in vol. 12, App. C.

3. Seventh Amendment

"A somewhat curious argument has been made against the consolidation of these cases. The argument relies on the Seventh Amendment to the Constitution U.S.C.A. providing that: In suits at common law * * * the right of trial by jury shall be preserved, * * *. The contention is that: The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted (Baltimore & Carolina Line, Inc. v. Redman, 55 S.Ct. 890, 891, 295 U.S. 654, 657, 79 L.Ed. 1636) and that at common law the cases of separate plaintiffs against the same defendant could not be consolidated for trial against their wills. The error in the argument is this: the common law rule—if that was the rule—that cases of separate plaintiffs could not be consolidated, was a rule of practice, it was not a peculiar characteristic inherent in trial by jury. Certainly it was not of the substance of the common-law right of trial by jury, which alone is preserved by the Seventh Amendment." Cecil v. Missouri Public Serv. Corp., D.C.Mo.1939, 28 F.Supp. 649, 650 (Clark, J.).

4. Three different senses

Ivanov–McPhee v. Washington Nat. Ins. Co., C.A.7th, 1983, 719 F.2d 927, 929, **quoting Wright & Miller**.

Ringwald v. Harris, C.A.5th, 1982, 675 F.2d 768, 770, **citing Wright & Miller**.

Minnesota v. U.S. Steel Corp., D.C.Minn.1968, 44 F.R.D. 559, 581.

and Sampling in Mass Torts, 1992, 44 Stan.L.Rev. 815.

26. Sample group

109 F.3d at 1019.

27. Essence of consolidation

109 F.3d at 1019.

28. Fifth Circuit holding

109 F.3d at 1020.

29. Human rights litigation

D.C.Haw.1995, 910 F.Supp. 1460, affirmed sub nom. C.A.9th, 1996, 103 F.3d 767.

30. Due process solution

910 F.Supp. at 1467.

31. TMI case

C.A.3d, 1999, 193 F.3d 613, amended on other grounds C.A.3d, 2000, 199 F.3d 158.

32. Prudential case

C.A.5th, 1994, 158 F.R.D. 562.

33. Summary judgment

193 F.3d at 725.

Supplement to Notes in Main Volume

1. Pending before the court

Glencore, Ltd. v. Schnitzer Steel Prods. Co., C.A.2d, 1999, 189 F.3d 264 (reversing district court's consolidation of two arbitration proceedings because they were not "pending before the court").

Improperly removed actions are not properly before the court for purpose of consolidation. Heck v. Board of Trustees, Kenyon College, D.C.Ohio 1998, 12 F.Supp.2d 728.

OHM Remediation Servs. Corp. v. Hughes Environmental Sys., Inc., D.C.N.Y.1997, 952 F.Supp. 120.

5. Stay all except one

If one plaintiff files two suits arising out of the same transaction, but naming different parties or seeking different relief, the court should consolidate them, or perhaps defer handling one until the other has been resolved. Post v. Gilmore, C.A.7th, 1997, 111 F.3d 556 (when inmate filed parallel habeas corpus and § 1983 actions, the court held that the appropriate action was to stay the inmates § 1983 action for damages arising out of a disciplinary proceeding pending the decision on the habeas corpus petition seeking restoration of good-time credits, rather than to dismiss the habeas petition).

7. Actions not merged

The court of appeals upheld consolidation of claims brought by two plaintiffs. The claims were brought against the same defendant, relied on the same witnesses, alleged the same misconduct, and were answered with the same defenses. The jury returned separate verdicts and damage awards for each plaintiff. Harris v. L&L Wings, Inc., C.A.4th, 1997, 132 F.3d 978.

Booth v. Quantum Chem. Corp., D.C.Ga. 1996, 942 F.Supp. 580.

In re Prudential Sec. Inc. Ltd. Partnerships Litigation, D.C.N.Y.1994, 158 F.R.D. 562, at 571.

8. Not made a single cause

Lewis v. ACB Business Servs., Inc., C.A.6th, 1998, 135 F.3d 389.

9. Retain separate identity

Because cases retain their separate identity after consolidation, the district court erred in dismissing both cases when only one lacked a jurisdictional basis. Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire, C.A.3d, 1999, 173 F.3d 909, **citing Wright & Miller**.

Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., C.A.11th, 1998, 135 F.3d 750.

Lewis v. ACB Business Servs., Inc., C.A.6th, 1998, 135 F.3d 389.

Tracinda Corp. v. DaimlerChrysler AG, D.C.Del.2001, 2001 WL 849736.

Schoers v. Pfizer, Inc., D.C.N.Y.2001, 2001 WL 64742.

Mylan Pharmaceuticals Inc. v. Henney, D.C.D.C. 2000, 94 F.Supp.2d 36.

Bristol-Myers Squibb Co. v. Safety Nat. Cas. Corp., D.C.Tex.1999, 43 F.Supp.2d 734 (denying consolidation because separate jurisdictional bases for each action did not exist prior to contemplated consolidation).

U.S. v. West Indies Transport Co., D.C.Virgin Islands 1998, 35 F.Supp.2d 450 (trial court announced that cases retain separate identities prior to ordering consolidation of criminal and civil actions for joint hearing to determine ownership of a vessel).

Heck v. Board of Trustees, Kenyon College, D.C.Ohio 1998, 12 F.Supp.2d 728.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

RESPONSE TO MOTION FOR TEMPORARY STAY PENDING CONSOLIDATION

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and for its Response to Appellant's Motion for a Temporary Stay Pending Consolidation of Appellant, states as follows:

1. Appellant has moved this Court to stay its own appeal in this matter so that four additional administrative matters pending before the Oil Conservation Division (hereinafter referred to as "the Division") can work their way through the administrative process and be consolidated with this case at some unspecified time in the future. This unprecedented motion has no basis in the relevant statutes governing this appeal (NMSA 1978, §§ 70-2-25 and 39-3-1.1) or the Rules of Civil Procedure, particularly Rule 1-074, NMRA, and should be denied.

2. This appeal is taken from an order of the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"). The Commission is a three-member body created by the Oil and Gas Act. See NMSA 1978, § 70-2-4 (Repl. 1995).

The principal responsibilities of the Commission are the conservation of oil and natural gas and the prevention of waste. See NMSA 1978, § 70-2-6.

3. The Order at issue is Order No. 11700-B, issued on April 26, 2002. Order No. 11700-B is contained in the Record on Appeal at pages 1-8. In the order, the Commission found that two permits to drill natural gas wells in Lea County, New Mexico had been improperly granted to Appellant.

4. The Commission based its ruling in-part on a ruling of the Fifth Judicial District Court that Appellant's mineral interests were not valid. See Record on Appeal, at 394-95 (decision of Judge Clingman); Order No. R-11700-B, ¶¶ 22, 28 and 29. However, the Oil and Gas Regulations (19 NMAC) clearly specify that only an "operator" may be granted a Permit to Drill an oil or natural gas well. See 19 NMAC 15.M.1101.A, 19.15.3.102 NMAC. An "operator" is a person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." NMAC 19.15.1.7.O(8). In this case, the Division had issued permits to drill to Appellant on the assumption that it was duly authorized and was in charge of development of the lease. See Order No. R-11700-B, Record on Appeal at 1-7. The District Court's ruling made it clear that Appellant had no such authority. The Commission therefore ruled that Appellant had no authority over the tracts in question, could not be an "operator" under the Oil and Gas Regulations, and should not have been granted a permit to drill.[1] See Order No. R-11700-B at ¶¶ 22, 28 and 29 (Record on Appeal at 4-6). The Commission's

[1] The Commission expressly found that it lacked the jurisdiction to determine the validity of any title or the validity or any oil and gas lease and that jurisdiction over such matters resided in the courts of the State of New Mexico. See Order No. R-11700-B, ¶ 27, Conclusion of Law (Record on Appeal at 6, 7).

order thus stands for the proposition that a party should not be permitted by the Commission to drill a well to access mineral interests belonging to someone else. Id.

5. The four administrative proceedings Appellant proposes to consolidate are very different. Those proceedings involve applications by various parties for "compulsory pooling" of all interests in two spacing units[2] to a single operator for drilling. See NMSA 1978, § 70-2-17(C). A compulsory pooling order permits an operator to operate a well despite the fact that the operator does not own all of the relevant mineral interests in a designated unit and cannot obtain consent of the various interest owners. The interests are "pooled" to the well of the operator and the interest owners share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

6. Appellant moves this Court to stay the appeal so that these four matters can work their way through the administrative process and finally arrive in this Court. Apparently at that point, Appellant then proposes to file another motion to consolidate those matters with this appeal. However, there is no basis for this highly unusual request, particularly as the four compulsory pooling cases are still at the administrative level. To stay this appeal to await those cases would circumvent important requirements of Rule 1-042 of the Rules of Civil Procedure.

