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;

Case No. 8769 (Reopened)
ORDER NO. R-8091-A

APPLICATION OF DOYLE HARTMAN FOR
COMPULSORY POOLING, LEA COUNTY,
BEING REOPENED UPON THE APPLICATION
OF HOWARD OLSEN TO RECONSIDER THE
PROVISIONS OF DIVISION ORDER NO. R-8091

PRE-HEARING STATEMENT

This prehearing statement is submitted by Howard Olsen as required by the Oil Conservation Division.

APPEARANCES

APPLICANT

Howard Olsen
P. O. Box 32279
Phoenix, Arizona 85016
(602) 951-9774

ATTORNEY

T. Calder Ezzell, Jr.
Hinkle, Cox, Eaton
Coffield & Hensley
P. O. Box 10
Roswell, N.M. 88202
(505) 622-6510

OTHER PARTY

Doyle Hartman, Oil Operator
500 North Main
Midland, Texas 79701

ATTORNEY

J. E. Gallegos
Gallegos Law Firm
141 East Palace Avenue
Santa Fe, N.M. 87501

STATEMENT OF CASE

APPLICANT

Howard Olsen filed an Application to reopen Case No. 8769, along with Case No. 8668 seeking enforcement of Order R-8091 and R-8031. The leasehold interest of Howard Olsen in the SE¼NE¼ Section

26, Township 25 South, Range 37 East, N.M.P.M., Lea County, New Mexico, had been forced pooled by Doyle Hartman, Oil Operator and, contrary to Order of the Division, Olsen was not submitted a schedule of estimated well costs and given an opportunity to participate in the drilling of the well.

The Division entered Order R-8091-A giving Olsen the opportunity to participate in the drilling of the Carlson Federal No. 5 well, by the payment of his pro rata share of well costs, plus interest. Doyle Hartman, Oil Operator filed an application for a de novo hearing before the full Oil Conservation Commission.

PROPOSED EVIDENCE

Howard Olsen will rely upon the stipulated Chronological Statement of Key Facts and the Exhibits presented to the Hearing Examiner at the September 6, 1989 Examiner's Hearing. There is no new evidence relative to this matter, and therefore Mr. Olsen will not need to call witnesses to testify or submit additional exhibits.

PROCEDURAL MATTERS

Howard Olsen requests that the record from the September 6, 1989 Examiner's Hearing in Reopened Case No. 8769 be incorporated into the record of the Hearing De Novo.

HINKLE, COX, EATON, COFFIELD & HENSLEY

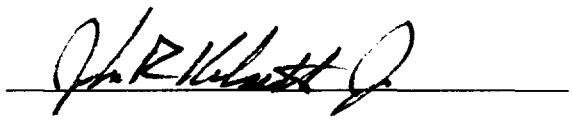
By _____

T. Calder Ezzell, Jr.
John R. Kulseth, Jr.
Post Office Box 10
Roswell, New Mexico 88202
(505) 622-6510

ATTORNEYS FOR HOWARD OLSEN

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Pre-Hearing Statement was hand delivered to J. E. Gallegos, attorney for Doyle Hartman, this 25th day of February, 1991.



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

RECEIVED

FEB 25 1991

OIL CONSERVATION DIV.
SANTA FE

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

CASE NO. 8769 (REOPENED)
ORDER NO. R-8091-A

THE APPLICATION OF DOYLE HARTMAN FOR COMPULSORY POOLING, LEA COUNTY, BEING REOPENED UPON THE APPLICATION OF HOWARD OLSEN TO RECONSIDER THE PROVISIONS OF DIVISION ORDER NO. R-8091

PRE-HEARING STATEMENT

This prehearing statement is submitted by Doyle Hartman as required by the Oil Conservation Division.

APPEARANCES OF PARTIES

APPLICANT

Howard Olsen
Phoenix, Arizona

ATTORNEY

T. Calder Ezzell, Jr., Esq.
Hinkle, Cox, Eaton,
Coffield & Hensley
P.O. Box 10
Roswell, New Mexico 88201

OPPOSITION OR OTHER PARTY

Doyle Hartman, Oil Operator
500 North Main
Midland, Texas 79701
(915) 684-4011

ATTORNEY

J.E. Gallegos, Esq.
Gallegos Law Firm
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

STATEMENT OF CASE

APPLICANT

Doyle Hartman applied in 1985 in Case No. 8769 to force pool certain mineral interests in Lea County New Mexico. The Division on September 27, 1985 granted his application by Order No. R-8091. Two years later, Howard Olsen, an owner of one of the force pooled mineral interests who neither appeared nor objected in the initial force pooling proceedings, filed an application to reopen the proceeding on August 17, 1987. Olsen seeks a reopening of the proceeding to determine whether Hartman complied with the requirements of Order No. R-8091, or alternatively that Order No. R-8091 be rescinded. Specifically, Olsen claims that he did not receive an itemized schedule of estimated well costs prior to commencement of or after completion of the well drilled pursuant to the Division's force pooling Order.

OPPOSITION OR OTHER PARTY

As more fully set forth in Doyle Hartman's Response to Application and Motion to Dismiss, filed with the Division on June 16, 1989 and attached hereto and incorporated by reference, it is Hartman's position that he has complied with the terms of Division Order No. 8091, and provided all necessary and substantial information on drilling costs to Olsen, that Olsen's application should be dismissed and that Olsen must abide by the terms of Order No. 8091 including payment of his share of drilling costs subject to the 200% nonconsent penalty included therein.

