STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF RICHARDSON OPERATING COMPANY TO ESTABLISH A SPECIAL 'INFILL WELL' AREA WITHIN THE BASIN-FRUITLAND COAL GAS POOL AS PROVIDED BY RULE 4 OF THE SPECIAL RULES FOR THIS POOL, SAN JUAN COUNTY, NEW MEXICO.

Requested De Novo
Review by the Secretary of
OCC Case No. 12734 (De Novo)

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2004, a copy of the Recommended Decision of the Hearing Officer to the Secretary and the Final Decision of the Secretary were sent by U. S. Mail, postage prepaid or hand delivered, to the following counsel of record:

James Bruce
P. O. Box 1056
Santa Fe, NM 87504

Larry P. Ausherman
Modrall Sperling Law Firm
P. O. Box 2168
Albuquerque, NM 98103

Charles E. Roybal
BHP Minerals
300 W Arrington #200
Farmington, NM 87401

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

William F. Carr
Holland & Hart
P. O. Box 2208
Santa Fe, NM 87504

Tom Mills, Deputy Secretary
Energy, Minerals and Natural
Resources Department

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF RICHARDSON OPERATING COMPANY TO ESTABLISH A SPECIAL 'INFILL WELL' AREA WITHIN THE BASIN-FRUITLAND COAL GAS POOL AS PROVIDED BY RULE 4 OF THE SPECIAL RULES FOR THIS POOL, SAN JUAN COUNTY, NEW MEXICO.

Requested De Novo
Review by the Secretary of
OCC Case No. 12734 (De Novo)

RECOMMENDED DECISION OF THE HEARING OFFICER TO THE SECRETARY

COMES NOW Tom Mills, Deputy Secretary of the Energy, Minerals and Natural Resource Department (EMNRD), acting as the designated hearing officer in this matter, and states that the following is his summary of the procedures and facts in this matter and his recommended decision for Joanna Prukop, Secretary of EMNRD ("Secretary"). Jurisdiction of this matter arises from NMSA 1978, Section 70-2-26.

Preliminary and Procedural Matters

1. By decision of December 19, 2002, the Oil Conservation Commission ("OCC" or "Commission") granted Richardson Operating Company's ("Richardson") Infill Application. The decision allows Richardson to drill wells with spacing reduced from 320 acres to 160 acres in an area that is also leased for the development of the underground mine belonging to the San Juan Coal Company ("San Juan"). The Commission denied San Juan's Application for Rehearing on January 23, 2003, by taking no action on the Application.

2. On January 24, 2003, San Juan filed an application for a hearing and review by the Secretary of the Energy Minerals and Natural Resources Department ("EMNRD" or "Department") of Order Number R-11775-B issued by the Commission in Case Number 12734. The application was made pursuant to NMSA 1978, Section 70-2-26 (hereafter simply Section 70-2-26).

3. Section 70-2-26 gives the Secretary the discretion to hold a public hearing "to determine whether an order or decision issued by the commission contravenes the public interest". The hearing is de novo, following which the Secretary "shall enter such order or decision as may be required under the circumstances, having due regard for the conservation of the state's oil, gas and mineral resources, and the commission shall modify its own order or decision to comply therewith". (Quoting relevant portions of the Section).

4. Richardson Operating Company filed a response on January 27, 2003. A reply and surreply followed.

5. On January 29, 2003, Joanna Prukop, Secretary of EMNRD, issued an order setting a hearing on the Application for February 10, 2003, arranging for public notice, appointing Deputy Secretary Tom Mills as the hearing officer for the case and requiring him to prepare a summary of the evidence and file a recommended decision.

6. On January 30, 2003, Deputy Secretary Mills issued a Pre-Hearing Order addressing a number of issues including designating all of the record before the Commission as a part of the record in this case, filing and service requirements, discovery deadlines and hearing requirements.

7. Publication of the Notice of Special Hearing was made on February 2, 2003, in The Albuquerque Journal. The Notice included instructions for becoming a party to the case or otherwise providing comment on the matter.

8. The hearing commenced at 9 a.m. on February 10, 2003 at the offices of EMNRD in Santa Fe, New Mexico. The participating parties were San Juan Coal Company and Richardson Operating Company. Counsel represented each party. No other person or entity applied for party status, and there are no other parties. A court reporter recorded the witnesses' testimony. Exhibits were offered and accepted. Public comment was also provided.

9. The Secretary has jurisdiction over the subject matter and over the two parties to this proceeding. The parties had adequate notice of the hearing and the issues to be considered. The hearing was held within twenty days of the Commission's January 23, 2003 denial of rehearing as required by Section 70-2-26. At the commencement of the February 10, 2003 hearing both Richardson and San Juan stated they were prepared to proceed or did not object to proceeding.

10. The record before the Secretary in this matter includes the record before the Commission; the evidence, testimony and statements presented at the

February 10, 2003 hearing; the parties' pleadings and attachments thereto, and correspondence submitted to and from the Department in this proceeding.

11. Two motions by the parties were addressed at the beginning of the hearing. In the Application, San Juan Coal Company requested a stay of the Commission's Order. The Hearing Officer denied the stay stating the relief should be requested from the Commission. On February 3, 2003, Richardson filed a Motion for Clarification of the Secretary's January 29th Order. The hearing officer denied the motion stating the determination of the public interest was a material issue in the proceeding.

12. Counsel for San Juan orally moved that the Hearing Officer order the parties to mediate their dispute. Counsel for Richardson opposed the motion on the ground that Richardson believed mediation would be fruitless based upon prior discussions between the parties regarding the buy-out value of Richardson's leases. The Hearing Officer took San Juan's motion for mediation under advisement.

13. The hearing ended on February 10, 2003, and parties were given the opportunity to file Proposed Findings of Fact and Conclusions of Law. Each party did so on February 20, 2003.

14. The evidence from the record referred to and cited in the text of this Decision constitutes the summary of the evidence required by the Secretary's above-referenced Order of January 29, 2003.

Standard of Review

15. Section 70-2-26 requires that the hearing before the Secretary be a "de novo proceeding". New Mexico has a long history of de novo hearings that was traced in the recent case of State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824 (2003). The New Mexico Constitution provides district courts with appellate jurisdiction over cases originating in lower courts saying that the trial shall be de novo unless otherwise provided by law. N.M. Const. art. VI, Section 27. Under state law, appeals from lower courts to the district court, "shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law". NMSA 1978, Section 39-3-1 (1955). In other words, the district court conducts a new trial as if the trial in the lower court had not occurred. State v. Foster. See also the Supreme Court's decision in Southern Union Gas Company v. Taylor, 82 N.M. 670, 486 P.2d 606 (1971), which holds that the district court may enter a judgment as if the case originated in that court.

