IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs. No. 24,311

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

ANSWER BRIEF OF THE NEW MEXICO OIL CONSERVATION COMMISSION

Respondent-Appellee

Civil Appeal from the District Court for the Fifth Judicial District
Eddy County
The Honorable Jay W. Forbes, District Judge

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As to the second issue, whether the OCC should have approved a tertiary recovery, Premier fails to cite to the record for any of its statements of alleged facts. There is no requirement in statute or rule that a secondary recovery must be completed before the OCC can approve a tertiary recovery. The OCC order contains its standard statement at the end of the order: "Jurisdiction of this cause is retained for entry of such further orders as the Commission may deem necessary." (R.P. 83) In this manner any unanticipated development, new technological advance or scientific advancement can be taken into consideration by the OCC at a later date. Again, there is substantial evidence in the record to support the OCC's approval of the tertiary recovery project.

Premier's last three points all relate to the participation formula adopted by the OCC and the inclusion of Premier's Tract 6 in the waterflood project. There is substantial evidence in the

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

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Oil Conservation Division

APPLICATION OF PREMIER OIL & GAS, INC. TO HAVE THE DIVISION ORDER EXXON COMPANY ,U.S.A. TO APPEAR AND SHOW CAUSE WHY ITS AVALON (DELAWARE) UNIT OPERATING AGREEMENT SHOULD NOT BE AMENDED TO CONFORM TO THE REQUIREMENTS OF THE STATUTORY UNITIZATION ACT, EDDY COUNTY, NEW MEXICO.

CASE NO. 11838

YATES PETROLEUM CORPORATION'S MOTION TO DISMISS

Yates Petroleum Corporation, ("Yates") hereby moves the Division for an Order dismissing with prejudice the application of Premier Oil & Gas, Inc.("Premier") in the above referenced case and in support of its motion states:

1. Yates is a working interest owner in the Avalon Delaware Unit which is operated by Exxon Company U.S.A. ("Exxon"), and which was approved by the Oil Conservation Commission by Order No. R-10460-B.

2. Yates supported Exxon's application for statutory unitization of the Avalon Delaware Unit Area, and presented testimony in support of that application at the hearings before the Oil Conservation Division and the Oil Conservation Commission.

3. At these hearings, Exxon reviewed the proposed Avalon Delaware Unit and presented as its Exhibit 3 the Unit Operating Agreement. Attached to the Unit Operating Agreement as Exhibit "H" was a list of the wellbores which qualified thereunder as Unit wells. Finding 20 of Order No. R- 10460 incorporated the Unit Operating Agreement by reference into the approval Orders.

Commission review of these issues conflicts with the express provisions of the Oil and Gas Act.

The Oil Conservation Division and Commission are creatures of statute whose powers are expressly defined and limited by the Oil and Gas Act. ***Continental Oil Co. v. Oil Conservation Comm'n***. 70 N.M. 310, 373 P.2d 809 (1962). The Act contains specific provisions which prescribe limited circumstances under which Division and Commission decisions may be reviewed.

The Act provides for *de novo* review of Division orders by the Commission on the application of an adversely affected party of record. NMSA 1978, § 70-2-13. Likewise, the Act provides for the rehearing of a Commission decision if a party of record files an application for rehearing within 20 days of the date of the order and the Commission grants the application within 10 days. NMSA 1978, § 70-2-25. This is the only provision in the Act which authorizes a rehearing on any matter decided by the Commission.

In this case, Premier has had the original approval Order reviewed as authorized by statute. It sought and received *de novo* review by the Commission and filed an application for rehearing which was denied. The Division can only reopen a case to consider an new issue within its jurisdiction that was not decided in the original hearing.[1] Upon denial of Premier's application for rehearing, the Commission's Order thereupon became final and may not be now reopened by the Commission, much less the Division.

The question raised by Premier concerning the Unit qualification of the FV-1 Well is not based on new facts nor is it a matter that was reserved for later decision. All data it needed to raise the issue was available to Premier before the 1995 Division Examiner hearing and before the 1996 Commission hearing. Premier simply failed to timely raise this argument. It may not raise this issue now. Furthermore, this issue was not reserved for later decision because the Commission not only approved the Unit plan, it also adopted the

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[1] As the court stated in ***Trigg v. Industrial Commission***, 5 N.E. 394 (Ill. 1936):

"...There is marked difference in reserving for future decision a matter which has not been determined but remains open for future adjudication, and a general order purporting to reserve jurisdiction over a cause when an order has been entered covering and adjudicating all matters in issue. In this first instance the undetermined matters may be adjudicated at a later time. In the second instance there is no power to relitigate or review the matters already decided by the order nor later to vacate or modify such order."

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

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

APPLICATION OF PREMIER OIL & GAS, INC.
TO HAVE THE DIVISION ORDER EXXON
COMPANY USA TO APPEAR AND SHOW
CAUSE WHY PREMIER'S FV-1 WELL
SHOULD NOT BE INCLUDED IN
THE AVALON DELAWARE UNIT,
EDDY COUNTY, NEW MEXICO.

CASE NO. 11838
Order No. R-10906

BRIEF OF EXXON CORPORATION
AND YATES PETROLEUM CORPORATION
IN SUPPORT OF THEIR MOTION TO DISMISS
THE FIRST AMENDED APPLICATION OF PREMIER OIL & GAS, INC.

COMES NOW EXXON CORPORATION ("Exxon") by its attorney, James Bruce and YATES PETROLEUM CORPORATION ("Yates") by its attorneys, Campbell, Carr, Berge & Sheridan, P.A. and hereby submits their Brief in Support of their Motion to Dismiss the First Amended Application of Premier Oil & Gas, Inc.

BACKGROUND FACTS:

(1) On March 12, 1996, the Oil Conservation Commission by Order No. R-10460-B (Case 11298) granted the Application of Exxon pursuant to the New Mexico Statutory Unitization Act for approval of the Avalon Delaware Unit, located in Eddy County, New

for Rehearing. NMSA 1978, Section 70-2-25.

Now, twenty months after the Commission approved Statutory Unitization of the Avalon Delaware Unit, and after Premier has appealed the Commission's unitization order to through the Courts, Premier wants to start over. It raises a new issue. Premier claims that Order No. R-10460-B is unfair since it did not include the Premier FV1 wellbore as a unit well. To correct this matter, it contends a supplemental order must be entered requiring Exxon to include this well in the Unit. Premier did not raise the issue of the FV1 well in its Application for Rehearing and, as to this issue, it has failed to exhaust its administrative remedies and has waived its right to have that issue reviewed by the Commission.

The exhaustion doctrine may be asserted when a person has failed to go before an agency for relief at all or, as here, when the person has participated in an agency proceeding but has failed to pursue an issue that it wishes to raise on appeal. *See* ***Ruyle v. Continental Oil Co.***, 44 F.3d 837 (10th Cir. 1994); ***Fransen v. Conoco, Inc.***, 64 F.3d 1481 (10th Cir. 1995). When, as here, a party fails to exhaust its administrative remedy as to any issue, it may not raise the issue with a new application.

The issue raised by this Motion to Dismiss is simple. Exxon properly applied for and obtained Division approval to statutorily unitize the Avalon Delaware Unit after notice and hearing. Premier participated in the hearing and appealed the resulting order. Premier chose not to raise the issue of the exclusion from the unit of the FV1 Well in its Application for Rehearing, and it may not now come before the Commission and challenge the propriety of