An Examiner Hearing was held on Olsen's application to reopen on September 6, 1989. Olsen did not challenge the reasonableness of well costs at the hearing. The Examiner issued Order No. R-8091-A on January 8, 1991. Although the Examiner Ordered that Order No. R-8091 should remain in full force and effect, and that the well costs incurred by Hartman were reasonable, Olsen was allowed 30 days from the entry of the 1991 Order to elect to participate in the well by payment of well costs with interest. Upon such election, Hartman is required under Order No. R-8091-A to pay Olsen proceeds from production attributable to Olsen's interest, with interest on such proceeds from date of their receipt by Hartman. Hartman, therefore, seeks a hearing de novo.[1]

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[1] The de novo hearing in this case is scheduled at the same time as a de novo hearing in the companion Case No. 8668 on Order No. R-8031-A, where the issues and evidence to be presented are identical but relate to a different pooled unit and well.

PROPOSED EVIDENCE

OPPOSITION

WITNESS	EST TIME	EXHIBITS
Howard Olsen (By Deposition) Prior compulsory pooling proceedings, negotiations and agreement to sell properties to D. Hartman	30 minutes	13
Doyle Hartman Prior compulsory pooling pooling hearings, notifications to H. Olsen, negotiations and agreements to purchase H. Olsen's interests.	30 minutes	19
William Aycock Prior pooling hearings	10 minutes	None
Lisa Woodward Well revenues and expenses and allocation among working interest owners.	10 minutes	None
Garold Bowlby (By deposition) H. Olsen review of expense and revenue records.	30 minutes	None

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PROCEDURAL MATTERS

Hartman's Motion to Dismiss is hereby expressly renewed before the Commission.

GALLEGOS LAW FIRM

By _____
J.E. GALLEGOS
JOANNE REUTER
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

ATTORNEYS FOR
DOYLE HARTMAN, OIL OPERATOR

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF HOWARD OLSEN TO REOPEN CASE NOS. 8668 AND 8769, LEA COUNTY, NEW MEXICO

RECEIVED
JUN 16 1989
OIL CONSERVATION DIVISION

RESPONSE TO APPLICATION AND MOTION TO DISMISS

DOYLE HARTMAN ("Hartman") hereby submits this Response to the captioned Application filed by Howard Olsen ("Olsen"). While Olsen asks the Oil Conservation Division ("Division") to reopen the earlier proceedings, in reality Olsen seeks to avoid the nonconsent penalties imposed upon him by Order Nos. 8668 and 8769. Hartman hereby moves the Division to dismiss the Application for the following reasons:

1. After proper notice and hearing, Order Nos. 8668 and 8769 were duly entered by the Division on September 27 and December 6, 1985, respectively. Olsen did not timely request a rehearing, but instead instituted this Cause approximately two years later seeking to overturn the action of the Division. Olsen may not now collaterally attack those Orders.

2. Olsen initiated this Cause in September of 1987. On April 15, 1989, the OCD notified Olsen's counsel that this Application would be scheduled for hearing and dismissed. Olsen's attorney requested a further continuance. Olsen has utterly failed to prosecute this Cause with due diligence and is prolonging the administrative process in an attempt to subvert a judicial resolution of other legal disputes with Hartman.

3. At the same time Hartman sought the compulsory pooling Orders attacked herein, he was negotiating with Olsen and arrived at an agreement for the purchase of

Olsen's interest. Hartman relied upon Olsen's agreement to sell his interest, but Olsen later reneged on that agreement. Olsen is equitably estopped from asserting any technical noncompliance with the provisions of Order Nos. 8668 and 8769.

4. Hartman drilled the wells authorized by the Orders at issue, undertaking all the financial risks and managerial responsibility for the benefit of the interest owners within the pooled lands. Hartman conscientiously complied with the terms and conditions imposed by Order Nos. 8668 and 8769. The policy underlying the conservation laws mandates that Olsen also abide by the terms of those Orders, including the payment of his share of drilling costs subject to the nonconsent penalty.

WHEREFORE, Hartman requests this Motion be set for hearing on the Division's docket for July 12, 1989, and the Division dismiss the Application for the foregoing reasons.

Respectfully submitted,

By Harry T. Nutter

J.E. GALLEGOS
HARRY T. NUTTER
300 Paseo De Peralta
Suite 100
Santa Fe, New Mexico 87501
(505) 983-6686

Attorneys for Respondent
Doyle Hartman

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response was served on this 16th day of June, 1989, to all counsel of record.

Harry T. Nutter
HARRY T. NUTTER

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

IN THE MATTER OF THE APPLICATION OF
HOWARD OLSEN TO REOPEN CASE
NOS. 8668 AND 8769, LEA COUNTY,
NEW MEXICO **DE NOVO**

MEMORANDUM OF DOYLE HARTMAN IN SUPPORT OF DISMISSAL OF APPLICATIONS

INTRODUCTION

This matter is before the full Commission for de novo adjudication of an application filed August 17, 1987 by one Howard Olsen to reopen Cases Nos. 8668 and 8769.[1]

That application to reopen was finally heard by the Division, Examiner Michael E. Stogner, on September 6, 1989. Sixteen months later on January 8, 1991 the Division issued its Orders Nos. R-8031-A and R-8091-A. The pertinent findings of those orders were essentially the same and read as follows in Order R-8091-A:

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

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[1] Order No. R-8031 entered September 27, 1985 in Case No. 8668, Application of Doyle Hartman for Compulsory Pooling, Lea County, New Mexico; Order No. R-8091 entered December 6, 1985 in Case No. 8769, Application of Doyle Hartman for Compulsory Pooling, Lea County, New Mexico.

(2) Olsen filed his application to reopen this case seeking strict compliance with Order No. R-8091 on August 17, 1987. Olsen specifically seeks enforcement of the Division's order requiring the submission by the operator of estimated well costs prior to drilling, the effect of which will enable him now to receive well costs, challenge those costs and make a decision about whether or not to join the well, knowing the productive ability and approximate current payout status of the well.

(3) The parties in this case, appearing by counsel, have submitted depositions and have stipulated to a Chronological Statement of Key Facts, and there are no factual disputes about the order of events.

(4) Howard Olsen did not appear and enter any objection at the original compulsory pooling hearing held on November 21, 1985, nor does he challenge the validity of the order.