16. By de novo review, the Court of Appeals explained in Clayton v. Farmington City Council, 120 N.M. 448, 902 P.2d 1051 (1995), it means judicial review that at a minimum includes additional evidentiary presentation beyond what is presented below and allows the court more discretion in its judgment than simply reversing the decision and remanding the case. Many decisions have described a trial de novo as a trial anew in the sense that the reviewing court considers issues on its own and is not bound or even influenced by the lower court's actions.

17. Under the de novo standard of review the Secretary must make an independent assessment of the record, in contrast to a substantial evidence review. "We note that substantial evidence review is different; there, evidence is viewed in the light most favorable to the prevailing party and all inferences arising from the factual findings of a trial court are indulged in...(citations omitted)." Aken v. Plains Electric Generation & Transmission Cooperative, Inc., 132 N.M. 401, 49 P.3d 662 (2002). Review on a de novo basis means no formal deference is paid to the trial court [here, OCC] decision. Galbaldon v. Erisa Mortgage Company, 124 N.M. 296, 949 P.2d 1193 (Ct. App. 1997)

Motion to Compel Mediation

18. At the hearing of this matter, counsel for San Juan orally moved the Hearing Officer to order the parties into mediation. Counsel for Richardson opposed this motion on the grounds that the gulf between the parties' positions on the terms of a possible buy-out of Richardson's interests by San Juan would render mediation fruitless.

19, The Hearing Officer took San Juan's motion to order mediation under advisement.

20. Section 70-2-26 does not explicitly grant the Secretary authority to order mediation. The authority cited by San Juan in support of its motion is a case about rule making, not mediation. While the case does state, "[t]he authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative interest or policy.", the very next sentence says, "however, such an approach to construction does not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations". Public Service Company v. New Mexico Environmental Improvement Board, 89 N.M. 223, 227, 549 P.2d 638 (Ct. App. 1976). The case also has language reminding us that administrative bodies are creatures of statutes and have no common law or inherent powers.

21. Those state agencies that do employ mediation to resolve cases derive their authority to require mediation in their rules from a specific statutory

authority. See NMSA 1978, Section 52-5-4(B) pertaining to the Workers Compensation Administration.

22. In this case the Secretary is acting in a quasi-judicial role. Nevertheless, the authority of judges in New Mexico to establish mediation programs in matters such as domestic relations cases derives from a specific statutory grant of authority. See NMSA 1978, Section 40-12-5.

23. The Secretary has no specific legal authority to order the parties into mediation, and for this reason, it is recommended that San Juan's motion for mediation be denied.

Discussion of the Case, Findings of Fact and Conclusions

24. From this point forward, material is presented to summarize the evidence from the OCC hearing and the February 10, 2004 proceeding, to discuss the issues raised in the case and make recommendations to resolve those issues. The discussion starts with a summary of the OCC's findings regarding its jurisdiction and the Secretary's jurisdiction.

25. OCC's Order R-11775-B in Case Number 12734 (hereafter the "Infill Order") created a special infill area ("infill area") within the Basin-Fruitland Coal Gas Pool where two wells may be drilled on each 320 acre spacing unit. In reaching its decision the OCC specifically held as follows:

Paragraph 62. The Commission lacks jurisdiction to consider the waste of the coal resource;

Paragraph 64. On its face, Section 70-2-26 does not apply to the Commission; even if it did, waste of coal is not at issue because the Mine Safety and Health Administration's ("MSHA") rules require leaving protection pillars around wells; and

Paragraph 69. The Commission cannot legally base its decision on Richardson's asserted priority of rights under the terms of various oil and gas leases, federal coal leases and stipulations pursuant thereto because the issue, like the issue of title, is one for determination by the courts rather than the Commission.

26. Despite these holdings, the Commission considered many of the facts necessary to the Secretary's determination of public interest. For example, the Commission made findings in Paragraph 9 regarding the waste of gas by the coal mine ventilation system that would justify accelerated production, Paragraphs 11-18 and 22 regarding the wells' commercial viability, Paragraphs 33 and 34 discussing the lease language, Paragraph 35 discussing the appeal through the Bureau of Land Management process and Paragraph 63 discussing the lack of evidence to support a claim of injury to San Juan's property. The Commission made these findings

within its jurisdictional authority, but they are relevant to the Secretary's broader jurisdiction to determine the public interest with due regard for the conservation of the state's oil, gas and mineral resources. The Secretary's authority goes beyond the Commission's authority, though many of the factual issues are common to both the Secretary's and the Commission's jurisdiction.

27. The Secretary granted San Juan's request for a hearing as part of the de novo review of the OCC decision because the Commission did not specifically consider the public interest issues involved with due regard for the conservation of the state's oil, gas and mineral resources.

28. Eighty-five percent (85%) of the land in the infill area is federal land.

29. Richardson is a lessee of the oil and gas rights in a portion of the infill area but within the areas subject to dispute in this case.

30. Richardson argued that the OCC decision did not contravene the public interest, because the lease rights for oil and gas development have priority over San Juan's coal lease because they were granted earlier in time.

31. Richardson also argues that the OCC Order is necessary to avoid waste of the coalbed methane, because if mining takes place first, the methane will be released from the coal to provide the ventilation needed for mining safety.

32. San Juan owns two state and two federal leases as described on San Juan Coal Co. Exs. 2 through 5. San Juan's federal leases are known as the "Deep Lease" and the "Deep Lease Extension" (San Juan Coal Co. Exs. 2 and 3 respectively). It has two state coal leases with the State Land Office (San Juan Coal Co. Exs. 4 and 5). San Juan operates an active coal mine, the San Juan Underground Mine, on its four leases

33. The Bureau of Land Management ("BLM") is the federal agency responsible for the management of federally owned mineral interests in oil, gas and coal.

34. The Department, through the Oil Conservation Division, and upon review to the OCC and the Secretary, is the agency with jurisdiction over questions of well spacing generally, and specifically, whether the infill well application should be granted. The Department's jurisdiction in this regard extends to federal, state and fee lands.

35. The evidence established there are seventy-six (76) wells penetrating the Fruitland Coal in the infill area, including nineteen (19) fracture-stimulated coalbed methane wells Richardson operates.