[2] A spacing unit is an area of specified acreage that represents the acreage that can be drained by a single well, and governs how many wells can be placed on a given tract. See NMSA 1978, § 70-2-12(10); 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In this case, a spacing unit is 320 acres. See Order No. R-11700-B, ¶ 12 (RA at 3).

7. NMRA 2002, Rule 1-042 provides that an action "pending before the court" may be consolidated for a joint hearing or trial with another "pending" action when the two actions "involv[e] a common question of law or fact ...":

> **A. Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

8. On its face, Rule 1-042 does not permit consolidation of matters that are not "pending before the Court." The four compulsory pooling matters are not before the Court (or even the Commission at this stage). Instead, they are currently pending before the Oil Conservation Division.[3] Before the compulsory pooling matters can reach this Court, *all* of the following must occur: (1) an adverse order of the Oil Conservation Division; (2) an appeal *de novo* to the Commission pursuant to NMSA 1978, § 70-2-13; (3) an adverse Commission order after hearing; (4) a denial of a motion for rehearing pursuant to NMSA 1978, § 70-2-25(A); and (5) the filing of an appeal to this Court pursuant to NMSA 1978, §§ 70-2-25(B) and 39-3-1.1.

9. The device Appellant intends to employ to avoid the "pending case" requirement of Rule 1-042 is the stay "pending" a motion to consolidate (which will apparently be filed at some indeterminate time in the future) when (and if) the administrative matters reach this Court.

10. There is simply no basis for using a stay to permit administrative matters to "catch up" so that they can be consolidated. Certainly, no basis for such an unorthodox

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[3] The Division is a part of the Energy, Minerals & Natural Resources Department. NMSA 1978, § 70-2-5. The Division employs hearing examiners, hears disputed matters in an administrative adjudicatory context, and makes it own orders. NMSA 1978, §§ 70-2-13. Decisions of the Division may be appealed *de novo* to the Commission. Id. This appeal started with applications filed by TMBR/Sharp Drilling, and the Division's decisions were appealed *de novo* to the Commission.

procedure exists in the relevant Supreme Court Rules governing this appeal or in the relevant appeal statues. See Rule 1-062(A)(stay of judgment unless stayed), Rule 1-062(D)(stay of order below upon appeal after deposit of supersedeas bond), Rule 1-062(E)(taking of an appeal by the state operates as a stay), Rule 1-074(S)(stay of an order of an administrative agency permitted only after a showing of likelihood to succeed on the merits, irreparable harm, and lack of irreparable harms to others, and posting of a surety or bond), NMSA 1978, §§ 70-2-25 and 39-3-1.1 (no stay provided for).

11. Not only is the "pending case" requirement not met, the requirement that the cases to be consolidated involve a "common question of law or fact" of Rule 1-042 is also lacking. The Commission was well aware of the differences between a dispute involving a permit to drill and an application for compulsory pooling, and so stated in its Order in this matter:

> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

Record on Appeal, at 6.

12. The four compulsory pooling cases are "related" to this appeal only in the sense that they involve the same property and some of the same parties. Beyond this, as the foregoing demonstrates, the cases are unrelated. This appeal involves essentially a matter of law: whether Appellant is an "operator" and therefore entitled to receive a permit to drill. The resolution of that question in turn implicates a question of real property law (which has been resolved against Appellant by the Fifth Judicial District Court and *res judicata* in this proceeding) and proper application of the Oil and Gas Regulations. Review of these issues implicates a particular standard of review on appeal. See NMRA 2002, Rule 1-074(Q)(4)(whether the action of the agency was in accord with law). The four compulsory pooling matters involve application of principles of petroleum engineering and geology to determine the proper orientation of spacing units and the application of these facts to the obligations under the Oil and Gas Act to protect correlative rights and prevent waste. These issues, if ever presented to a Court for review, would be governed by a whole record review to determine if substantial evidence exists to support the decision. See NMRA 2002, Rule 1-074 (Q)(2)(whether agency's decision, based on a whole record review, is supported by substantial evidence); NMSA 1978, § 39-3-1.1(D)(2)(same standard).

13. Without any pending case before the Court and without a common question of law or fact, no grounds exist for a stay "pending consolidation."

14. Moreover, Appellant's motion seeks relief that was denied repeatedly at the administrative level, and at the very least should be a part of the assignment of error to be reviewed by the Court, not a motion for direct relief.

15. Appellant attempted to delay or consolidate this matter at the administrative matter on at least two previous occasions. See Record on Appeal at 413-18, 558-63, 640-658. Each request was denied. See Order No. R-11700-A (RA at 556-57)(denying motion to continue); R-11700-B, decretal paragraph 3 (RA at 8). The Commission decided to refuse the stay in this matter so as to avoid confusing the permitting matter with the four compulsory pooling matters:

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending the resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. Arrington and Ocean Energy's conclusion does not necessarily follow. An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused. The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights. NMSA 1978, § 70-2-17(C).
>
> 34. It has long been the practice in New Mexico that the operator is free to choose whether to drill first, whether to pool first, or whether to pursue both contemporaneously. The Oil and Gas Act explicitly permits an operator to apply for compulsory pooling after the well is already drilled. See NMSA 1978, § 70-2-17(C) (the compulsory pooling powers of the Division may be invoked by an owner or owners "... who has the right to drill *has drilled* or proposes to drill a well [sic] ..."). Issuance of the permit to drill does not prejudge the results of a compulsory pooling proceeding, and any suggestion that the acreage dedication plat attached to an application to drill somehow "pools" acreage is expressly disavowed.

> If acreage included on an acreage dedication plat is not owned in common, it is the obligation of the operator to seek voluntary pooling of the acreage pursuant to NMSA 1978, § 70-2-18(A) and, if unsuccessful, to seek compulsory pooling pursuant to NMSA 1978, § 70-2-17(C).
>
> 35. Thus, where compulsory pooling is not required because of voluntary agreement or because of common ownership of the dedicated acreage, the practice of designating the acreage to be dedicated to the well on the application for a permit to drill furthers administrative expedience. Once the application is approved, no further proceedings are necessary. An operator may first apply for a permit to drill a well and may thereafter pool (on a voluntary or compulsory basis) separately owned tracts to the well. Alternatively, the operator may first pool and later seek a permit to drill. The two are not mutually exclusive, and there is no preferred methodology.

Order No. R-11700-B (RA at 6-7).

16. These paragraphs are probably going to be the primary focus of Appellant's appeal, particularly because the other core principle of the Commission's order (that one cannot drill on someone else's property) cannot be legitimately attacked. The Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the arcane rules that govern such operations. See Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983). The Commission knew that the compulsory pooling matters were unrelated to the permit matter, and knew that it would be confusing and unwieldy to deal with the two matters simultaneously, and therefore declined.

17. Therefore, the Commission's decision to deny Appellant's many requests to stay or consolidate the separate matters should be accorded deference by the Court. Furthermore, the Commission's procedural decisions should be reviewed under a deferential standard of review. The Oil and Gas Act specifically delegates to the

Commission authority to manage its procedural affairs. NMSA 1978, § 70-2-7 (Repl. 1995) (the division shall prescribe by rule its rules of order or procedure in hearings). And courts invariably give deference to administrative agencies on purely procedural matters. *See e.g.* In the Matter of the Otero County Electric Cooperative, 108 N.M. 462, 774 P.2d 1050 (1989); Mobil Oil Exploration & Producing S.E. v. United Distribution Companies, 498 U.S. 211, 112 L.Ed.2d 636, 111 S.Ct. 615 (1991); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978); Northern Border Pipeline Co. v. Federal Energy Regulatory Comm'n, 129 F.3d 1315, 1319 (D.C. Cir. 1997); United States v. Jenks, 22 F.3d 1513, 1518 (10th Cir. 1994), *after remand* 129 F.3d 1348 (10th Cir. 1997); American Airlines Inc. v. Civil Aeronautics Board, 495 F.2d 1010 (D.C. Cir. 1974). See also Fasken v. Oil Conservation Commission, 87 N.M. 292, 293, 532 P.2d 588 (1975)(expertise of the Commission in dealing with technical matters entrusted to it by the Oil and Gas Act should be accorded "special weight and credence").

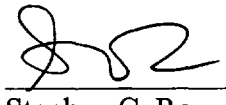
18. What should be obvious from the foregoing is that Appellant's motion for a stay of unlimited duration may not be what it seems, and may in fact be a tactic to avoid the Commission's Order altogether without ever addressing it directly through this appeal. Furthermore, the motion, by seeking relief that the Commission has already twice denied and which presumably will be an assignment of error on appeal, seems also to seek to avoid direct review of the Commission's decisions on appeal by substituting a Court order. Either goal seems improper.