(5) Howard Olsen was a party force-pooled by Order R-8091 into a standard proration unit in the Langlie-Mattix Pool, being the SE/4 NE/4 of Section 26, Township 25 South, Range 37 East, NMPM, Lea County, New Mexico, upon the application of Doyle Hartman.

(6) Doyle Hartman commenced drilling the Carlson Federal No. 5 well (the "subject well"), on said proration unit on December 10, 1985, which is four days after the entry by the Division of Order No. R-8091.

(7) Although Hartman provided Olson with an AFE for the subject well prior to the compulsory pooling hearing, he did not do so after the order was entered

and at least thirty days prior to drilling the well in accordance with the provisions of the order.

(8) The uncontroverted evidence is that Olsen was aware of Hartman's plans to drill the subject well and had entered into negotiations to sell his interest to Hartman prior to the drilling of the well, but he did not continue with those negotiations after the well was drilled. There is additional evidence that Olsen refused communications from Hartman regarding operations on this well. (Emphasis added.)

(9) Olsen did not file his application to reopen until August 1987, almost two years after the well was spudded.

(10) In October and November of 1987 a certified public accountant retained by Mr. Olsen examined the financial records of Doyle Hartman relating to the costs of the subject well. Olsen has not filed any objection to the costs of said well, and the actual well costs should be determined to be reasonable. (Emphasis added.)

(11) The Division will normally require strict compliance with its orders, but it must rely on affected parties to bring non-compliance to its attention. (Emphasis added)

(12) Olsen did not diligently pursue his remedy although the evidence shows that he had substantive knowledge of sufficient information to enable him to protect his interests. This failure on his part to seek relief make it impossible for the Division to compel strict compliance with the terms of Order R-8091. (Emphasis added.)

(13) It is the intent of compulsory pooling orders entered by the Division to give parties pooled thereunder the opportunity to pay their costs and share in

the risks and benefits of drilling the well, or in the alternative to allow those parties paying the costs and taking the risk to be compensated for that risk." (Emphasis added.) Yet, after making those findings, the Orders exercised magnificent contradiction by providing that six years after the force pooling cases and drilling of the wells, Howard Olsen would nonetheless be allowed to elect to participate voluntarily by paying his 25% share of the costs and receiving his share of gas purchase revenue.

Olsen's case rests entirely on legalistic technicalities. He did not receive estimated and actual well costs for the Carlson Federal No. 4 and No. 5 wells in precisely the manner prescribed by the force pooling orders. That circumstance is supposed to permit Olsen to sleep on his rights and sit back to observe whether participation in the Hartman drilled wells turned out later to look like a good deal financially.

If substance, practicality and diligence mean anything, then the evidence will show without contravention that in fact Hartman did furnish Olsen with estimated and actual well costs to satisfy the substance of the pooling orders. In November 1987 Olsen availed himself of a complete audit on the wells. He had the opportunity to join in the wells financially (but the eventual payout status was then unknown) or to object to the well costs. He did neither.

Olsen received all the information, and more, than he would have obtained had there been strict compliance with the force pooling orders. Moreover, there will be absolutely no evidence that Olsen was prejudiced by the lack of such technical compliance.

LEGAL ARGUMENT AND AUTHORITY

POINT I

AN ADMINISTRATIVE AGENCY HAS DISCRETION TO RELAX OR MODIFY ITS PROCEDURAL RULES FOR HARMLESS AND NONPREJUDICIAL ERROR

It is well settled that administrative agency decisions will not be set aside for procedural errors unless they are major, substantial and prejudicial. American Farm Lines v. Black Ball Freight Service, 397 U.S. 563, 90 S.Ct. 1288, 1292 (1970); County of Del Norte v. United States, 732 F.2d 1462, 1467 (9th Cir. 1984); N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967); Anderson v. United States Forest Service, 647 F.Supp. 3, 7 (E.D. Cal. 1985). This is especially true where the error was harmless because there was no resulting prejudice, or where the failure to follow the procedural rule inflicts no significant injury upon the party entitled to the rule's observance. Dodson v. Nat'l Transp. Safety Bd., 644 F.2d 647, 652 (7th Cir. 1981).

POINT II

BURDEN OF PROOF IS ON OLSEN TO SHOW PREJUDICE

The burden is on the complaining party to establish prejudice has occurred. N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967); Center for Auto Safety v. Tiemann, 414 F.Supp. 215, 226 (D.C. 1976); Langingham v. United States, 2 Cl.Ct. 535, 556 (Cl. Ct. 1983).

Where an agency furnished notice to plaintiff earlier than required by that agency's regulations thereby affording plaintiff the opportunity intended to be furnished

to plaintiff by the regulation, such procedural irregularity was deemed trivial and did not mandate setting aside agency's action. County of Del Norte, 732 F.2d 1462. In Tiemann a plaintiff challenging an agency's action failed to meet its burden of showing it had been prejudiced by an agency's failure to hold open public meetings regarding its intended action as required by statute because plaintiff was able, albeit through its own initiative, to comment on the intended action while it was pending before the agency. Tiemann, 414 F.Supp. at 226. In Laningham the United States was unable to show it had been prejudiced by unauthorized personnel having conducted an investigation of a claim for disability retirement rather than the designated authority where the facts clearly supported the conclusion of that investigation and the procedural rule was deemed so technical as to be inconsequential, constituting harmless error, if any. Laningham, 2 Cl. Ct. at 556.

POINT III

POLICY AND EQUITABLE PRINCIPLES UNDERLYING COMPULSORY POLICY STATUTE DICTATE OLSEN'S APPLICATION BE DISMISSED

Where an administrative agency is expressly given the power to determine what is fair and equitable, equitable principles are necessarily applied in their decisions. Securities & Exch. Com. v. Chenery Corp., 318 U.S. 80, 90-92 (1943); 1 AmJur2d Administrative Law Sec. 143 (1962). When in a given case the ends of justice require it an administrative agency should exercise its discretion to modify or relax its procedural rules. American Farm Lines v. Black Ball Freight Service, 397 U.S. 563, 90 S.Ct. 1288, 1292 (1970); Neighborhood TV Co., Inc. v. F.C.C., 742 F.2d 629, 636 (D.C. 1984).