36. The evidence established that there are substantial recoverable reserves of coalbed methane gas in the application area, and production from wells in the application area will be both economical and efficient.

37. Accelerating natural gas production from the Fruitland coal will prevent the waste of coalbed methane that will otherwise be destroyed when San Juan mines the coal.

38. The Commission order allows Richardson to drill two additional wells penetrating the Fruitland coal in the infill area and to recomplete thirteen (13) additional wells in this area. No new Richardson well under the contested Order will be drilled in a mine district on State of New Mexico lands pursuant to the Commission order.

39. San Juan plans to extract over 100 million tons of coal from its mine through the year 2017 under the current coal sales agreement with San Juan Generating Station (SJGS). Those coal sales will yield about $250 million dollars in royalty payments from the federal leases (based on the current royalty rate of 8%). One-half of this royalty is payable to the State of New Mexico under applicable federal statutes. See 30 U.S.C. Section 191.

40. San Juan argues the OCC decision contravenes the public interest on both economic and health and safety grounds. First, the coal it will be forced to bypass for safety reasons because of the wells will produce far more revenue to the State than will the gas wells, some of which may be uneconomical. Second, San Juan's expert witness, Dr. Steven L. Bessinger, Ph.D., testified at the February 10th hearing that water injected by hydraulic fracturing can effectively turn those formations into unstable mud in a short period of time, and he provided a demonstration of that at the same hearing. He also testified that the hydraulic fractures themselves could destabilize the mine roof and floor in the coal formation and the formations above and below it. The geologic formations at and immediately above the roof and at and immediately below the floor in the mine are unstable. They are brittle, consisting of water-soluble shales and mudstones. Dr. Bessinger testified that hydraulic fractures themselves could destabilize the mine roof and floor in the coal formation and the formations above and below it. These unstable conditions pose significant risks of roof and floor failure that could lead to serious consequences for workers and equipment, and could increase the potential for spontaneous combustion.

41. Dr. Bessinger testified that there is a risk of hydraulic fractures propagating in a horizontal direction because of the San Juan Underground Mine's relatively shallow depth. These fractures would pose a greater risk

to roof conditions than would vertical fractures of the type described in William P. Diamond's paper. (Richardson Ex. C-28).

42. The increased risk of roof failures from horizontal fractures increases health and safety risks to San Juan's employees and increases the risk of stranding San Juan's longwall mining system, a piece of equipment costing from 40 to 60 million dollars.

43. Use of water during hydraulic fracturing can be viewed as only a marginal additional hazard to the coal mining roof and floor stability, because most of the frac fluids are recovered immediately following fracturing. The coal also contains substantial amounts of water exceeding amounts introduced during a fracturing operation. (OCC ¶ 52)

44. San Juan suggests that any significant production interruptions could adversely affect SJGS' ability to produce electricity. The San Juan mine is the sole source of coal supply for the SJGS power plant, which produces much of the power used in New Mexico.

Public Interest Analysis – Utility Service

45. Testimony regarding the relationship between the San Juan mine and the SJGS was offered by San Juan's witness, Mr. Woomer (Record on Appeal, p. 307) and as public comment by Bill Real, Senior Vice President of Public Service Company of New Mexico ("PNM") (2-10 Tr., pp. 73-76). Mr. Real testified PNM is one of the SJGS owners and its operator. The power plant produces more than 50% of the electricity used by PNM's New Mexico customers and more than 40% of PNM's total generating capacity. The only economical supply of fuel to the power plant is from the San Juan mine, which is the sole fuel source. Any interruption in that fuel supply would create a significant and extreme hardship on PNM customers.

46. To be supportable, an administrative agency's action that affects a substantial right must be supported by some competent evidence. This is referred to as the Residuum Rule. Duke City Lumber v. New Mexico EIB, 101 N.M. 291, 681 P.2d 717, 721, *on remand* 102 N.M. 8, 690 P.2d 451, *cert. quashed* 101 N.M. 741, 688 P.2d 778 (1984). The substantial right apparently at issue with respect to the SJGS is PNM's right under its contract(s) with San Juan to receive fuel for the SJGS from the San Juan mine. It is substantial, because the mine is the only economical source of fuel and an interruption could conceivably cause a power outage to PNM's New Mexico customers. The question is, does the testimony in the record on this issue constitute competent evidence to support a finding by the Secretary that the Commission Order should be overturned, because the effect of Richardson's operations permitted under the Order will be to

interrupt the delivery of electric service to New Mexico rate payers, and this would contravene the public interest?

47. The Hearing Officer assumes, without deciding, that if the direct effect of a Commission order were to cause a power blackout to a substantial number of New Mexicans, the order would contravene the public interest. However, the Hearing Officer concludes that there is no competent evidence in the record to this effect.

48. San Juan failed to establish a cause and effect relationship between the limited additional operations Richardson will undertake under the Commission Order and the risk of an interruption in the delivery of electric power to New Mexico consumers. Considerable additional evidence would be required to do so. By way of illustration, the record is silent on the terms of the San Juan coal supply contract, on San Juan's options for supplying SJGS from its Navajo mine, on PNM's ability to purchase power from other sources in an emergency, on the costs of any of these alternatives and the effect on the public interest of incurring such costs, and not least, on PNM's independent legal obligation as a regulated utility to provide an uninterrupted supply of electricity to its customers. Courts have historically recognized public utilities operations as affected with a public interest. See Chas. Wolff Packing Co. v. Court of Industrial Relations of State, 262 U.S. 522, 534 (1923).

49. The Hearing Officer concludes that the Infill Order does not contravene the public interest with respect to its effect, if any, on the SJGS.

Public Interest Analysis – Waste of Coal

50. San Juan argued before the Commission that the Commission is required under the Oil and Gas Act, NMSA 1978, Chapter 70, Article 2 to consider the "waste" of the coal resource from its mine that will result from having to mine around Richardson's wells (Infill Order ¶ 61).

51. San Juan argues that NMSA 1978, Sections 70-2-2 and 70-2-11(A) prohibit waste and require the Commission to protect correlative rights, respectively. And that under NMSA 1978, Section 70-2-3 "waste" includes not only waste of oil and gas but also waste of other minerals.

52. The Commission concluded that the waste referred to in the Oil and Gas Act does not include coal (Infill Order ¶ 62).