19. Hints that these are indeed the tactics being employed are present in Appellant's motion. For example, Appellant claims that resolution of the compulsory

pooling matters will "obviate" the need to litigate this matter further, apparently as an independent basis for its motion, and apparently represents an argument for an indefinite stay. If Appellant disagrees with Order No. R-11700-B, the matter should be briefed and presented to this Court for review. If Appellant believes that the resolution of the four pending compulsory pooling cases truly "obviate" Order No. R-11700-B, then there is no need for this appeal, particularly since the Commission retained jurisdiction to address any changes in the Fifth Judicial District Court's ruling on the property issue. There is no "middle ground," where the Appellant's own appeal is stayed indefinitely without decision.

20. For the aforementioned reasons, Appellant's motion to stay its own appeal in this matter "pending consolidation" should be denied.

Respectfully Submitted:



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State of New Mexico
Energy, Minerals & Natural Resources Department

OIL CONSERVATION DIVISION
2040 South Pacheco
Santa Fe, NM 87505

Form C-101
Revised October 18, 1994
Instructions on back
Submit to Appropriate District Office
State Lease - 6 Copies
Fee Lease - 5 Copies

☐ AMENDED REPORT

APPLICATION FOR PERMIT TO DRILL, RE-ENTER, DEEPEN, PLUGBACK, OR ADD A ZONE

[1] Operator Name and Address.	[2] OGRID Number
[redacted] P. O. Drawer 10970 Midland, TX 79702 Supplemental to API #30-025-35653	036554 [3] API Number 30-025-35865

[4] Property Code	[5] Property Name	[6] Well No.
28579	[redacted]	[redacted]

UL or lot no.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	County
E	25	16S	35E		1913	North	924	West	Lea

[8] Proposed Bottom Hole Location If Different From Surface

UL or lot no.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	Coun

[9] Proposed Pool 1	[10] Proposed Pool 2
Townsend; Mississippian, N.	Townsend: Morrow

[11] Work Type Code	[12] Well Type Code	[13] Cable/Rotary	[14] Lease Type Code	[15] Ground Level Elevation
N	G	R	P	3959
[16] Multiple	[17] Proposed Depth	[18] Formation	[19] Contractor	[20] Spud Date
No	13,200'	Mississippian	TMBR/Sharp	9/01/01

[21] Proposed Casing and Cement Program

Hole Size	Casing Size	Casing weight/foot	Setting Depth	Sacks of Cement	Estimated TOC
17½	13⅜	54.5	420	500	Surface
12¼	9⅝	40	5,000	1800	Surface
8¾	7	23 & 26	12,000	1000	5,000
6¼	4½	11.6	13,200	135	11,900

[22] Describe the proposed program. If this application is to DEEPEN or PLUG BACK give the data on the present productive zone and proposed new productive zone. Describe the blowout prevention program, if any. Use additional sheets if necessary.

It is prososed to drill a 17½" hole to ±420' with fresh water & set 13⅜" csg & cement to surface. A 12¼" intermediate hole will be drilled to ±5000' with cut-brine system & 9⅝" csg will be set & cemented back to surface. A 3000 psi annular preventer & 3000 psi dual ram BOP will be used on the intermediate hole. An 8¾" hole will be drilled to a TD of ±12,000' with FW mud where 7" csg will be set at TD & cemented back to the intermediate csg @ 5000'. We will drill a 6¼" hole to TD of ±13,200'. We plan to run a 4½" liner to TD with top of liner @ 11,900' & cement w/135 sacks. A 3000 psi annular preventer & a 5000 psi double ram BOP will be used on the 8¾" & 6¼" hole. Mud up will occur between 9080 & 10,000' & several DST's are planned.

[23] I hereby certify that the information given above is true and complete to the best of my knowledge and belief.

Signature: K. n. Arnold

Printed name: Lonnie Arnold

Title: Production Manager

Date: March 15, 2002 Phone: (915) 699-5050

OIL CONSERVATION DIVISION

Approved by: PAUL F. KAUTZ PETROLEUM ENGINEER

Title:

Approval Date: MAR 20 2002 Expiration Date:

Conditions of Approval Attached ☐

Permit Expires 1 Year From Approval Date Unless Drilling Underway

DISTRICT I
P.O. Box 1980, Hobbs, NM 88241-1980

DISTRICT II
P.O. Drawer DD, Artesia, NM 88211-0719

DISTRICT III
1000 Rio Brazos Rd., Aztec, NM 87410

DISTRICT IV
P.O. BOX 2088, SANTA FE, N.M. 87504-2088

State of New Mexico
Energy, Minerals and Natural Resources Department

OIL CONSERVATION DIVISION
P.O. Box 2088
Santa Fe, New Mexico 87504-2088

Form C-102
Revised February 10, 1994
Submit to Appropriate District Office
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WELL LOCATION AND ACREAGE DEDICATION PLAT

☐ AMENDED REPORT

API Number	Pool Code	Pool Name
30-025-35865	86390	Townsend; Mississippian, N.

Property Code	Property Name	Well Number
28579	BLUEFIN 25	1

OGRID No.	Operator Name	Elevation
036554	TMBR/SHARP DRILLING, INC.	3959'

Surface Location

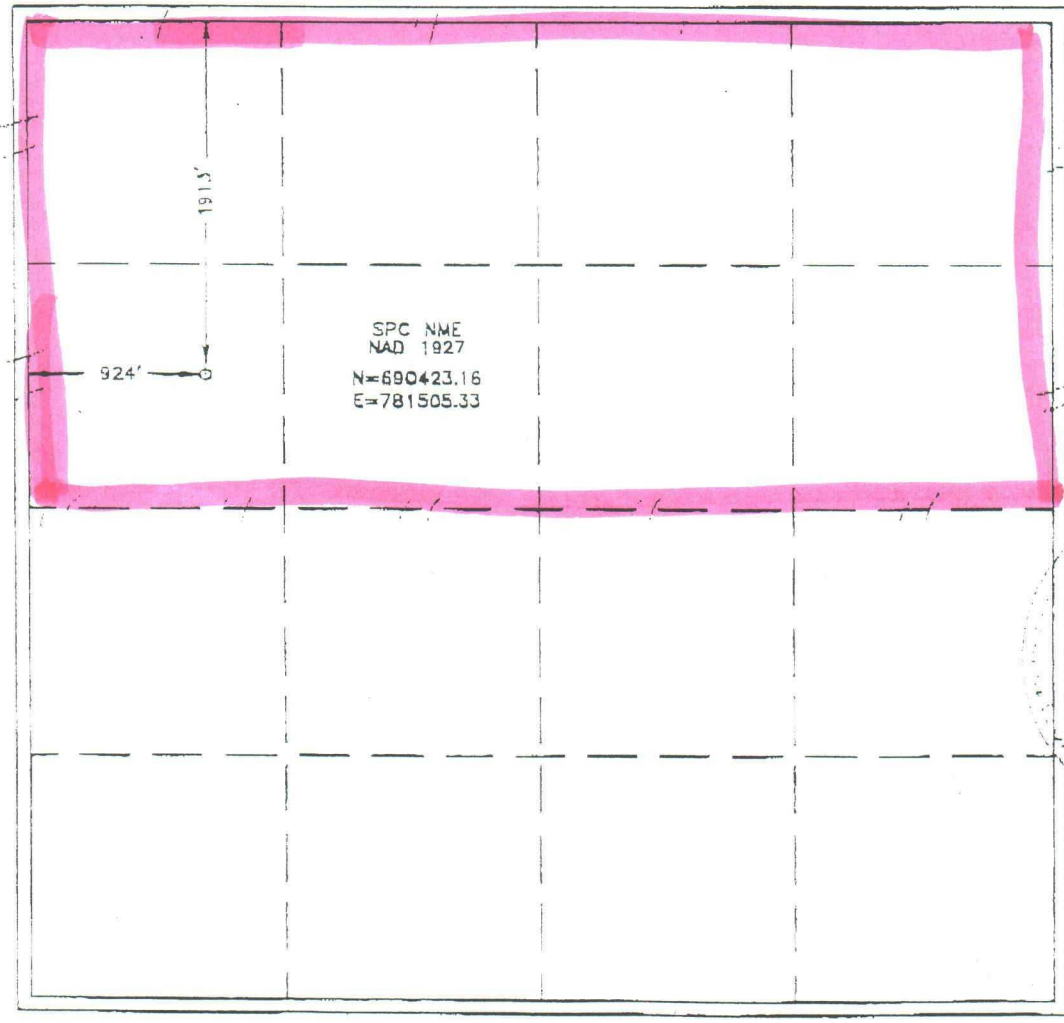
UL or lot No.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	County
E	25	16-S	35-E		1913	NORTH	924	WEST	LEA

Bottom Hole Location If Different From Surface

UL or lot No.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	County

Dedicated Acres	Joint or Infill	Consolidation Code	Order No.
320	N	P	

NO ALLOWABLE WILL BE ASSIGNED TO THIS COMPLETION UNTIL ALL INTERESTS HAVE BEEN CONSOLIDATED OR A NON-STANDARD UNIT HAS BEEN APPROVED BY THE DIVISION



OPERATOR CERTIFICATION

I hereby certify the the information contained herein is true and complete to the best of my knowledge and belief.