State law empowers the Division to compel pooling as a means of achieving orderly development when interest owners cannot voluntarily agree to do so. §70-2-17 C. NMSA (1987 Repl.). The purpose of compulsory pooling is to prevent the drilling of unnecessary wells, protect correlative rights and prevent waste. Id.; see also, Rutter & Wilbanks v. Oil Conservation Commission, 87 N.M. 286, 291-292, 532 P.2d 282 (1975) (primary consideration of conservation laws is prevention of waste and protection of correlative rights). The compulsory pooling statute prevents waste by appropriately limiting the number of wells drilled. §70-2-17 B. NMSA 1978 (1987 Repl.). The statute protects correlative rights by assuring each owner the opportunity to produce his just and equitable share of the pooled substances. §70-2-17 A. NMSA 1978 (1987 Repl.).

Under the statutory scheme of compulsory pooling, the operator and participating parties assume all the financial risk of drilling. See, §70-2-17 C. NMSA 1978 (1987 Repl.) (compulsory pooling order should provide that those electing not to pay their proportionate share in advance be reimbursed "solely out of production"). Therefore, the operator and any participating parties bear the loss if a well drilled pursuant to the statute proves to be a dry hole or does not pay-out. In order to compensate the participating parties for their assumption of that risk, the statute assesses a penalty upon the nonparticipating party or so-called force pooled party. §70-2-17 C. NMSA 1978 (1987 Repl.) (charge for risk not to exceed 200% of nonconsenting owners' prorata share of drilling and completing costs); see also, Ranola Oil Co. v. Corporation Commission, 752 P.2d 1116, 1119 (Okla. 1988) (purpose of forced pooling is to equalize the risk of loss by forcing all interest owners to choose in advance whether they will share in both benefits

and risk exploration). The statute further protects the rights of the nonconsenting party by allowing the Division to determine proper costs in the event a dispute arises. §70-2-17 C. NMSA 1978 (1987 Repl.).

CONCLUSION

Olsen is asking the OCD to set aside two force pooling orders issued six years ago because he was not furnished with estimated and actual well costs in the technically exact manner prescribed by those orders. As a practical matter, Hartman has complied with the Division's orders in all respects. Moreover, Olsen has failed to meet his burden to show how he has been prejudiced by technical noncompliance. The error complained of was harmless.

Olsen openly acknowledges having received the information that the orders required to be furnished, as well as having had the opportunity to audit Hartman's records on these wells. In the almost four years which have passed since Olsen's audit Olsen has never objected to the OCD about the reasonableness of the well costs.

The purpose of force pooling is to equalize the risk of loss by forcing all interest owners to choose in advance whether they will share in both the benefits and the risk of pay-out. Hartman has already borne all risk associated with drilling, completing and producing these wells over the last four years. In February 1989 Hartman sold out to Meridian Oil Inc. all his interest in the wells.

What Olsen really is attempting to do is to manipulate a technical procedural rule of the OCD to defeat the purposes and public policy underlying the force pooling statute. Even if that were to be permitted, as the Division Orders provide, then the

accounting for Olsen's belated participation should replicate the conditions that would have prevailed had Hartman provided the well cost data in 1985 and early 1986 and then Olsen either (a) elected to participate and paid expense out of the revenue he would have received from El Paso Natural Gas Co. under his gas purchase agreement, or (b) gone nonconsent and been subject to the 200% penalty provided in the pooling Orders. He cannot have the best of both worlds.

CAMPBELL & BLACK, P.A.

By _____
WILLIAM F. CARR
P. O. Box 2208
Santa Fe, New Mexico 87504
(505) 988-4421

GALLEGOS LAW FIRM, P.C.

By _____
J. E. GALLEGOS
141 E. Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

ATTORNEYS FOR DOYLE HARTMAN

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

IN THE MATTER OF THE APPLICATION OF
HOWARD OLSEN TO REOPEN CASE NOS.
8668 AND 8769, LEA COUNTY, NEW MEXICO

DE NOVO

APPLICANT'S MEMORANDUM IN RESPONSE TO MEMORANDUM OF DOYLE HARTMAN IN SUPPORT OF DISMISSAL OF APPLICATIONS

Applicant Howard Olsen submits this Memorandum in Response to the Memorandum presented at the Commission's hearing of February 28, 1991 by Doyle Hartman in support of his contention that the Applications should be dismissed.

INTRODUCTION

Olsen joins in Hartman's Introduction through the point which Hartman quotes portions of the Oil Conservation Division's Order R-8091-A. Hartman's Memorandum at 1-4 (lines 1 and 2). However, Hartman has quoted selectively from Order R-8091-A, ignoring those portions of the Order which reflect adversely upon him. The remaining findings of the Order are as follows:

> (14) It is not clear from the evidence that Olsen had a reasonable opportunity to participate in drilling the well, and he should be afforded the opportunity at this time to pay his pro rata share of the well costs and receive his pro rata share of the proceeds of production, if he so elects to participate.
>
> (15) Hartman has incurred and paid those costs attributable to Olsen's interest, and, considering the time that has passed because this matter has not been diligently pursued, if Olsen elects to pay his pro rata share of well costs, he should compensate Hartman for the use of his money with a reasonable interest charge.

(16) If Olsen elects to pay his share of the costs of the well, he should be entitled to receive his share of the proceeds of production together with a reasonable interest thereon.

(17) The reasonable rate of interest is the rate provided for in New Mexico statutes for interest on judgments.