53. NMSA 1978, Section 70-2-3 lists a number of items included in the definition of "waste" under the Oil and Gas Act. Despite the fact that coal is not mentioned, San Juan argues that it is included in the term "waste" because the start of the statute states, "[a]s used in this act, the term

'waste,' in addition to its ordinary meaning, shall include...". San Juan then argues that the "ordinary meaning" comes from the dictionary, which lists several definitions for waste, including defining it as a "disused part of a coal mine".

54. Next, San Juan cites Section 70-2-26 for the proposition that the Commission is obligated thereby to have due regard for the conservation of the state's oil, gas and mineral resources. The Commission concluded that this section does not apply to the Commission, because the standard cited by San Juan comes into play only upon an appeal to the Secretary. The Commission further concluded that conservation of San Juan's coal was not at issue owing to the MSHA mine safety regulations applicable to San Juan (Infill Order ¶ 64).

55. San Juan contends also that the Commission did not properly give effect to NMSA 1978, Section 70-2-12(B)(7) of the Oil and GasAct, because the Commission did not consider the possibility that Richardson's operations will threaten "injury to neighboring leases or properties". (Infill Order ¶ 63). In fact the Commission concluded the evidence did not support a finding that granting Richardson's application would harm San Juan's operations, and went on to suggest that the words "lease" and "property" in Section 70-2-12(B)(7) should have the meaning as understood in the oil and gas industry. (Infill Order, ¶ 64)

56. Well recognized rules of statutory interpretation and construction will be followed in this Recommended Decision. The "plain language" rule of statutory construction is the primary indication of legislative intent. Albuquerque v. Peoples Energy Resources, Inc., Opinion Number 2004-NMCA-084 (May 15, 2004), Bar Bulletin, July 29, 2004, Page 30. In construing the meaning of a particular statute [here, the Oil and Gas Act], the reviewing court [here, the Hearing Officer] must determine and give effect to the legislature's intent. Security Escrow Corporation and First Escrow, Inc. v. State of New Mexico Taxation and Revenue Department, 107 N.M. 540, 543, 760 P.2d 1306 (Ct.App.1988), citing State ex rel. Klineline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988)

57. In determining legislative intent the reviewing official or body must "look primarily to the language of the act and the meaning of the words, and when they are free from ambiguity, we will not resort to any other means of interpretation". Security Escrow, at 543, referencing, State v. Pitts, 103 N.M. 778, 714 P.2d 582 (1986); and New Mexico Beverage Co. v. Blything, 102 N.M. 533, 697 P.2d 952 (1985).

58. In construing an act, requirements that are not in it cannot be added. Nor can language be read into it which is not there. But, the act must be read in its entirety and each part must be construed in connection with every

other part to produce a harmonious whole. State ex rel. Klineline. In this matter the word "waste" is used frequently in the Act. To say that it includes the waste of coal or other mineral resources would create unreasonable results. Among other problems, it would burden the Oil Conservation Division ("OCD") with duties to regulate coal when the mining of coal is governed by a separate act, the Surface Mining Act, NMSA 1978, Chapter 69, Article 25A.

59. The Hearing Officer concludes that the term "waste" as used in the Oil and Gas Act ("Act") does not apply to mineral estates other than potash, which is specifically noted in the Act. The introductory language of NMSA 1978, Section 70-2-3, "[a]s used in this act the term "waste", in addition to its ordinary meaning, shall include...." cannot be parsed to include the waste of coal, notwithstanding the dictionary definition San Juan cites. First, the words "as used in this act" serve to define the context within which the ordinary meaning of waste is to be determined. If we were to accept San Juan's provision, it would render the references in the Act to protecting potash deposits surplusage. Such a result is highly disfavored under rules of statutory construction. Moreover, reading key provisions of the Act together supports this conclusion. Specifically, the provisions of NMSA 1978, Section 70-2-12 enumerating the powers of the Oil Conservation Division ("Division") to make rules, regulations and orders refer to the data and records the Division is required to develop and maintain. These include detailed information about ownership of oil and gas producing properties, leases, equipment and other facilities as well as determining the limits of any area containing commercial potash deposits and updating such limits. NMSA 1978, Section 70-2-12 (B)(8) and (16). Had the legislature intended to include all mineral estates within the definition of waste, it would have empowered the Division with the power and responsibility to collect the data necessary to apply the Act to mineral estates other than potash. Likewise, the power given to the Division by NMSA 1978, Section 70-2-12 (B)(17) to regulate and prohibit when necessary oil and gas drilling and production that would unduly reduce the recovery of commercial quantities of potash underscores the same point. Namely, that had the protection of other mineral estates from waste been intended under the Act, the Division would have been given the specific authority to prevent undue reductions in their recovery. This interpretation harmonizes the provisions of the Act, in contrast to San Juan's interpretation, which creates the surplusage noted above.

60. The Commission's Infill Order ¶ 63 contains dicta that the words "leases and properties" in NMSA 1978, Section 70-2-12 (B)(7) apply solely to neighboring oil and gas leases and properties, and that it is likely these terms have the meaning as understood in the oil and gas industry. San Juan argued that the requirement in (B)(7) that the Commission's permitting orders prevent injury from wells to neighboring leases or

properties means that the Commission should have considered the possibility that Richardson's operations would threaten such injury to its coal lease.

61. As noted in paragraphs 22 and 51 above, the Commission made careful findings of fact on issues ranging from waste, injury to leases and property, economics and safety. While correct in asserting its lack of jurisdiction in particular respects, the Commission's Order concluded that the evidence before it did not support a finding that granting Richardson's application would harm San Juan's operations. San Juan introduced evidence at the administrative appeal attempting to establish costly health and safety threats to its operation from Richardson's application. For the reasons stated below in the portion of the analysis of the public interest standard examining the relationship of MSHA to these claims of San Juan, the Hearing Officer concludes that the impacts of Richardson's application on San Juan's operations have been fully considered, and that the evidence does not support a finding that Richardson's application will harm San Juan's operations. That being the case, there is no need to reach the question whether the Commission failed to properly apply NMSA 1978, Section 70-2-12 (B)(7). The Hearing Officer observes, however, that the interpretation of the Act found in paragraph 58 above appears to be equally applicable to this issue.

62. The Commission held in ¶ 64 of the Infill Order that Section 70-2-26 does not permit it to consider conservation of the state's mineral resources, because on its face Section 70-2-26 does not apply to the Commission, but rather, pertains to secretarial review of a Commission order, and, quoting ¶ 64, "[t]hat section provides that *the Secretary* (emphasis in original) may enter such order as may be required under the circumstances in the 'public interest' and ...having due regard for the conservation of the state's oil, gas and mineral resources...".

