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

Mexico. Yates is a working interest owner in the Unit Area and participated in the working interest owner meetings and negotiations that resulted in the unit plan. Yates appeared in Case 11298 and presented evidence and testimony in support of unitization.

(2) With Order No. R-10460-B the Commission approved the Avalon Delaware Unit as proposed by Exxon and, pursuant to the Statutory Unitization Act, found that:

> " (27) The Avalon (Delaware) Unit Agreement and the Avalon (Delaware) Unit Operating Agreement provide for unitization and unit operation of the Avalon (Delaware) Unit Area upon terms and conditions that are **fair, reasonable and equitable,** and include;
>
> (a) a participation formula which will result in **fair, reasonable and equitable** allocation to the separately owned tracts of the Unit Area of all oil and gas that is produced from the Unit Area and which is saved, being the production that is (i) not used in the conduct of unit operations, or (ii) unavoidably lost:
>
> (b) **a provision for the credits** and charges **to be made in the adjustment among the owners in the Unit Area for their respective investments in wells**, tanks, pumps, machinery, materials and equipment contributed to unit operations;...."

(3) Although Order No. R-10460-B repeatedly referenced The Premier FV3 Well, it was silent on Premier's FV1 Well.

(4) The Unit became effective when Order No. R-10460-B was properly ratified by the interest owners in the Avalon Delaware Unit Area as required by the Statutory Unitization Act.

(5) Premier filed its Application for Rehearing of Order No. R-10460-B as

provided in the Oil and Gas Act [NMSA 1978, Sec. 70-2-25]. The Commission did not act on this application within ten days and it was thereby denied.

(6) Premier appealed this order to the District Court of Eddy County, New Mexico where it was affirmed. Next, Premier appealed the case to the Supreme Court of New Mexico. The case has been briefed and argued to the Court and is now awaiting decision.

(7) In July 1997, Premier filed its Application seeking a Commission order requiring the inclusion of the Premier FV1 Well as a unit well. The Division dismissed this application.

(8) With its Amended Application, Premier now brings this issue to the Commission.

ARGUMENT:

I.
PREMIER FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES AND HAS WAIVED ITS RIGHT TO CHALLENGE THE EXCLUSION OF THE FV-1 WELL

The Oil and Gas Act ("the Act") contains specific provisions which govern appeals of Commission orders. This statute provides that an Application for Rehearing may be filed within twenty days of the entry of a Commission order and that this application must set forth the respects in which the petitioner believes the order to be erroneous. The Act specifically limits the issues that can be reviewed on appeal to those raised in the Application

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

the Commission's findings and mandates in Order No. R-10460-A.

II.
THE COMMISSION LACKS AUTHORITY TO RECONSIDER THE FAIRNESS OF THE AVALON DELAWARE UNIT

Premier's Amended Application is nothing more than a challenge to Order No. R-10460-B. Contrary to the findings in this order, it contends that unless its FV1 Well is included as a unit well, this order is not "fair, reasonable, and equitable" and does not protect the rights of Premier. See, Premier's First Amended Application at paragraph (7).

The Oil Conservation Commission has no authority to reopen this matter and reconsider this issue. Under New Mexico law, no state administrative agency has any inherent or implied authority to reopen, reconsider or reexamine a final administrative decision and order. **Armijo v. Save 'N Gain**, 771 P.2d 989, 994 (N.M. Ct. App. 1989). Our Court has instructed that, "the power of any administrative agency to reconsider its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power." **Id.** (citations omitted).

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. This is the only circumstance where the Division or Commission may reopen and reconsider issues already addressed and decided by a prior order.[1]

Following rehearing, or the denial thereof, orders of the Commission become final. Thereafter, the Commission lacks authority to reopen or reconsider an order. ***See Armijo***, 108 N.M. at 286, 771 P.2d at 994. Final agency orders may only be reviewed by the courts.[2] *See* NMSA 1978, § 70-2-25.

Thus, the Division's authority to reconsider, reexamine or rehear any matter covered by its Order No. R- 10460-B is governed by the statutory provisions which authorize

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The Division can reopen a case to consider a new issue within its jurisdiction that was not decided in the original hearing. As the court stated in ***Trigg v. Industrial Commission***, 5 NE2d 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."

2

The Texas Courts have recognized that the Railroad Commission lacks inherent or implied power to reopen and reconsider a final Commission decision. **Sexton v. Mount Olivet Cemetery Ass'n**, 720 S.W.2d 129, 137 (Tex. App. 1986).