As is discussed more fully hereinbelow, Olsen rejects the remainder of the Introduction. Rather than resting on "legalistic technicalities," Olsen's case is about Hartman's attempt to reap the substantive benefits conferred upon him by Order Nos. R-8031 and R-8091 ("the Force Pooling Orders") without discharging his substantive obligations as mandated by those Orders. Olsen did not "sleep on his rights." Instead, Hartman has failed to discharge his duty to inform Olsen what his rights were and to provide for an option to participate in the relevant wells with notice of the rights.

Olsen takes specific exception with the implicit suggestion that the November, 1987 audit of the relevant wells is somehow relevant to this action. Hartman's Memorandum at 4. By the time that audit took place, Olsen had filed his Applications which are now at issue. Olsen did not sneak up on Hartman by conducting the audit and then seek compliance with the Force Pooling Order's. While the Division's Orders regarding Olsen's Applications were not entered until long after that audit, this process had begun months before the audit was undertaken.

Otherwise, Hartman uses the audit as a red herring. Hartman correctly observes: "In the almost four years that have passed since Olsen's audit, Olsen has never objected to the OCD about the reasonableness of the well costs." Hartman's Memorandum at 8. While the Division reopened the Force Pooling Orders to allow Olsen to make an election within

30 days whether to participate in the well costs, it made no provision to reopen those Orders for purposes of objecting to the reasonableness of those well costs.

While Olsen sought full compliance with the Force Pooling Orders in his Application, after his Application was filed with the Division he had the opportunity to audit. By failing to reopen the Orders to allow Olsen to object to the reasonableness of the actual well charges, the Division was making the sensible judgment that Olsen should have voiced any such objections by now. What is not sensible is an attempt to equate Olsen's failure to object to the reasonableness of well charges with a desire not to participate in the wells. It is perfectly consistent for one to elect to participate in a well and to not have objections to actual well costs. By the time the audits took place, Olsen had filed his Applications with the Division to reopen the Force Pooling Orders manifesting a clear intent to be afforded the opportunity which he had not previously had, to participate in the wells knowing that a 200% risk penalty was the consequence of declining to participate.

ARGUMENTS AND AUTHORITIES

I. HARTMAN MISAPPREHENDS THE NATURE OF OLSEN'S APPLICATIONS

The linchpin of Hartman's argument, both for dismissal and in the case in chief, is that there have been harmless procedural errors. Olsen need not quarrel with the legal authorities cited by Hartman or the propositions for which they are cited, only their application to this case. By attempting to characterize his own omissions as "procedural" Hartman fails to apprehend the nature of Olsen's Applications and the nature of the Force Pooling Orders. The Force Pooling Orders confer certain substantive benefits and substantive obligations on Hartman. In return for receiving the guarantee that his co-

tenants will either participate or be force pooled with a risk penalty assessed, Hartman must discharge certain substantive obligations, namely providing notice to those co-tenants that a force pooling order has been entered assessing a certain risk penalty (200% in this case), an estimate of actual well costs, and an opportunity to participate within the specified deadlines.

Later Hartman would have been required to provide notice of actual well costs. Viewed in a light most favorable to Hartman, the evidence in this case only reflects that: (1) Olsen had notice that force pooling applications had been filed; (2) substantially prior to Hartman seeking force pooling, Olsen had received estimated well costs for the first of the two wells and an opportunity to participate; and, (3) after the initiation of these proceedings, Olsen had notice of the actual well costs as a result of his November, 1987 audit.

Because of Hartman's failure to comply with the Force Pooling Orders, Olsen did not receive notice that the force pooling applications had been granted and did not have opportunity to elect to participate knowing the percentage penalty assessed under the Force Pooling Orders.

As is discussed below, these omissions are clearly substantive and prejudicial. At this point, it is illuminating to understand what Olsen's rights in the subject wells would be absent force pooling. Hartman and Olsen are co-tenants in and to the mineral estate underlying the lands which are the subject of these proceedings. Absent force pooling, their respective rights and obligations would be governed by common law rules of co-tenancy.

At common law, the drilling of an oil and gas well is a speculative venture. If one co-tenant undertakes such a speculative venture without having obtained the agreement of those co-tenants to participate in the venture, that co-tenant would do so at his own risk. *See generally*, 2 Williams & Meyers Oil and Gas Law §504.1 (1990) (discussing rights and obligations of co-tenants); and *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App. 1987). Applied to this case, this principle would mean that Hartman would drill the subject wells at his own risk and cost without any right to seek reimbursement from Olsen if the venture proved to be unsuccessful.

Also under common law, if the co-tenant is successful in his speculative venture, he has the right to recoup the actual costs of undertaking the speculative venture from the profits, but after successfully recouping those costs, must account to the co-tenants for the remainder of the profits. *Williams & Meyers*, *supra*, at §504.1. Additionally, after such payout, the co-tenants would be liable for their pro rata share of operational expenses. *Id.*

Again applied to this case, that would mean that Hartman would have had the right to recoup his actual drilling costs from the income generated by sales of production from the wells, would have had to account to Olsen for Olsen's proportionate share of monies generated as profit (i.e. income in excess of actual drilling costs) and Olsen would have been responsible to Hartman for his proportionate share of operational expenses.

Thus, the principle difference between force pooling and the common law of co-tenancy is that force pooling, when granted, allows the drilling co-tenant to obtain a specified penalty for the risk he undertakes in drilling the well. No such right exists in common law.

By failing to provide notice and opportunity to participate in the wells after the Orders were entered, Olsen clearly suffered prejudice and Hartman violated substantive provisions of the Orders. First, it was essential that Olsen receive notice that a force pooling order had been entered. The mere notice that a force pooling hearing had been scheduled is certainly inadequate in this regard. Force pooling applications are sometimes denied and often withdrawn or continued. The notice that a hearing was to take place cannot be equated with notice that an order had actually been entered. If Olsen had received proper notice that an order had been entered, he would have known that his common law rights as a co-tenant were being modified in that Hartman was going to be able to recoup some sort of risk penalty and addition to his actual costs if the wells were successful.