63. The Hearing Officer concludes that the Commission was indeed correct in holding that Section 70-2-26 does not apply to the Commission. The Hearing Officer finds that such a conclusion is compelled by both the language of that section and the language of the Oil and Gas Act discussed above in paragraph 59 supporting the interpretation that the operation of the Act does not extend to protecting mineral resources other than those specifically named, such as potash, except for the language in Section 70-2-26 itself. By vesting the Secretary with the right to grant a de novo hearing to consider whether an order of the Commission is in the public interest and requiring the Secretary to give due regard to the conservation of the state's mineral resources, in addition to oil and gas resources, Section 70-2-26 draws a bright line between the Commission and the Secretary. This section recognizes that the Secretary is better positioned than the Commission to consider broad policy questions attending a

determination of what constitutes the public interest in relation to the effects of a Commission order when mineral resources, any and all mineral resources in fact, are affected.

Public Interest Analysis – Mine Safety Concerns

64. San Juan argues that the potential health and safety impacts from fracturing of the coal seam caused by Richardson's additional wells and the costs of mining around them are impacts severe enough to contravene the public interest within the meaning of Section 70-2-26, thereby justifying a reversal of the Commission's Infill Order.

65. The Commission noted that the MSHA and its regulations require the use of protection pillars or other measures to protect mine worker safety. Therefore, it concluded that the conflict in this case "is not between oil and gas producers and coal miners, but between San Juan's obligation to its workers under the Act and MSHA regulations and its plan of operations". Infill Order ¶ 64. See 30 USC Section 877.

66. The Federal Mine Safety and Health Act of 1977 imposes on coal mine operators the duty to locate oil and gas wells penetrating coal beds and to establish and maintain barriers around such wells. These barriers, or pillars of coal left unmined, shall not be less than three hundred feet in diameter (unless greater or lesser barriers are required or permitted by the Secretary of Labor). 30 USC Section 877(a).

67. The Hearing Officer takes administrative notice of 30 USC Section 801 (d) and (f) and Congressional findings and declaration of purpose. Subsection (d) states, "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated". Subsection (f) states, "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce".

68. The Hearing Officer takes administrative notice that under 30 USC Section 814 -- Citations and Orders -- a mine inspector has the authority to issue a withdrawal order to a mine operator requiring the removal from a mine area of all persons affected by a violation of any mandatory health or safety standards if the inspector also finds that the violation is also caused by a mine operator's unwarrantable failure to comply. 30 USC Section 814(d).

69. MSHA inspectors also have the authority to evacuate a coal mine if a condition presents an "imminent danger". "Imminent danger" means the

existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. 30 U.S.C. Section 802 (j). See also, Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App., 523 F.2d 25 (7th Cir. 1975) (upholding validity of withdrawal order where inspector found imminent danger, holding that "imminent danger" is not intended to apply only to situations involving immediate danger.)

70. Mr. Jacques F. Abrahamse testified for San Juan that in the first coal mining district, which is the one in which San Juan is currently mining, in the 100 panel area, LW-101, -102 and -103, all risks have been mitigated for gas wells in that area. He also testified that San Juan has not made any proposals to MSHA to change the diameter requirements for pillars around the gas wells within San Juan's lease areas and that if San Juan wanted to request a change the proper procedure would be to submit an amendment to San Juan's ventilation plan for MSHA review. Transcript, Volume II, Pages 392-94.

71. The Hearing Officer concludes that the public interest is served by providing safe working conditions for miners San Juan employs and that MSHA is the agency best qualified to make that determination. The Commission's Order does not interfere with the MSHA requirements and, therefore, does not conflict with the public interest in safe operations.

Public Interest Analysis – Lease Terms

72. Also as noted above, Richardson asserts that the public interest cannot be contravened by the Infill Order, because its gas leases have legal priority over San Juan's coal leases, the BLM policy is to favor development of both resources, which is in the public interest, and MSHA requirements that San Juan mine around gas wells are sufficient to address San Juan's health and safety arguments.

73. The Commission held that it lacked jurisdiction to make a determination about the priority of Richardson's rights under its oil and gas leases, because the Commission's function is not to determine title to or the validity of any oil and gas lease. Infill Order ¶ 69.

74. San Juan's Coal Lease with the BLM known as the "Deep Lease" was effective on April 1, 1980. Richardson Exhibit 2. On September 10, 1998, San Juan executed and submitted to the BLM a Protocol for the Mediation of Adverse Impacts on Oil and Gas Revenues ("Protocol"). Under this Protocol San Juan agreed that "[v]alid existing rights under federal oil and gas leases . . . will be honored". San Juan committed itself to take all reasonable steps to avoid adverse impacts on oil and gas

resource production, gathering and transportation facilities, including mining around existing well bores. Richardson Exhibit A-8.

75. San Juan's Coal Lease with the BLM known as the "Deep Lease Extension" was effective on March 1, 2001. Richardson Exhibit 3. Under Special Stipulations in Section 15 of this lease, San Juan agreed that this lease was "subject to all prior existing rights including the right of oil and gas lessees & other mineral lessees and surface users". San Juan also stipulated that it has sole responsibility "to clear the coal tract of any . . . pre-existing land uses that would impede or prevent coal mining on the tract".

76. By letter dated August 31, 2001, to the BLM's Farmington Field Office (FFO), San Juan protested the issuance of Applications for Permits to Drill (APDs) to Richardson Operating Company and Dugan Production Corporation in areas where San Juan has plans to mine. San Juan requested that the BLM put stipulations on the requested APDs to prohibit the operators from hydraulically fracturing the coal seam. San Juan asserted the following safety concerns: steel casing in the basal coal seam could adversely impact the continuous mining machines; hydraulic fracturing would adversely impact roof stability; and such fracturing would increase the risk of spontaneous combustion. Richardson Exhibit A-23.

77. The FFO by letter decision of September 20, 2001 denied the protest. The FFO found that San Juan's proposed conditions would render the oil and gas leases uneconomic, also stating "this would constitute an unfair burden on the oil and gas lessees who have priority rights in developing their associated mineral resource". The FFO further concluded that in light of the language of Special Stipulation 3 of its Deep Lease Extension (See ¶ 73, *supra.*), the requested conditions were unreasonable. Richardson Exhibit A-26.