Signature

Lonnie Arnold
Printed Name

Production Manager
Title

March 15, 2002
Date

SURVEYOR CERTIFICATION

I hereby certify that the well location shown on this plat was plotted from field notes of actual surveys made by me or under my supervision, and that the same is true and correct to the best of my belief.

JULY 26, 2001
Date Surveyed AWB

Signature & Seal of Professional Surveyor

Ronald J. Eidson 7/27/01

01.11.0899

Certificate No. RONALD J. EIDSON 3239
GARY L. JONES 12641

BEFORE THE NEW MEXICO OIL CONSERVATION DIV.

OIL CONSERVATION DIVISION 08 JAN 28 PM 2:18

APPLICATION OF TMBR/SHARP DRILLING,
INC. FOR COMPULSORY POOLING,
LEA COUNTY, NEW MEXICO

Case 12816

APPLICATION

TMBR/Sharp Drilling, Inc., by its undersigned attorneys, hereby makes application of an Order pooling all interests in the formations described below underlying the **N/2 of Section 25**, Township 16 South, Range 35 East, N.M.P.M., Lea County, New Mexico, and in support thereof would show:

1. Applicant is the working interest owner of certain interests in the N/2 of Section 25, Township 16 South, Range 35 East, Lea County, New Mexico.

2. Applicant proposes to drill a well at a standard location in the SW/4NW/4 of Section 25, to test all formations/pools under said lands currently spaced on 320-acre gas spacing units, including but not limited to the Mississippian formation, with the N/2 of Section 25 to be dedicated to the well.

3. Applicant has in good faith sought to join all other mineral owners in the N/2 of Section 25 for the purposes set forth herein.

4. Although Applicant attempted to obtain voluntary agreements from all mineral interest owners to participate in the drilling of the well or to otherwise commit their interests to the well, some mineral interest owners have refused to join in dedicating their acreage or are not locatable. Therefore, Applicant seeks an Order pooling all mineral interest owners in the formations identified above underlying the N/2 of Section 25 pursuant to § 70-2-17 N.M.S.A. 1978.

5. Applicant asks that the Division consider the cost of drilling and completing the well, the allocation of the cost thereof, as well as actual operating costs and costs charged for supervision. **Applicant also requests that it be designated as operator of the well** and that the Division set a penalty for the risk involved in drilling the well.

6. The pooling of all mineral interests in the formations identified above underlying the N/2 of Section 25 will prevent the drilling of unnecessary wells, prevent waste, and protect correlative rights.

PHIL BREWER
PO Box 298
Roswell, New Mexico 88202-0298
(505) 625-0298

Dated: January 25, 2002

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

THE NEW MEXICO OIL CONSERVATION COMMISSION'S RESPONSE TO APPELLANT'S STATEMENT OF REVIEW ISSUES

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and, pursuant to SCRA 2002, Rule 1-074(L), submits the foregoing as its response to Appellants' Statement of Appellate Issues:

I. INTRODUCTION.

This is an appeal of Order No. R-11700-B of the New Mexico Oil Conservation Commission[1] (hereinafter referred to as "the Commission"). In that order, the Commission found that permits to drill two natural gas wells had been improperly granted to David Arrington Oil and Gas Co. (hereinafter referred to as "Arrington") instead of TMBR/Sharp Drilling Inc. (hereinafter referred to as "TMBR/Sharp"). Order

[1] The Commission is a three-member body created by the Oil and Gas Act and charged with conservation of oil and natural gas resources, prevention of waste of oil and natural gas, protection of correlative rights, and many other tasks related to the production of crude oil and natural gas. See NMSA 1978, §§ 70-2-4, 70-2-6, 70-2-11, 70-2-12 (Repl. 1995 and Supp. 2001).

No. R-11700-B can be found in the Record on Appeal (hereinafter referred to as "RA") at pages 1-8.

This case began when two oil and gas producers applied to the Oil Conservation Division for permits to drill deep natural gas wells to the Mississippian formation below two sections of the same township near Lovington, in Lea County, New Mexico. One of the parties, TMBR/Sharp Drilling Inc., had spent several years searching for sources of natural gas near Lovington. RA at 67-72. In fall of 2000, TMBR/Sharp drilled a natural gas well in Section 24, next to the sections at issue in this appeal. RA at 70, 72. The well was very prolific. RA at 97-98. After being successful with this well, TMBR/Sharp elected to pursue drilling in Sections 23 and 25, where it ~~held interests under~~ holds oil and gas leases granted by Madeline Stokes and Erma Stokes Hamilton in 1997 to Ameristate Oil and Gas Inc.[2] RA at 67-72, 167-172, 482-487.

Arrington and Ocean Energy were also ~~interested in~~ exploring for natural gas in the same general area. Arrington and Ocean Energy executed an agreement in December of 2000 to drill a test well in nearby Section 20. RA at 219-225. Eventually, Arrington focused on the same property held by TMBR/Sharp. In March 2001, a person named James D. Huff, identified by Arrington as its agent, obtained leases from Ms. Stokes and Ms. Hamilton on the same property that had been leased to TMBR/Sharp (Ameristate) in 1997. RA at 528-533. These leases, referred to by the parties herein as "top leases," would not take effect according to their terms until the leases held by TMBR/Sharp became ineffective. RA at 80-81. See 8 Williams & Myers, Oil and Gas Law 1115-1117 ("top lease" defined)(2001).

[2] Ameristate and TMBR/Sharp entered into an agreement whereby TMBR/Sharp became the operator of properties listed in the agreement, which included the Stokes/Hamilton leases. RA at 173-210.

The present dispute concerns permits to drill in Sections 23 and 25. A permit to drill a natural gas well in New Mexico is required by rules and regulations of the Oil Conservation Division. 19.15.3.102 NMAC. Such a permit is obtained from a district office of the Oil Conservation Division, and requires, among other things, that the operator provide proof of financial assurance, set forth a casing and cementing program to protect fresh water supplies and other producing formations, identify the source of oil or natural gas that is the objective of the well, and provide an acreage dedication (so that the Division can ensure that the spacing requirements and other applicable requirements are met). See 19.15.3.101, 19.15.3.102, NMAC.

After Mr. Huff obtained the top leases from Ms. Stokes and Ms. Hamilton, Arrington applied to the Oil Conservation Division for permits to drill wells in sections 23 and 25, which were granted. RA at 159-60, 156-58. less than a month later TMBR/Sharp ~~subsequently~~ applied for permits to drill in the same sections. RA at 164-166, 166-163. TMBR/Sharp's applications were denied because of the permits that had already been issued to Arrington ~~in the same "spacing unit" as TMBR/Sharp's proposed wells~~. RA at 161, 164. Spacing rules of the Oil Conservation Division specify how many wells can be placed on a given tract. 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In Sections 23 and 25, no more than one well is permitted on each 320-acre parcel. RA at 3 (Order No. R-11700-B, ¶ 12). Each section is, of course, 640 acres, and a "spacing unit" is half of each section. TMBR/Sharp's applications were denied because additional wells would violate these rules. RA at 161, 164.

The dispute matured when TMBR/Sharp sought review of the decision denying the permits through the Oil Conservation Division's hearing process. The major issue before the Division (and subsequently, before the Commission) was the validity of

Arrington's top leases. By the time this matter was heard by the Oil Conservation Commission during its *de novo* review of the Division's order, the District Court of Lea County had issued a decision that declared that the top leases of Arrington were ineffective. RA at 329, 403.

II. STATEMENT OF THE ISSUES

Arrington assigns two issues on appeal: (1) whether the Commission improperly revoked Arrington's permits, and (2) whether the Commission should have granted Arrington's request to stay and/or consolidate this dispute with four other disputes pending before the Oil Conservation Division.

Resolution of these issues require the Court to apply the standard of review in NMSA 1978, §§ 39-3-1.1(D) (Supp. 2002) and ~~70-2-25(B) (Supp. 2001)~~, and Rule 1-074, SCRA 2002 and thereby determine whether Order No. R-11700-B is supported by substantial evidence, whether it was within the scope of authority of the Commission, or whether it was "fraudulent, arbitrary or capricious," or otherwise not in accordance with law.