Second, notice of the actual risk penalty percentage and opportunity to participate would give Olsen notice of the extent of the modification of his common law rights as a co-tenant. For instance, an owner of a force pooled interest subject to a 50% risk penalty may be less likely to participate in a drilling of a well than an owner of the same interest subject to a 200% risk penalty.

In essence, Hartman's position in these proceedings is that he should be entitled to reap all of the benefits of the Force Pooling Orders without being subject to the obligations imposed on him by those Orders. Hartman cries crocodile tears when he complains that the Division essentially afforded Olsen the opportunity to elect to participate in the wells with 20/20 hindsight as to what happened with respect to drilling the wells and marketing the product therefrom. The only reason Olsen is to be afforded this opportunity is because

Hartman failed to comply with the terms of the Orders which he affirmatively sought. That is, he drilled the wells and wants Olsen to be assessed the risk penalty without affording Olsen any opportunity to participate in the wells knowing the consequences of failing to contribute (i.e. the 200% risk penalty). Hartman created his mess and it is only fair that he lie in it.

II. THE RELIEF SOUGHT BY OLSEN IS CONSISTENT WITH CASE LAW.

The only reported judicial decision regarding a force pooling applicant's failure to conform to the notice provisions of a force pooling order by the Division is from the Tenth Circuit. *Mountain States Natural Gas Corp. v. Petroleum Corp.*, 693 F.2d 1015 (10th Cir. 1982). In that case, Petco mailed notice to Mountain States, the owner of the force pooled interest, which notice contained all of the information required in the Division's force pooling order but was subsequently returned as undeliverable. Also, although the force pooling order at issue provided that the notice would be provided to Mountain States "'[a]fter the effective date of [the] order and within a minimum of thirty days prior to commencing a well,'" Petco commenced drilling the wells six days after it mailed the notice to Mountain States. *Id.* at 1017 (quoting the relevant order by the Division). The Tenth Circuit held as follows:

> The Division order provided that Petco was required to furnish to Mountain States "within a minimum of thirty days prior to commencing a well." The language of the order is clear. Despite Petco's argument that notification had been **within** thirty days of drilling, the plain language of the order is that Petco was required to provide Mountain States with at least thirty days notice **before** commencing drilling operations.

> We hold that Petco violated the terms of the Division order by failing to furnish Mountain States with notice at least thirty days before commencing the well. Accordingly, Mountain States was not allowed the opportunity accorded by Division's order to elect to pay the costs of drilling.

Id. at 1020-1021.

The facts in this case are obviously similar. First, there is no evidence in the record that Olsen received notice of the entry of the Force Pooling Order, estimated well costs or opportunity to participate after the Order was entered. Second, and much more importantly, the record is quite clear that as to Order R-8031, Hartman commenced drilling prior to the entry of that Order and, as to Order R-8091, Hartman commenced drilling four days after the entry of that Order.

The holding in *Mountain States* quoted above relies solely on the fact that drilling commenced prior to the expiration of the thirty day notice period. In this case, the notice language provides for a longer time frame than that in *Mountain States*. See Order R-8031 at ¶ 3 and Order R-8091 at ¶ 3 (both providing: "after the effective date of this Order and within 90 days prior to commencing said well . . . "). In this case, Hartman commenced one of the wells prior to the notice period commencing and the other, 86 days prior to the expiration of the notice period. Thus, under the ruling in *Mountain States*, the relief afforded by the Division to Olsen is perfectly justified.

III. THE COMMISSION SHOULD DECLINE HARTMAN EQUITABLE RELIEF FROM THE FORCE POOLING ORDERS SINCE HE HAS UNCLEAN HANDS.

In seeking dismissal, Hartman is really relying on the Commission to grant him equitable relief from the provisions of the Force Pooling Orders. Hartman's Memorandum

at 6-9. It is a fundamental provision of equity that equity is not granted to the person with unclean hands, that is to say, one who has engaged in improper conduct. It is completely undisputed that, in one instance Hartman did not even wait for the Division to enter an order granting force pooling before commencing drilling the well and, in the other, commenced drilling four days after the Order despite the 90 day notice provisions in both Orders. Additionally, it is also undisputed that Hartman provided Olsen with no notice of the penalty provisions of the Force Pooling Orders after they had been entered. Hartman's actions do not reflect that he did not attempt to comply with the spirit of the Force Pooling Orders. He completely ignored his substantive obligations thereunder to provide notice to Olsen after they had been entered. Nothing in the Force Pooling Orders suggest that estimated costs provided prior to the entry of the Orders was sufficient. Hartman would have no reasonable basis for believing that such notice was sufficient. Additionally, such notice clearly did not contain notice of the penalty provisions Olsen would have to bear if he declined to participate. Indeed, when the one estimate was provided to Olsen, as is discussed above, if Hartman had gone ahead and drilled the wells, there would have been no penalty provisions for Olsen under common law of co-tenancy.

IV. HARTMAN'S ARGUMENTS REGARDING THE PRICE OF GAS RECEIVED ARE OF NO MOMENT.

In an argument made at the hearing before the Commission and alluded to briefly in his Memorandum, Hartman contended that Olsen would not have been entitled to the price which Hartman received from El Paso so that payout should not be calculated on the price Hartman actually received but on the price Olsen would have received. This argument is pure speculation. Olsen has never had opportunity to negotiate with El Paso regarding

his interests in these wells since, at no time since the entry of the Force Pooling Orders, has Hartman afforded him the opportunity to participate. Indeed, Olsen can postulate scenarios in which he might have received higher prices than Hartman received. Any postulations by Hartman or Olsen as to what price Olsen would have or could have received, are mere fantasy. All the Commission has to go on is reality, that is the price which Hartman actually received for production. All calculations relevant to Olsen's Applications should be made on the prices actually received rather than fictions concocted by the parties.