78. On October 18, 2001, San Juan appealed the FFO decision to the BLM State Director. By letter decision of December 17, 2001 the State Director essentially upheld the FFO's decision, but remanded the matter for a further examination of an environmental assessment the FFO had performed.

79. The State Director's decision held that Richardson has a prior existing right to develop coal bed methane. The analysis also cited Section 15 of the Deep Lease Extension to support its conclusion that Richardson's oil and gas leases are valid existing rights and it is San Juan's sole responsibility to remove impediments to coal mining. In addition, the Decision also concluded with respect to priority that by signing the above-referenced Protocol as well as the Deep Lease Extension San Juan agreed

to recognize the valid existing oil and gas leases' senior stature. Richardson Exhibit A-27.

80. San Juan appealed the State Director's decision to the Interior Board of Land Appeals. That case was dismissed by Order of the Administrative Law Judge on August 27, 2002, pursuant to a Stipulated Motion for Dismissal filed by San Juan and the BLM. Paragraph 5 of the Motion states that the BLM approval of the four APDs at issue establishes no significant legal precedent "because, *inter alia*, future APDs must be adjudicated on their own facts and existing and future Field Office Managers and State Directors retain their management prerogatives to make their own decisions on APDs and other issues that may be presented in the future. Moreover, BLM and the Field Solicitor regard the issues presented and resolved by the State Director's decision as being unrelated to BLM's future decisions concerning the proper administration of competing coal and oil/gas leases. Accordingly, the policies which frame those decisions will not be constrained by the outcome or language of the State Director's decision." Richardson Exhibit No. 7 filed in De Novo proceeding.

81. Richardson's oil and gas leases pre-date San Juan's coal leases. Infill Order ¶ 30.

82. The Hearing Officer finds that compliance by San Juan with 30 USC Section 877(a) constitutes a means of avoiding adverse impacts on oil and gas resource production and of clearing its coal tract of any pre-existing oil and gas land use that would impede or prevent coal mining on its coal leasehold within the meaning of the Protocol and Section 15 of it Deep Lease Extension, respectively.

83. The Hearing Officer concludes that Richardson's rights under its oil and gas leases include the right to apply to the Commission for the Infill Order issued in this case.

Public Interest Analysis – Contractual Benefits

84. In deciding whether the Infill Order contravenes the public interest within the meaning of Section 70-2-26, this decision does not attempt to define what the public interest is in all circumstances. To attempt that would be beyond this decision's scope. What this analysis does do, however, is look to case law the Hearing Officer believes is relevant to the evidence in the record in this case, because it furnishes a framework for deciding whether the public interest has been contravened. In particular, the Hearing Officer concludes that the application of New Mexico's strong public policy favoring the enforcement of valid contracts to the facts of this case is determinative of this inquiry.

85. Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910), involved a decision of the territorial engineer approving one of two competing permit applications to appropriate waters of the territory for an irrigation project. The territorial engineer was empowered by statute to reject an application to appropriate waters of the state "if in his opinion the approval thereof would be contrary to the public interest...". In rejecting the Hinderlider application in favor of the Young & Norton application, the engineer based his decision on the fact that there wasn't enough water to irrigate the approximately 14,000 acres contemplated by the Hinderlider application, while there was enough to irrigate the roughly 5000 acres of the Young & Norton application, and the Hinderlider project would result in a higher price of water for users. Therefore, approval of the Hinderlider application would be contrary to the public interest. The Board of Water Commissioners for the Territory reversed this decision and the District Court upheld. The Supreme Court discussed the public interest standard, set aside the District Court judgment and remanded the case to the District Court to obtain additional facts bearing on the question of public interest. In its discussion the Supreme Court clearly stated that matters that are contrary to the public interest are not limited only to cases in which a project would be a menace to the public health or safety. Nor is the public interest necessarily contravened by a project that would cost irrigators more per acre than a competing proposal. The Court made it clear that determining the public interest includes assessing the interplay of a variety of factors and their effects, including not only public health and safety and project cost to consumers, but also a project's economic viability, lest approval of a financially unsound project lead to injurious speculation and harm to the developing Territory's capital markets. Id. at 677, 678.

86. The Hearing Officer reads Hinderlider to mean that determining the public interest necessarily involves balancing competing interests, such as public health and safety and economic impacts to the parties and third parties, but in doing so, a decision maker must consider the implications of his decision on important public policies that could be directly affected.

87. New Mexico's courts have repeatedly recognized that upholding and enforcing valid contracts serve the public interest. In Coquina Oil Corp. v. Transwestern Pipeline Company, 825 F.2d 1461 (10th Cir. 1987), the U.S. District Court for the District of New Mexico granted plaintiffs' motion for a preliminary injunction enjoining defendant from not taking amounts of gas produced monthly by plaintiffs required to be taken under their contracts with defendant. Defendant opposed the motion for preliminary injunction on multiple grounds, including asserting that orders of the Federal Energy Regulatory Commission (FERC) had so reduced its market for natural gas sales as to constitute force majeure under the contracts with plaintiffs, thereby excusing defendant's performance to take

plaintiffs' gas at contract prices. One of defendant's other defenses was that injunctive relief would be contrary to the public interest because down stream customers would have to pay more for natural gas, defendant would purchase less from small independent producers and reduced sales would jeopardize defendant's business.

88. The court rejected defendant's force majeure defense, in part because the defendant was still able to perform under its contracts. Noting that force majeure only excuses a party if performance of the contract is not practicable, the court found that performance was practicable, because, while defendant might be excused from taking plaintiffs' gas, it had the alternative and ability to pay for the gas whether it took it or not. Noting that "[c]ourts rarely discharge a duty on the ground of mere loss of revenue; the proper focus in assessing impracticability is defendant's general financial health, not the losses resulting from a particular contract". [citations omitted] Id. at 6. There was evidence in the record that defendant earned substantial income despite the FERC orders. Moreover, the court found that the FERC orders did not constitute a supervening event excusing defendant's performance. That is, the FERC orders were not an unanticipated circumstance that made performance of defendant's contract obligations vitally different from what the parties should reasonably have contemplated when they entered into the contract. The court held that the FERC orders were foreseeable and that the defendant could have covered that contingency in the contract. Accordingly, the defendant was held to have assumed the risk represented by the FERC orders' effects.