III. SUMMARY OF THE PROCEEDINGS

On August 8, 2001, the District Supervisor of the Hobbs District Office of the Oil Conservation Division denied a permit to TMBR/Sharp for its proposed natural gas well named the "Leavelle 23 Well No. 1" to be located in the northeast quarter of Section 23 (T16S, R35E, NMPM, Lea County). RA at 164-166. On the same day, the District Supervisor denied a permit to drill to TMBR/Sharp for its proposed "Blue Fin '25' Well No. 1" to be located in the northwest quarter of Section 25 in the same township (T16S, R35E, NMPM, Lea County). RA at 161-163. The District Supervisor denied the permits

because Arrington had previously been granted permits to drill[3] in the same sections. RA at 161, 164.

TMBR/Sharp filed an application before the Oil Conservation Division pursuant to Rule 1203(A) of the rules and regulations of the Oil Conservation Division (19 NMAC 15.N.1203.A), to seek reversal of the District Supervisor's denial of the permits (Case No. 12744) and for an order staying Arrington from commencing operations under the approved permits to drill (Case No. 12731). RA at 226-227. Shortly thereafter, TMBR/Sharp filed suit against Arrington in the Fifth Judicial District Court for declaratory relief, tortuous interference, repudiation, damages and injunctive relief. See RA at 247-285 (Complaint). That suit sought, in part, a declaration that TMBR/Sharp's leases in Sections and 23 and 25 remained valid and that Arrington's leases to the same acreage were not valid. See RA at 252-256.

A Division hearing examiner held an evidentiary hearing on TMBR/Sharp's application on September 20, 2001 and the Director subsequently issued Order No. R-11700 on December 11, 2001. RA at 226-231. The Order denied TMBR/Sharp's applications and left intact the decision of the District Supervisor. Id.

Subsequent to the Order in the Division case, the Fifth Judicial District Court entered summary judgment in favor of TMBR/Sharp concerning its leases in Sections 23 and 25. RA at 329, 403. See also RA at 294-328 (parties' briefs concerning the motion(s) for summary judgment). Accordingly, on January 7, 2002, TMBR/Sharp filed a petition for hearing *de novo* pursuant to NMSA 1978, § 70-2-13 and Rule 1220 (19

[3] Arrington had been granted a permit to drill its "Blue Drake 23" well, to be located in the southeast quarter of Section 23 on July 3, 2000. RA at 159-160. It had also been granted a permit to drill its "Triple-Hackle Dragon 25" well, to be located in the northwest quarter of Section 25 on July 17 or 19, 2001. RA at 156-158.

NMAC 15.N.1220). RA at 396-397. Under these provisions, any order of the Oil Conservation Division may be heard *de novo* by the Commission. Id. The Commission conducted an evidentiary hearing on TMBR/Sharp's applications on March 26, 2002 and issued its Order No. R-11700-B on April 26, 2002. Largely on the basis of the District Court's ruling, the Commission's Order found in favor of TMBR/Sharp and reversed the decision of the District Supervisor. Arrington filed for rehearing, which was denied by operation of law. See NMSA 1978, § 70-2-25 (Supp. 2001). This appeal ensued.

III. ARGUMENT

A. The Commission's Order.

Order No. R-11700-B

~~The Commission's order~~ dealt with the two major issues raised by Arrington and Ocean Energy: (1) whether TMBR/Sharp's applications to drill should have been approved instead of denied, and (2) whether it was appropriate to hear the permit cases separately from with four pending applications for compulsory pooling in Sections 23 and 25.

On the first issue, the Commission found that TMBR/Sharp should have been issued permits to drill instead of Arrington. RA at 6 (Order, ¶ 29). The Commission's decision was based on Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC) of the rules and regulations of the Oil Conservation Division; those regulations restrict issuance of a drilling permit to an "operator" who is a "person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." RA at 3 (Order, ¶ 13). The Commission noted that TMBR/Sharp's leases in sections 23 and 25 were created by the 1987 oil and gas leases of Madeline Stokes and Erma Stokes Hamilton and the joint operating agreement between

TMBR/Sharp and Ameristate Oil & Gas, Inc. RA at 3 (Order, ¶¶ 16, 17). The Commission further observed that on March 17, 2001, Ms. Stokes and Ms. Hamilton leased the same property to James D. Huff, a "top lease." RA at 4 (Order, ¶ 19). The Commission also observed Arrington had acquired interests in section 25 by virtue of a "farm-out"[4] agreement from Ocean Energy on September 10, 2001. RA at 4 (Order ¶ 21). Finally, the Commission observed that TMBR/Sharp had filed suit in the Fifth Judicial District Court challenging the validity of the top lease, and that the District Court had issued summary judgment to TMBR/Sharp, which in effect declared the top leases of Arrington ineffective. RA at 4 (Order, ¶ 22). When TMBR/Sharp applied for permits, Arrington lacked a presently-existing mineral lease in the west half of Section 25 or the east half of Section 23 to support its applications; TMBR/Sharp should therefore have been granted a permit to drill when it applied in August 2001. RA at 5-6 (Order ¶¶ 28, 29). The Commission accordingly ordered the permits issued to Arrington rescinded, and the matter of the TMBR/Sharp permits remanded to the District Office for appropriate action. RA at 7-8 (Order, decretal ¶¶ 1, 2). Because Arrington and Ocean Energy asserted that the District Court's order would be appealed, the Commission expressly retained jurisdiction of the matter. RA at 6, 8 (Order, ¶ 30, decretal, ¶ 5).

On the second issue, the Commission denied the motions to stay the proceedings pending resolution of the competing applications for compulsory pooling. RA at 8 (Order, decretal ¶ 3). The Commission reasoned that that the two proceedings serve different objectives and should not be confused. RA at 6-7 (Order, ¶¶ 33, 34, 35, 36). The Commission found that issuance of a permit to drill enables to the Oil Conservation

[4] A "farm-out" agreement is a common form of agreement whereby a lease owner who does not desire to drill at the present time assigns the lease or some portion thereof to another operator who is interested in drilling the well. 8 Williams & Myers, Oil and Gas Law at 377 ("Farmout agreement")(2001).

Division to examine the operator's financial assurance and insure that the operator's designation of pool, spacing and setbacks is accurate. The Commission further found that a compulsory pooling proceeding exists to ensure that unnecessary wells are not drilled and that correlative rights are protected. RA at 6 (Order, ¶ 33). The Commission found that such matters are best dealt with separately to avoid confusion. RA at 7 (Order, ¶¶ 34, 35, 36).

B. Standard of Review.

Orders like Order No. R-11700-B may be reversed on four very limited grounds: (1) if, based on the whole record on appeal, the "decision of the agency was not supported by substantial evidence"; (2) if the agency acted "fraudulently, arbitrarily or capriciously"; (3) if the action "was outside the scope of authority of the agency"; or (4) if the action of the agency "was otherwise not in accordance with law." See NMSA 1978, § 70-2-25(B) (Supp. 2000); NMSA 1978, § 39-3-1.1(D) (Supp. 2000) and Rule 1-074, SCRA 2000.

An agency's decision is supported by "substantial evidence" if evidence presented to the agency is such that "a reasonable mind might accept [it] as adequate to support a conclusion." Fugere v. State Taxation and Revenue Department, 120 N.M. 29, 33, 897 P.2d 216 (Ct.App. 1995); Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether evidence is substantial, reviewing courts do not re-weigh the evidence the agency received, but only consider whether it is adequate to support the decision:

> "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citation omitted] In resolving those arguments of the appellant, *we will not weigh the evidence.*

By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings.

Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). While the substantial evidence standard does not require a Court to ignore contradictory evidence if it undermines the reasonableness of a decision, contradictory evidence is viewed in the light most favorable to upholding the agency decision according to the general standard of reasonableness:

> [W]e view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [citation omitted] The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision.

Santa Fe Exploration Co. v. Oil Conservation Commission of the State of New Mexico et al., 114 N.M. 103, 114, 835 P.2d 819 (1992).

An "arbitrary or capricious" administrative action is an "illegal action" or where the agency has not proceeded in the manner required by law. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 783, 907 P.2d 182 (1995), Santa Fe Exploration, supra. at 115. See also Regents of the University of New Mexico v. Hughes, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992)(formulation of judicial review of administrative agency in terms of "arbitrary, unlawful, unreasonable, capricious or not based on substantial evidence" is synonymous with illegality). It is also a decision that does not have a "rational basis" or where the decision is "contrary to logic and reason." Santa Fe Exploration, supra. at 115.

C. The Commission Properly Rescinded Arrington's Drilling Permits.

Arrington takes issue with paragraph 29 of the Commission's order, where the Commission found that, *at the time Arrington applied for a drilling permit to drill* in Sections 23 and 25, Arrington had no authority over the property and should not have

been issued a permit to drill. Statement of Appellate Issues, at 7; RA at 6 (Order, ¶ 29, 31).