CONCLUSION

As is reflected in the Division's Orders resulting from Olsen's Applications, Olsen is merely seeking the one opportunity which he has been denied by Hartman since the Force Pooling Orders were entered: the opportunity to elect to participate in the wells knowing the consequences (i.e. the 200% risk penalty) of failure to participate. While, as to one of the two wells, Olsen did receive estimated well costs substantially prior to Hartman initiating force pooling proceedings, those estimates are clearly deficient as attempts to discharge Hartman's obligation under Order R-8031 since Olsen's refusal to elect to participate at that time simply meant if Hartman proceeded to drill the well, he would only be able to recoup his actual costs and no penalty from production. There is a substantial and material difference between those two scenarios.

Additionally, as to Order R-8091, there is no evidence in the record that Olsen received estimated well costs or opportunity to participate at any time before or after the entry of that Order. Olsen does not dispute the policies behind force pooling. However, force pooling clearly contemplates that prior to assessing a risk penalty against an owner of

a concurrent interest in and to the relevant mineral estate, that owner must be afforded the opportunity to participate in the contemplated well knowing the risk penalty he would bear if he declines to participate. Olsen readily acknowledges that affording him the opportunity to participate in the wells at the present time, if he elects to do so, would have a net effect of forcing Hartman to bear the risk of drilling the well without compensation for risk or distributing the risk to Olsen. However, this is a problem of Hartman's own creation since he failed to comply with the Force Pooling Orders. Additionally, Hartman often notes in his Memorandum that it has been over five years since the Force Pooling Orders were entered. However, it has been over three years since Olsen's Applications were filed with the Division. Since the Force Pooling Orders were entered, except for the brief period of time in which the Division's Orders reopening the Force Pooling Orders were in effect (they have now been stayed), Olsen has never had any opportunity to elect to participate in the Wells knowing the risk penalty.

As a final matter, Hartman has consistently maintained that Olsen has never indicated a willingness to participate. In dong so, Hartman manages to ignore Olsen's initiation of these proceedings. More importantly, Hartman's contention turns the Force Pooling Orders on their head. Hartman is required to afford Olsen the opportunity to participate, at which time Olsen has the right to elect whether to participate. Throughout these proceedings Hartman has contended that Olsen was validly force pooled, but would require Olsen to engage in the futile act of electing to participate when Hartman refused to recognize a right to do so. After the Division's Orders were entered, Olsen did indicate

a willingness to participate. See Letter to Robert Stovall from T. Calder Ezzell, Jr., dated February 6, 1991 attached as Exhibit "A".

For the reasons set forth above, Olsen urges that the Commission reopen the Force Pooling Order, granting Olsen the thirty days to elect to participate in the wells at issue.

Respectfully submitted,

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: _____

T. Calder Ezzell, Jr.
Andrew J. Cloutier
John R. Kulseth, Jr.
P. O. Box 10
Roswell, New Mexico 88202
(505) 622-6510

Attorneys for Howard Olsen

I hereby certify that on the 8 *day of March, 1991, a true and correct copy of the foregoing Memorandum was hand-delivered to the following:*

J.E. Gallegos, Esq.
Gallegos Law Firm
141 East Palace Avenue
Santa Fe, New Mexico 87501

William F. Carr, Esq.
Campbell & Black
P.O. Box 2208
Santa Fe, New Mexico 87504

_____
John R. Kulseth, Jr.

HINKLE, COX, EATON, COFFIELD & HENSLEY
ATTORNEYS AT LAW
218 MONTEZUMA
POST OFFICE BOX 2068
SANTA FE, NEW MEXICO 87504-2068
(505) 982-4554
FAX (505) 982-8623

LEWIS C. COX
PAUL W. EATON
CONRAD E. COFFIELD
HAROLD L. HENSLEY JR.
STUART D. SHANOR
ERIC D. LANPHERE
C. D. MARTIN
PAUL J. KELLY JR.
MARSHALL G. MARTIN
OWEN M. LOPEZ
DOUGLAS L. LUNSFORD
JOHN J. KELLY
T. CALDER EZZELL JR.
WILLIAM B. BURFORD*
RICHARD E. OLSON
RICHARD R. WILFONG*
THOMAS J. McBRIDE
STEVEN D. ARNOLD
JAMES J. WECHSLER
NANCY S. CUSACK
JEFFREY L. FORNACIARI
JEFFREY D. HEWETT
JAMES BRUCE
JERRY F. SHACKELFORD*
JEFFREY W. HELLBERG*
ALBERT L. PITTS
THOMAS M. HNASKO
JOHN C. CHAMBERS*
MICHAEL A. GROSS
THOMAS D. HAINES, JR.

FRANKLIN H. McCALLUM*
GREGORY J. NIBERT
DAVID T. MARKETTE*
MARK C. DOW
KAREN M. RICHARDSON*
FRED W. SCHWENDIMANN
JAMES M. HUDSON

STANLEY K. KOTOVSKY JR.
BETTY M. LITTLE*
JEFFREY S. BAIRD*
RUTH S. MUSGRAVE
HOWARD R. THOMAS
PATRICIA A. WATTS
MACDONNELL GORDON
REBECCA NICHOLS JOHNSON
WILLIAM P. JOHNSON*
ELLEN S. CASEY
S. BARRY PAISNER
MARGARET CARTER LUDEWIG
MARTIN MEYERS
GREGORY B. WHEELER
ANDREW J. CLOUTIER
JAMES A. GILLESPIE
GARY W. LARSON
STEPHANIE LANDRY
JOHN R. KULSETH, JR.
LISA K. SMITH*

*NOT LICENSED IN NEW MEXICO

OF COUNSEL
C. M. CALHOUN*
MACK EASLEY
JOE W. WOOD
RICHARD S. MORRIS

CLARENCE E. HINKLE (1901-1985)
W. E. BONDURANT JR. (1913-1973)
ROY C. SNODGRASS, JR. (1914-1987)