89. In rejecting the defendant's argument that a preliminary injunction would contravene the public interest, the court said, "[w]hile I am concerned about harm to small independent producers, focusing on the public interest means considering whether there are policy considerations that bear on whether the order should issue. [citations omitted] Thus, enforcing plaintiffs' contracts serves the public interest even though it may harm independent producers who have voluntarily rolled back their contract prices." Id. at 8. In this case, the effect of not denying Richardson's applications by upholding the Infill Order is to require San Juan to fulfill its contractual obligations and to protect Richardson's rights as an intended beneficiary under the Protocol and Section 15 of the Deep Lease Extension.

90. New Mexico recognizes the well established rule that a third party may sue and recover upon a valid contract in which he has a beneficial interest, even if he is not explicitly designated as a beneficiary therein. Hamill v. Maryland Cas. Co., 209 F.2d 338, 340 (10th Cir. 1954). The intent of the contracting parties to benefit a third person is controlling. Intent is gathered from a construction of the contract in light of the surrounding

circumstances. Id. The New Mexico Supreme Court has held that the issue of determining whether legal liability to a third party beneficiary exists is one of contract. Permian Basin Inv. Corp. v. Lloyd, 63 N.M. 1, 7, 312 P.2d 533 (1957). The court recognized the impossibility of encompassing all third party situations in a single statement, but affirmatively approved the following statement from Corbin on Contracts, Vol. 4, 776, pp. 18, 19:

> A third party who is not a promisee and who gave no consideration has an enforceable right by reason of a contract made by two others . . .if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract. Id.

And, a member of a class intended to be benefited by a contractual obligation has standing to maintain a suit. Id. at 6. The court then contrasted the principle upon which third persons are denied recovery: . . "[t]he promisor should not be held liable in damages for breach of his contract with the promisee by one whose detriment by its nonperformance could not reasonably been forseen by the promisor and by one whose existence (whether specific or general) and interest in the contracted-for performance (whether contingent or direct) was not within the reasonable contemplation of the promisor when the promise was made". Id. at 7, 8.

91. Under these rules, Richardson is an intended beneficiary of the Protocol and Section 15 of the Deep Lease Extension, because (a) Richardson is within the class of oil and gas lessees to whose prior rights the Deep Lease Extension is subject; (b) Richardson's leases predate San Juan's lease; (c) San Juan's promise in the Protocol to honor the rights of valid oil and gas leases is for the pecuniary benefit of the class of which Richardson is a part; (d) such assurances were a motivating cause for the BLM to enter into the lease with San Juan, to maximize the development of both the gas and coal resources; and (e) the detriment to oil and gas lessees from San Juan's non-performance is entirely foreseeable.

92. Likewise, New Mexico courts in other contexts have upheld the right of private parties to be secure in the knowledge that their contracts will be enforced. For example, in Cafeteria Operators, L.P. v. Coronado-Santa Fe Associates, L.P. and A.P. Century II, 124 N.M. 440, 952 P.2d 435 (Ct. App. 1997) the appellate court upheld the district court's decision granting a mandatory injunction requiring the defendant landlord to demolish a building on its shopping center site that it had constructed and then leased in violation of its configuration agreement with plaintiff tenant. This breach was held to be intentional, which weighed in tenant's favor. Interestingly, the appellate court stated, "[w]e recognize that it may appear

wasteful to require demolition of the building when its benefit to Landlord and others may greatly exceed its detriment to Tenant. But nothing forbids Landlord from negotiating with Tenant to waive its right to compel removal of the building". Id. at 448.

93. In Bowen v. Carlsbad Ins. & Real Estate, Inc., 104 N.M. 514, 724 P.2d 223 (1986) the Supreme Court upheld the trial court's judgment that a restrictive covenant (a non-competition clause) in a business purchase and sale agreement was reasonable and enforceable. The court held that the restrictive covenant was not void as a restraint of trade and quoted Meissel v. Finley, 198 Va. 577, 584; 95 S.E. 2d 186, 191 (1956) as follows, "[i]t is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones". The court also cited Lovelace Clinic v. Murphy, 76 N.M. 645, 650; 417 P.2d 450, 453 (1966) in support of its holding "(public interest in enforcing contractual rights and obligations)". Id. at 517.

94. With respect to the health and safety concerns cited by San Juan, the Hearing Officer concludes that San Juan's duty to comply with the Federal Mine Safety and Health Act is *per se* in the public interest, and that actual compliance with the Act by San Juan will suffice to protect mine worker health and safety from the adverse impacts of oil and gas wells San Juan asserts. For as discussed above, the Federal Mine Safety and Health Act's mandatory requirements represent national policy which balances the economic interests of mine operators with the health and safety of mine workers in order to promote the public interest. Therefore, when San Juan entered into the Deep Lease, the Protocol and the Deep Lease Extension it knew it was and would be subject to the Federal Mine Safety and Health Act's provisions, both those empowering inspectors to evacuate a mine to avoid imminent danger as well as those provisions authorizing San Juan to request a modification in the diameter of pillars around well bores. The costs of complying with mine safety regulations are a cost of doing business. San Juan could also reasonably have anticipated when it signed its coal leases and the Protocol that a lessee under a pre-existing oil and gas lease would at some point request infill wells that would increase San Juan's cost of complying with safety rules.

95. The Hearing Officer concludes that there is competent evidence in the record by which the Commission could have found that the protections of the Protocol and of Section 15 of the Deep Lease Extension apply to Richardson's oil and gas leases, and the Hearing Officer hereby does so find. Specifically, by executing the Protocol and subsequently agreeing to the terms of Section 15, knowing that Richardson's leases predated either document, San Juan itself recognized the oil and gas leases' priority. This evidence supports both the Commission's Infill Order and the

Commission's conclusion that it lacks jurisdiction to adjudicate *sua sponte* the validity, force and effect of Richardson's oil and gas leases.

96. The Hearing Officer concludes that the effect of the Protocol San Juan signed was to acknowledge as a matter of law that Richardson's oil and gas leases were valid existing federal oil and gas rights that San Juan would have to honor, because Richardson's leases pre-dated the Protocol as a matter of record.

97. The Hearing Officer concludes that San Juan's obligations under the Protocol and Section 15 of the Deep Lease Extension (See Recommended Decision ¶s 67 and 68 above) extend to Richardson's oil and gas leases and to Richardson's rights to seek an infill order for development of the leases. Consequently, the Infill Order will not result in the mineral's waste.