Substantial evidence supports finding 29. ~~As noted, the Commission~~ found that Arrington was not an operator and should not have been issued a permit to drill because its top leases in Sections 23 and 25 had been declared ineffective by the District Court. RA at 247-285, 252-256, 294-328, 329, 403, 294-328. The Commission observed that Arrington's farm-out from Ocean was not executed until September 10, 2002, and therefore had not been effective at the time TMBR/Sharp applied for its permit. RA at 379-386. Thus, Arrington was not, at the time TMBR/Sharp applied for permits to drill, "duly authorized" or "in charge of the development" on the property for which it had applied for a permit. Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC).

Arrington claims that *during the time it held a drilling permit* it had a right to drill and operate lease interests in the west half of Section 25 that were "separate and apart" from the leases that were involved in the District Court action. Statement of Appellate Issues, at 7. Arrington's parsing of this argument (in italics above) is important. While Arrington may have an interest in the west half of Section 25 *now* by virtue of the farm-out agreement with Ocean Energy, the evidence presented to the Commission and the District Court's order shows that when Arrington filed its applications for a permit to drill in the west half in July 2001, it had no such interest.

Arrington also argues that the Commission failed to consider its interests in the *east half* of Section 25. Statement of Appellate Issues, at 8. However, Arrington's application for a permit to drill requested a spacing unit consisting of the *west half* of

Section 25, not the east half. RA at 152, 156-158. Indeed, Arrington proposed to drill a well in the *northwest* quarter of Section 25. Id. Arrington seems to theorize that its holdings in the east half are relevant because if a north half spacing unit is finally established, and only two spacing units can exist in a 320-acre spacing unit, that its interests in the east half will be affected and the Commission should have considered those interests. ~~This is the "what happens in the west half affects the east half" argument.~~ But ownership of an interest in the east half of Section 25 ~~could not~~ cannot support an application for a permit in the west half; without an interest in the west half, Arrington could not become an operator of that well that it applied for --- and should not have been issued a permit to drill. 19.15.1(O)(8) NMAC. Even if it had had evidence of some interest in the east half before it, that evidence would not have been relevant to the Commission's inquiry into Arrington's interests in the west half. to support its application to drill

Arrington further claims the Commission "assumed" that the District Court adjudicated "all of Arrington's title" and implies that the Commission failed to consider an independent interest of Arrington that would have supported its applications. Statement of Appellate Issues, at 8. The Commission made no such assumption. The Order shows that the Commission considered ~~the~~ all of the interests ~~of the parties~~ that had been presented, as well as the parties' arguments. RA at 1-6. ~~Moreover,~~ The Commission could rightfully assume *from the presentations ~~of the parties~~* (including that of Arrington) parties' that Arrington had no other interests other than those presented. And no evidence of an independent interest was presented to the Commission by Arrington or anyone else. Indeed, Arrington characterized its interests in Section 23 and 25 at the time it applied for drilling permits as "equitable" (RA at 109. ll. 9-10) and presented evidence only of the

farm-out and the disputed top leases. See RA at 24, ll. 6-16 ("... David Arrington ... control[s] an interest in this area. We have in Section 25, in the west half, we have a farmout agreement. That was dated back in September of 2001."); RA at 22, ll. 5-8 ("... David Arrington does own part of the acreage, part of the farmout -- and that's part of the agreements that we're going to put into evidence -- in the west half of section 25."), RA at 105-106 (Arrington presents four exhibits - the farm-out agreement, a letter agreeing to release the permit to drill in Section 23, the December, 2000 agreement between Arrington and Ocean Energy concerning a well in Section 20, and a copy of ~~an unrelated~~ a ruling of the District Court on the tortuous interference claims).

Although Arrington now seems to argue that it has an "independent interest" or "interests" that otherwise support its application, it did not reveal those interests to the Commission,[2] and has waived the issue. See Duke City Lumber Co. v. New Mexico Environmental Improvement Division, 101 N.M. 301, 308, 681 P.2d 727 (Ct.App. 1983) (party waived objections to testimony of witness during administrative hearing by not objecting); Wolfley v. Real Estate Commission, 100 N.M. 187, 188-189, 668 P.2d 303 (1983) (issues not raised in administrative proceedings will not be considered for the first time on appeal). See also Randolph v. New Mexico Employment Security Department, 108 N.M. 441, 444-445, 774 P.2d 435 (1989) (NMESD's attempt to introduce a letter containing additional evidence after the conclusion of the hearing was improper - the tendered evidence was not to be considered as a part of whole record review by the reviewing courts). ~~All the Commission could consider was what was before it. And that is all that the Court may consider either. Duke City, Wolfley, Randolph, supra.~~

[2] Counsel for Arrington argued that Arrington has interests in the "northeast quarter" of section 25 "presently," but did not present any evidence of those interests. See RA at 21, ll. 15-17.

Finally, Arrington, citing to Magnolia Petroleum Co. v. Railroad Commission et al., 141 Tex. 96, 170 SW2d 189 (1943), claims that the *practical effect* of the Commission's order was to "adjudicate title." Arrington claims that the Commission exceeded its authority when it rescinded Arrington's permit. Arrington claims that the Commission should have taken the approach spelled out in Magnolia Petroleum. Statement of Appellate Issues, at 9.

Magnolia Petroleum does not support this argument. The Oil Conservation Commission did not and could not adjudicate title. Order No. R-11700-B expressly deferred to the district courts on such matters and the Commission agreed that it had no authority to adjudicate title. RA at 5 (Order, at ¶ 27)("The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico.").

The Texas Supreme Court, in Magnolia Petroleum, made a similar finding. In that case, the Court held that the Texas Railroad Commission (the oil and gas regulatory body in Texas) was without power to adjudicate questions of title or rights of possession, and all such questions must be settled by the courts. Magnolia Petroleum involved a suit by an oil and gas producer against the Railroad Commission to obtain cancellation of two drilling permits issued to a third party. Magnolia Petroleum contended that the permits violated the Railroad Commission's spacing rules and further alleged that the person who had obtained the permits had no title to the property (a quiet title suit had previously been filed in Gregg County, the county in which the property at issue was situated, on this issue). The district court in Travis County cancelled the permit and entered an injunction

against the drilling of the two wells. The Travis County court made findings concerning the chain of title of both the minerals and the surface of the disputed tract so as to conclude that a bona fide dispute existed as to the title of the disputed lands, and the court concluded that given the disputed title and the proceedings in Gregg County, the Railroad Commission should not have issued a drilling permit. An intermediate court of appeals remanded the case to the district court to suspend the case until final judgment of the case in Gregg County.

In that posture, the case reached the Supreme Court, which held the Railroad Commission was without power to "... adjudicate questions of title or rights of possession. These questions must be settled in the courts." Magnolia Petroleum, 170 S.W.2d at 191. The Court further noted that the Railroad Commission lacked the authority to adjudicate title and if it purported to do so, the act would be void: "When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land. If other parties are in possession of the property, as in the present case, they may defend their possession by self-help, or by injunction proceedings. Before the permittee can drill, he must first go to court and establish his title." Id. The Court found that issuance of a drilling permit cannot decide such issues: "[A permit] ... grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary's title. It merely removes the conservation laws and regulations as a bar to drilling the well ..." Id.

Thus, even if the New Mexico Oil Conservation Commission had taken upon itself to impermissibly "adjudicate title" as Arrington claims, under Magnolia Petroleum, any such act would have been void. The permit issued to TMBR/Sharp, even if it had

explicitly purported to adjudicated title, would only have "remove[d] the conservation laws and regulations as a bar to drilling the well ..." Magnolia Petroleum, 170 S.W.2d at 191.

The Texas Supreme Court did note that the Railroad Commission should not completely disregard title questions when it grants a permit to drill. Magnolia Petroleum, 170 S.W.2d at 191. The Court noted that the Railroad Commission should not blindly issue a permit to a person who lacks any claim to the property upon which a permit to drill is sought, and the Court observed that a permit should be refused unless the applicant can claim the property in "good-faith." Magnolia Petroleum, 170 S.W.2d at 191.[6] Arrington seems to use the Court's discussion on this point to argue that a good faith dispute concerning the property still exists (presumably with respect to the top leases), apparently based on the parties' assertions that an appeal of the District Court's summary judgment would be forthcoming after entry of a final order. See RA at 51-51 (statement of Mr. Bruce), 128-129 (statement of Mr. Carroll).

But much more than a "good faith dispute" exists here. The District Court has *adjudicated* Arrington's title and found it wanting. RA at 232 (district court's entry of summary judgment). This is a critical difference between this case and Magnolia Petroleum. In Magnolia Petroleum, the Gregg County court had not yet adjudicated title when the permit dispute reached the courts, and the Supreme Court couldn't justify abating the statutory appeal to await adjudication of title. Magnolia Petroleum, 170 S.W.2d at 191. But Magnolia Petroleum does not hold and cannot be read to hold that the New Mexico Oil Conservation Commission must issue a permit to anyone with a

[6] The "good faith belief" is the same standard the Commission adopted in this case. See RA at 5-6 (Order, at ¶ 28).

good faith belief in their title if, in fact, a court has declared that title has failed. Such a ruling would be nonsensical and violate the very principles that Magnolia Petroleum establishes. Until and unless the district court's ruling is reversed, Arrington's title has failed, and the Commission had no choice but to recognize and accept that fact.