Applications for Rehearing. *See* N.M. Stat. Ann. Sec 70-2-25 (1978) (1995 Repl. Pamp.). And under Section 70-2-25, the time for filing any Application for Rehearing respecting Order No. R-10460-B ran out long, long ago and the order about which Premier complains became final. **Id.** As a matter of law, the Division cannot now, many months after the fact, rehear, reconsider or reexamine Exxon's application for statutory unitization, the fairness of the unit without the FV1 Well, or any evidence presented at the original unitization hearings. **Railroad Commission of Texas v. McKnight**, 619 S.W. 2d 255, 260 (Tex. App. 1981) (the Commission is without power to set aside administratively a final order after a fourteen year period).

III.
PREMIER'S APPLICATION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON A FINAL ORDER OF THE COMMISSION

A claim that challenges directly or indirectly an order or regulation of the conservation agency other than that specified by statute is a collateral attack on the agency's order or regulation. Collateral attacks on agency orders cannot be maintained. This is true whether the collateral attack is before a court or before the agency. "Just as parties cannot collaterally attack an order of an agency in a judicial proceeding that is not a proper review of the order so too must an agency refrain from setting aside an order without a basis founded in changed conditions or changed knowledge of conditions. Otherwise, the agency would be collaterally attacking its own order or acting arbitrarily." 1B. Kramer & P. Martin, *Pooling and Unitization*, §14.02 (1989, 1996). ***Leede Oil & Gas, Inc. v. Corporation Commission***,

747 P.2d 294 (Okla. 1987). The prohibition against collateral attacks, the exhaustion doctrine, and the doctrine of collateral estoppel are related to and are like the judicial doctrine of *res judicata* in that they are concerned with prevention of litigation of an issue already judicially decided and with requiring parties to raise their claims in a timely fashion. *See* ***International Paper Co. v. Farrar***, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985).

In this case, Premier seeks the re-examination of fairness of the Avalon Unit Plan -- a matter presented to the Commission many months ago. Commission review of this matter would now conflict with the express provisions of the Oil and Gas Act.

IV.
THE COMMISSION'S ASSERTION OF CONTINUING JURISDICTION OVER A CASE BEFORE IT DOES NOT PERMIT RECONSIDERATION OF AN ORDER ONCE IT HAS BECOME FINAL

The Division's retention of continuing jurisdiction of the case and the subject matter thereof is not effective as to the issues decided in this case. Any express reservations in administrative orders which assert power to reopen a proceeding or modify an order have generally been held not to confer such power upon the agency where it does not exist in the absence of such a reservation. E.H. Schopler, Annotation, *Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority*, 73 ALR2d 939, 954 (1960). The New Mexico Oil Conservation Division and Commission were created by the legislature for the purpose of administering the Oil and Gas Act. They can only make orders as are within the powers conferred on them. Nothing in this statutory

scheme authorizes the Commission or Division to reopen final orders and reconsider the issues decided therein. This limitation on agency review of issues it has determined by final order is essential for without it there would be no place in this administrative process where it would be definitely known that the agency review had ended. *See* Schopler, 73 A.L.R. 2d at 954.

The Oil Conservation Division is not authorized by the Oil and Gas Act to reconsider the issues previously determined in a final Division order. Absent this authorization from the legislature, it lacks power to reconsider the issues raised by the Premier application in this case and it must be dismissed.

CONCLUSION

The issue presented by this Motion to Dismiss is simple. Exxon properly applied for and obtained, after notice and hearing, Division approval of Statutory Unitization for the Avalon-Delaware Unit . Premier participated in this hearing, and appealed the Commission's decision through the Courts In its Application for Rehearing, Premier did not raise its current concern about the FV1 Well. Having failed to raise this issue at that time it has waived its right to raise the issue now.

Premier may not now come before the Commission and challenge the propriety of the Division's findings and mandates in Order No. R-10460-B for Premier's application is an impermissible collateral attack on the order. Order No. R-10640-B became a final commission order when Premier's Application for Rehearing was denied in 1996. Once a

commission order becomes final, the Commission lacks jurisdiction to reconsider the issues decided therein. Premier's Amended Application must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Exxon Corporation and Yates Petroleum Corporation in Support of Their Motion to Dismiss the First Amended Application of Premier Oil & Gas, Inc. was hand delivered this 23rd day of February, 1998 to:

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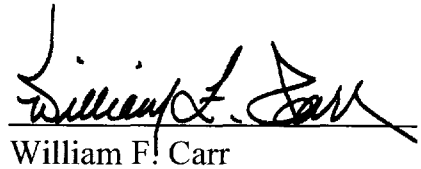

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