98. In light of San Juan's obligations to Richardson, San Juan's legal arguments in this case, in effect, take the position that the public interest standard of Section 70-2-26 vests the Commission and the Secretary with the power to excuse San Juan from its contractual obligations. The Hearing Officer finds that such authority is in the nature of, and for purposes of this analysis may be equated with a court's equitable powers. However, under the Coquina analysis discussed above and the reasoning in the United Properties Limited case cited and discussed below, San Juan cannot meet the specific legal tests necessary to establish its right to such equitable relief in light of New Mexico's extremely strong public policy of enforcing valid contracts. Nothing in the record, for example, supports a finding that the Protocol and the terms of Section 15 fall within one of the well-defined equitable exceptions to freedom of contract, such as unconscionability, mistake, fraud or illegality. Nor is there evidence in the record that San Juan cannot perform its contract obligations, or that its general financial health is at risk from the Infill Order's effects. These conclusions are strongly reinforced by the decision of the New Mexico Court of Appeals in United Properties Limited Co. v. Walgreen Properties Inc., 2003 NMCA-180, 134 N.M. 725, 82 P.3rd 535 (2003).

99. In the United Properties Limited (hereafter "UPL") case, the issue was whether a tenant and sub-tenants ("Tenant") under a commercial lease were entitled to equitable relief from the Tenant's failure to properly give notice to the Landlord of its intent to exercise its option to renew the lease for an additional five year period. Tenant had made two million dollars in improvements to the leased property after assuming the lease. The District Court granted the equitable relief the Tenant requested. The Court of Appeals reversed the District Court and held that the lease's notice provisions must be enforced as they were written, because the notice was

quite late measured against the notice period provided for and simple neglect caused the late notice.

100. The Court of Appeals acknowledged a split of legal authority on the question whether equity will or will not relieve a lessee of the consequences of his failure to give timely notice of his exercise of an option to renew or extend a lease. However, in setting forth the rationale for its decision the court noted that it "wholeheartedly" agreed with the court's conclusions in the case of SDG Macerich Props., L.P. v. Stanek, Incorporated a/ka/ Stanek, Inc., 648 N.W. 2d 581 (Iowa 2002). The UPL court stated that it would not use equitable principles to save a party from the circumstances it created and that weighing the equities in each case where the parties bargained freely to their contract would create instability in business transactions and disregard commercial realities. Enforcing the written words of unambiguous contracts afford the greatest certainty that the intention of contracting parties will be realized and that compliance with the performance terms of contracts will occur. And finally, a court of equity is bound by a contract as the parties have made it and should be a last resort, not a first resort, to afford relief only where there is obvious fraud, real hardship, oppression, mistake or unconscionable results. Id. at p. 17. And, earlier in its decision, the UPL court noted that under the governing principles of New Mexico contract law, in the absence of mistake, fraud or illegality, a contract negotiated at arm's length is not voidable on grounds of unconscionability or oppression simply because some of its terms resulted in a hard bargain or exposed a party to substantial risk. Id. at p. 13.

101. The Hearing Officer concludes that the Infill Order is consistent with Richardson's rights as an intended beneficiary under the Protocol and Deep Lease Extension San Juan agreed to with the BLM, and that overturning the Infill Order based upon San Juan's economic impact arguments would in fact contravene the public interest in enforcing valid contracts, as discussed in detail above. Applying another prong of the Coquina analysis to the facts of this case shows that there is no evidence in the record that San Juan will be rendered incapable of complying with the MSHA regulations, despite a potentially higher cost of doing so. Nor is the Infill Order a supervening event that will excuse San Juan from its obligations under the Protocol and Section 15 of the Deep Lease Extension. It is rather an action of which San Juan assumed the risk when it executed those agreements. Finally, conceding that there may be some economic harm to the state from reduced tax revenues, or to San Juan from increased costs, the public interest is better served under these facts by denying San Juan's application to set aside the Infill Order.

102. The Hearing Officer concludes that the Infill Order does not contravene the public interest pursuant to Section 70-2-26.

103. The Hearing Officer notes that the Commission also finds support for its Infill Order in the above-cited State Director's Decision. The Hearing Officer concludes that, notwithstanding the Stipulated Dismissal of San Juan's appeal to the Interior Board of Land Appeals, the State Director's Decision remains a valid expression of how the BLM has interpreted the effects of the Protocol and the Deep Lease Extension Section 15. This Decision, then, is entitled to deference by the Commission, especially in light of the fact that the parties, issues and documents involved are essentially the same in both the OCC proceeding and San Juan's BLM appeals. The Hearing Officer reads the Stipulated Dismissal to mean that the BLM has the right to reach a different result in a future case, not that the State Director's Decision is not a valid agency interpretation of its policies in light of its approvals of both Richardson's APDs and its contracts with San Juan. There is no evidence in the record to suggest that that interpretation has been superceded or overruled. The language of the Stipulated Dismissal in fact recognizes that it may be given limited precedential value, not that it has no value. Therefore, the Commission could have taken administrative notice of and given deference to the State Director's Decision for purposes of characterizing the validity of Richardson's oil and gas leases and the duties San Juan owes to Richardson under the Protocol and Deep Lease Extension. The State Director's Decision constitutes additional competent evidence that supports the Infill Order.

104. Because there is competent evidence in the record to support the Infill Order, and because the Infill Order does not contravene the public interest for the reasons discussed, the Infill Order of the Commission should not be set aside.

San Juan's Request to Strike Portions of Infill Order ¶'s 75 and 76

105. San Juan suggests striking the Commission's comments in paragraphs 75 and 76 of its Infill Order about the parties' motivations and the consequences of the parties' actions, which San Juan considers beyond the evidence in the record and thus unsupported and beyond the Commission's jurisdiction.

106. The Hearing Officer declines to recommend striking these paragraphs in whole or in part. These are not findings of fact, but are the Commission's conclusions, though not necessary to the decision. Formal decisions almost always contain a certain amount of dicta or statements for which there is room for disagreement.

IT IS THEREFORE RECOMMENDED THAT THE FOLLOWING ORDER BE ENTERED :

1. Oil Conservation Commission Order No. R-11775-B does not contravene the public interest pursuant to NMSA 1978, Section 70-2-26. Paragraphs 1 through 7 of the actual Order shall be and hereby are affirmed.

2. San Juan's motion for mediation is hereby denied.

3. All other motions not granted in the context of the Recommended Decision are hereby denied.

RESPECTFULLY SUBMITTED at Santa Fe, New Mexico on this 30th day of September, 2004.

HEARING OFFICER

Tom Mills

Tom Mills, Deputy Secretary
Energy, Minerals and Natural Resources Department