D. The Commission's Decision to Hear This Matter First Was Reasonable and Authorized by Law.

~~While these proceedings were pending before the Commission,~~ Both Arrington and Ocean Energy attempted to convince the Commission that this matter should be stayed and consolidated with four applications for "compulsory pooling" in Sections 23 and 25. Arrington has filed a motion with this Court seeking the same relief.

The Commission rejected the motions because the applications for compulsory pooling raised entirely different questions than those raised in this case by TMBR/Sharp's applications. RA at 6 (Order, ¶¶ 32-36).

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary*

objectives are to avoid the drilling of unnecessary wells and to protect correlative rights. NMSA 1978, § 70-2-17(C).

RA at 6 (emphasis added).

Arrington assigns error to this decision. Arrington argues that the Commission failed to "completely resolve" the dispute and failed to accord "full relief" to the affected parties. Statement of Appellate Issues, at 10. Arrington argues that the Commission has allowed the issues in this case to "unduly influence events" and has failed to consider its statutory mandates to prevent waste, protect correlative rights and prevent the drilling of unnecessary wells. Id. Arrington argues that the Order in this case has caused Arrington more problems and have frustrated its efforts to develop the east half of Section 25, acreage that Arrington claims "should not have been affected by these proceedings." Id.

Like all decisions of the Oil Conservation Commission, its decision to defer hearing the compulsory pooling cases must be judged by the applicable standard of review. See NMSA 1978, § 39-3-1.1(D) and Rule 1-074, SCRA 2000. Relevant to this inquiry, it should be noted that nothing in New Mexico law requires that the Commission consolidate all related or similar cases and adjudicate all together. *See* NMSA 1978, § 70-2-25(B) (no such requirement); NMSA 1978, § 39-3-1.1(D) (no such requirement) and Rule 1-074, NMRA 2002 (no such requirement). To the contrary, the Oil and Gas Act seems to allow the Division to issue a permit to drill *prior to* compulsory pooling proceedings. See NMSA 1978 70-2-17(C)("Where ... [an] owner ... who has the right to drill *has drilled* ... the division ... shall pool ..."). If an owner "has drilled," it is only after receipt of a permit to drill issued by the Division. See RA at 7 (Order, ¶ 34).

The Commission's decision was rationally based on its peculiar knowledge of such proceedings. A compulsory pooling proceeding is one in which an operator requests

the Division to designate the operator of a well. See NMSA 1978, § 70-2-17(C). In compulsory pooling, the interests are "pooled" to a single well, an operator of the well is designated, and the owners of the mineral interests in the spacing unit share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

The Commission understands that compulsory pooling matters are unrelated to permitting, and knows that it would be confusing and unwieldy to deal with two such matters simultaneously, and therefore declined to do so in this case. RA at 6 (Order, ¶¶ 32, 33). The Commission's expertise in handling these complex regulatory matters is entitled to considerable deference. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members. . . . Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment."). See also Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same).

Appellant however argues that the Commission was *mandated* to address the compulsory pooling applications, citing § 70-2-17(C), Sims v. Mechem, 72 NM 186, 188, 382 P.2d 183, 184 (1963), Kerr-McGee Nuclear Corp. v. New Mexico Environmental

Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct.App. 1981), Van Horn Oil Co. v. Oklahoma Corporation Commission, 753 P.2d 1359, 1363 (1988), Anderson v. Grand River Dam Authority, 446 P.2d 814 (1968) and Am.Jur.2d. ("Administrative Law, Section 522").

These citations do not support the assertion. Section 70-2-17(C) of the Oil and Gas Act provides the Commission with ~~specific~~ *authority* to enter compulsory pooling orders. It requires the Commission to enter a pooling order only if certain factual predicates are present. On its face, section 70-2-17(C) does not require the Commission to consolidate cases stay cases, or afford a "complete resolution" as proposed by Arrington. ~~Further, another section of~~ Indeed, the Act expressly permits the Commission to prescribe its rules of order in proceedings. NMSA 1978, § 70-2-7 (1987). The Oil and Gas Act thus permits the Commission procedural latitude to make sensible decisions to manage complex and technical cases.

The citation to Sims is not helpful either. Sims involved ~~an application for~~ entry of a compulsory pooling ~~on which the~~ order by the Commission ~~had issued a pooling order~~. The Court in that case noted that "... the commission is *authorized* to require pooling of property when such pooling has not been agreed upon by the parties ..." Sims, 72 N.M. at <>. (emphasis added). The specific issue in Sims concerned ~~the Commission's compulsory pooling order, which~~ lacked of a finding in the order concerning waste. Sims, 72 N.M. at <>. ~~The case~~ Sims does not stand for any relevant proposition here, as this matter involves the disputed and certainly does not stand for the proposition that the Commission has to bring the parties before it and adjudicate whether property should be subject to compulsory pooling. It permits,

Appellant's citation to Kerr-McGee and Anderson are similarly misplaced. Kerr-McGee involved the promulgation of *regulations* by the New Mexico Environmental Improvement Board. Several actions of the Board were questioned during the promulgation of its radiation protection regulations, and the fact that staff of the Environment Department had drafted the proposed rules was called into question. The Court held that the Board had in fact impermissibly delegated its authority and the regulations should have been drafted by the Board's staff. Kerr-McGee, 97 N.M. at <>. Anderson involved a regulation of the Grand River (Oklahoma) Dam Authority requiring permission of adjoining landowners before it would issue a houseboat permit on a lake. After a houseboat owner was unable to obtain approval form the adjoining landowner, the Dam Authority took possession of the houseboat and sold it. The Oklahoma Supreme Court decided that the regulation impermissibly delegated the Dam Authority's authority to the adjoining landowners. Anderson, 446 P.2d at 819.

These cases concern delegation of authority by an agency. In this case, the Commission has not delegated authority to anyone. The compulsory pooling cases are not yet before it; they remain pending before the Oil Conservation Division and the decision-making authority hasn't been improperly delegated. See NMSA 1978, § 70-2-6(B). The issue raised by Arrington is not a question of delegation of authority, but the procedure chosen by the Commission to address the issues.

The citation to Van Horn is the most puzzling reference, because that case *upheld* numerous purely procedural decisions of the Oklahoma Corporation Commission. In Van Horn, a compulsory pooling proceeding, the Oklahoma Supreme Court upheld the Commission's decisions: (1) *to proceed to hearing and deny Van Horn Oil Company's*

motion to continue, (2) to elect to proceed to hearing despite the fact that Van Horn's principals could not participate because they were on vacation, (3) to conduct an oral hearing on Van Horn's challenge to a hearing officer, (4) to decide contrary to the hearing officer's recommendations, and (5) its refusal to re-open the record to take additional evidence. Van Horn alleged on appeal that the Commission could not overrule the findings of its hearing officer once the hearing officer had been delegated authority to hear the matter. The Oklahoma Supreme Court made clear that no such principle exists because the hearing officer's "decision" was only a recommendation to the Corporation Commission, not a decision. Van Horn, 753 P.2d 1359. The Court commented, in *dicta*, that the Commission would have been without power to completely delegate its decision-making power to the hearing officer.

This citation isn't any more relevant than Kerr-McGee and Anderson because the ion is not a factor here.
~~Commission hasn't improperly~~ delegated ~~its power to enter a compulsory pooling order. It simply hasn't consolidated the compulsory pooling cases with the permit dispute as Arrington desires~~. If it stands for anything, Van Horn stands for the proposition that the Commission has inherent power to manage the cases and matters before it.

Courts invariably give deference to administrative agencies on ~~such~~ purely procedural matters like this one. *See e.g.* In the Matter of the Otero County Electric Cooperative, 108 N.M. 462, 774 P.2d 1050 (1989); Mobil Oil Exploration & Producing S.E. v. United Distribution Companies, 498 U.S. 211, 112 L.Ed.2d 636, 111 S.Ct. 615 (1991); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978); Northern Border Pipeline Co. v. Federal Energy Regulatory Comm'n, 129 F.3d 1315, 1319 (D.C. Cir. 1997); United States v. Jenks, 22

F.3d 1513, 1518 (10th Cir. 1994), *after remand* 129 F.3d 1348 (10th Cir. 1997); American Airlines Inc. v. Civil Aeronautics Board, 495 F.2d 1010 (D.C. Cir. 1974).

The procedural discretion vested in administrative bodies is critical to their proper functioning and efficiency. For example, in Matter of Otero County, the Supreme Court approved the Public Service Commission's decision to sever an issue ~~of~~ the fairness of a billing method known as "demand metering" from a proceeding devoted to ~~adjudicating~~ ~~of~~ customer complaints. The Supreme Court held the Commission had discretion to conduct such an inquiry separately, to preserve the *status quo* of the utility's income stream while separately addressing the important question raised by the customer:

> In this case, the PSC granted a rate request, but ordered a separate proceeding to review the fairness of demand metering. Given the nine-month time constraint of [the Public Utility Act], and the imperative of "just and reasonable" rates under [the Public Utility Act], the PSC's severance is a reasonable procedure under its legislative mandates. This procedure allowed the PSC to leave the utility's income stream intact, while preserving its mandate under [the Public Utility Act] to determine the reasonableness of Otero's rate structure.

Matter of Otero County, 108 N.M. at 465. Here, the Oil Conservation Commission's decision to hear separately matters concerning the issuance of a drilling permit and compulsory pooling, like the decision of the Public Service Commission's decision to address demand metering separately from ratemaking, is entitled to considerable deference.

F. ORDER NO. R-11700-B SHOULD BE AFFIRMED.

Order No. R-11700-B was supported by substantial evidence, including the District Court's declaration that TMBR/Sharp's mineral interests in Sections 23 and 25 had not failed, the farm-out agreement of September 10, 2001, and the lack of any other evidence of an independent mineral interest to support Arrington's applications for

would

permits to drill. A reasonable mind ~~might~~ accept this evidence as adequate to support the conclusions reached. Grace, 87 N.M. 208.

The Commission's decision to address the permitting issue separately from the compulsory pooling issue was rational and reasonable and based on the Commission's understanding of the essential differences between such proceedings and is entitled to substantial deference. Matter of Otero County, 108 N.M. at 465. The decision to hear the matters separately was not unreasonable, was not contrary to law, and was not arbitrary or capricious, and as such should be upheld ~~on appeal as well~~. See NMSA 1978, §§ 70-2-25(B), 39-3-1.1(D) and Rule 1-074, NMRA 2002.

STATEMENT OF RELIEF SOUGHT

The Commission requests affirmance of Order No. R-11700-B, dismissal of Arrington's appeal herein, and issuance of the appropriate mandate.

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Any suggestion that the Commission's decision to hear these matters separately means that the Commission has abrogated its responsibilities mischaracterizes the Commission's order. The Commission did not refuse to hear the four compulsory pooling cases. It just refused to hear them when Arrington wanted them heard. RA at 8 (Order, ¶ 3, decretal). The parties are entitled pursuant to the Oil and Gas Act (§ 70-2-13) to have the compulsory pooling cases heard *de novo* by the Commission once an order is entered by the Division. Id. Nothing in the procedure adopted by the Commission that it is intends to shirk its duties to prevent waste or protect correlative rights or is refusing to hear the geological and engineering that is required to resolve a compulsory pooling case.

Another problem in this case concerns the orientation of the spacing unit in Section 25, because the two resulting 320-acre spacing units may be oriented in a north-south direction or an east-west direction. These different orientations are often referred to as "stand-up" or "lay-down" units. See 8 Williams & Myers, pages 556, 1030. In this case, TMBR/Sharp would apparently benefit more from a spacing unit in Section 25 that is a "lay-down" unit (oriented in an east-west orientation) because its interests are apparently concentrated in the north half of the section. See RA at 150, 242. TMBR/Sharp accordingly proposed an east-west orientation for its Bluefin 25 well in its application for a permit to drill. RA at 153. Arrington and Ocean Energy, because their interests are apparently concentrated in the west half of Section 25, would benefit from a stand-up unit (oriented in a north-south direction), and their application for permit to drill the Triple-Hackle Dragon 25 accordingly proposed such a north-south orientation. RA at 152. The parties seem to agree that the best location for a well in section 25 is the northwest quarter. Compare RA at 152 (Arrington's application) with RA at 153 (TMBR/Sharp's application). A different situation apparently presents itself in Section 23; both Arrington and TMBR/Sharp proposed units comprising the east half of that Section and the parties seemed to agree that a "stand up" unit is appropriate there. Arrington's application to drill the Blue Drake 23 proposed a north-south orientation for the spacing unit (RA at 154), and TMBR/Sharp proposed a north-south orientation for its Leavelle 23 well (RA at 155).

However, the orientation of the spacing units was not before the Commission and is therefore not before the Court; that dispute is pending before the Oil Conservation Division in cases 12816, 12841, 12859 and 12860. The hearing examiner

has conducted an evidentiary hearing and a decision is pending. The determination of the proper orientation by the Division (or, if an application for de novo review is filed, by the Commission) in cases 12816, 12841, 12859 and 12860 will affect how much each party stands to profit from the development of the natural gas in Sections 23 and 25. It is a very charged issue, but as noted, it is not before the Court because it was not before the Commission (see discussion below, at **19**).

See NMSA 1978, § 70-2-25(B) (Supp. 2000); NMSA 1978, § 39-3-1.1(D) (Supp. 2000) and Rule 1-074, SCRA 2000.

An agency's decision is supported by "substantial evidence" if evidence presented to the agency is such that "a reasonable mind might accept [it] as adequate to support a conclusion." Fugere v. State Taxation and Revenue Department, 120 N.M. 29, 33, 897 P.2d 216 (Ct.App. 1995); Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether evidence is substantial, reviewing courts do not re-weigh the evidence the agency received, but only consider whether it is adequate to support the decision:

> "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citation omitted] In resolving those arguments of the appellant, *we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings.*

Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). While the substantial evidence standard does not require a Court to ignore contradictory evidence if it undermines the reasonableness of a decision, contradictory evidence is viewed in the light most favorable to upholding the agency decision according to the general standard of reasonableness:

> [W]e view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [citation omitted] The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision.

Santa Fe Exploration Co. v. Oil Conservation Commission of the State of New Mexico et al., 114 N.M. 103, 114, 835 P.2d 819 (1992).

Courts often speak of these procedural matters being committed to agency discretion. For example, in Mobil Oil Exploration, a dispute concerning whether the Federal Energy Regulatory Commission should have addressed a problem raised by one of the parties during a proceeding, the United States Supreme Court held that the agency is best suited to determine how to handle related yet discrete issues and its decisions in this regard are committed to agency discretion:

> The court clearly overshot its mark if it ordered the Commission to resolve the take-or-pay problem in this proceeding. *An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures* [citations omitted] *and priorities. ... * * * [A]n agency need not solve every problem before it in the same proceeding.* This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.

Mobil Oil Exploration, 498 U.S. at 230-231 (emphasis added). The holding in Mobil Oil Exploration echoed the Supreme Court's earlier decision on this topic in Vermont Yankee. In that case, an environmental group claimed the Atomic Energy Commission should consider the issue of spent nuclear fuel in a separate nationwide proceeding --- the AEC had instead chose to address the spent fuel issue during individual licensing proceedings. The Supreme Court upheld the AEC's chosen procedure; the Court observed that decisions when to address an issue is a matter of procedure entrusted to the agency's discretion, not that of the reviewing court:

> [T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.
> * * *
> *Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of*

> *procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "* [citations omitted] Indeed, our cases could hardly be more explicit in this regard.

Vermont Yankee, 435 U.S. at 524, 534-44 (emphasis added). *See also* American Airlines, 495 F.2d at 1020 (where the Civil Aeronautics Board, in a proceeding concerning "interline" airline fares, had considered the relationship between rates in a separate proceeding from the absolute levels of rates, and the Court of Appeals approved this separate consideration of issues: "The courts have uniformly recognized the Board's authority to arrange its business and order its dockets as expedience may dictate. [citations omitted] In the present case the Board divided its labors in an eminently sensible fashion."); Northern Border, 129 F.3d at 1319 (where the Court held: "We believe it is entirely appropriate, therefore, for FERC to defer [determination whether costs of a pipeline acquisition could properly be included in a rate base] ... until the company's customers have an opportunity to offer their views [in a separate proceeding]. The question of 'how best to handle related, yet discrete, issues in terms of procedures' is a matter committed to agency discretion."); Jenks, 22 F.3d at 1518 (where the defendant refused to apply to the Forest Service for a special use permit to use an access road, but the Court held that the requirement that he apply for a permit was reasonable). The Court in Jenks remarked that an agency possesses substantial procedural latitude implementing its mandate:

> An agency must be given substantial latitude in determining how to implement a statutory mandate. [citations omitted] "As long as an agency's procedures are reasonably designed to permit the agency to 'discharge [its] multitudinous duties,' a court should not interfere." [citations omitted] In the instant case, the Forest Service's permit procedure appears to be a reasonable method of implementing ANILCA's statutory mandate to provide access to inholders while assisting the Forest Service in the management and preservation of forest lands.

Id. <Cite to REA express???>