700 UNITED BANK PLAZA
POST OFFICE BOX 10
ROSWELL, NEW MEXICO 88202
(505) 622-6510
FAX (505) 623-9332

2800 CLAYDESTA NATIONAL BANK BUILDING
POST OFFICE BOX 3580
MIDLAND, TEXAS 79702
(915) 683-4691
FAX (915) 683-6518

1700 TEAM BANK BUILDING
POST OFFICE BOX 9238
AMARILLO, TEXAS 79105
(806) 372-5569
FAX (806) 372-9761

500 MARQUETTE N.W., SUITE 800
ALBUQUERQUE, NEW MEXICO 87102-2121
(505) 768-1500
FAX (505) 768-1529

February 6, 1991

Oil Conservation Division
State Land Office Building
P. O. Box 2088
Santa Fe, New Mexico 87504

ATTENTION: Mr. Robert Stovall
General Counsel

Re: Case No. 8688 (Reopened)
Case No. 8769 (Reopened)

Dear Mr. Stovall:

Please find enclosed the request of Howard R. Olsen for stays of Order Nos. R-8031-A and R-8091-A pending the outcome of Mr. Hartman's Application for Hearing De Novo in each case.

Mr. Howard R. Olsen has elected to participate in the Carlson Federal No. 4 and Carlson Federal No. 5 wells, pursuant to the terms of the above referenced Orders, and by copy of this letter to Mr. Gene Gallegos, Doyle Hartman's attorney, we are confirming that election to participate. However, in light of Mr. Hartman's Applications for Rehearing before the full Commission, currently set for hearing on February 28, 1991, we are requesting stays of the Orders so that the 30 day time period within which we must evidence our election to participate by the payment to Mr. Hartman of our pro rata well costs, plus interest, will not expire. While we feel that the full Commission will not reverse the Hearing Examiner's Decision, Mr. Olsen would suffer extremely negative consequences if forced to pay Mr. Hartman in

excess of $300,000 before the matter is even heard by the full Commission.

Yours very truly,

HINKLE, COX, EATON, COFFIELD & HENSLEY

T. Calder Ezzell, Jr.

TCE/tw
Enclosures

cc: Mr. J. E. Gallegos
Mr. Howard Olsen

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:

CASE NO. 8769 (REOPENED)
ORDER NO. R-8091-A

THE APPLICATION OF DOYLE HARTMAN FOR COMPULSORY POOLING, LEA COUNTY, BEING REOPENED UPON THE APPLICATION OF HOWARD OLSEN TO RECONSIDER THE PROVISIONS OF DIVISION ORDER NO. R-8091

PRE-HEARING STATEMENT

This prehearing statement is submitted by Doyle Hartman as required by the Oil Conservation Division.

APPEARANCES OF PARTIES

APPLICANT

Howard Olsen
Phoenix, Arizona

ATTORNEY

T. Calder Ezzell, Jr., Esq.
Hinkle, Cox, Eaton,
Coffield & Hensley
P.O. Box 10
Roswell, New Mexico 88201

OPPOSITION OR OTHER PARTY

Doyle Hartman, Oil Operator
500 North Main
Midland, Texas 79701
(915) 684-4011

ATTORNEY

J.E. Gallegos, Esq.
Gallegos Law Firm
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

STATEMENT OF CASE

APPLICANT

Doyle Hartman applied in 1985 in Case No. 8769 to force pool certain mineral interests in Lea County New Mexico. The Division on September 27, 1985 granted his application by Order No. R-8091. Two years later, Howard Olsen, an owner of one of the force pooled mineral interests who neither appeared nor objected in the initial force pooling proceedings, filed an application to reopen the proceeding on August 17, 1987. Olsen seeks a reopening of the proceeding to determine whether Hartman complied with the requirements of Order No. R-8091, or alternatively that Order No. R-8091 be rescinded. Specifically, Olsen claims that he did not receive an itemized schedule of estimated well costs prior to commencement of or after completion of the well drilled pursuant to the Division's force pooling Order.

OPPOSITION OR OTHER PARTY

As more fully set forth in Doyle Hartman's Response to Application and Motion to Dismiss, filed with the Division on June 16, 1989 and attached hereto and incorporated by reference, it is Hartman's position that he has complied with the terms of Division Order No. 8091, and provided all necessary and substantial information on drilling costs to Olsen, that Olsen's application should be dismissed and that Olsen must abide by the terms of Order No. 8091 including payment of his share of drilling costs subject to the 200% nonconsent penalty included therein.

An Examiner Hearing was held on Olsen's application to reopen on September 6, 1989. Olsen did not challenge the reasonableness of well costs at the hearing. The Examiner issued Order No. R-8091-A on January 8, 1991. Although the Examiner Ordered that Order No. R-8091 should remain in full force and effect, and that the well costs incurred by Hartman were reasonable, Olsen was allowed 30 days from the entry of the 1991 Order to elect to participate in the well by payment of well costs with interest. Upon such election, Hartman is required under Order No. R-8091-A to pay Olsen proceeds from production attributable to Olsen's interest, with interest on such proceeds from date of their receipt by Hartman. Hartman, therefore, seeks a hearing de novo.[1]

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[1] The de novo hearing in this case is scheduled at the same time as a de novo hearing in the companion Case No. 8668 on Order No. R-8031-A, where the issues and evidence to be presented are identical but relate to a different pooled unit and well.

PROPOSED EVIDENCE

OPPOSITION

WITNESS	EST TIME	EXHIBITS
Howard Olsen (By Deposition) Prior compulsory pooling proceedings, negotiations and agreement to sell properties to D. Hartman	30 minutes	13
Doyle Hartman Prior compulsory pooling pooling hearings, notifications to H. Olsen, negotiations and agreements to purchase H. Olsen's interests.	30 minutes	19
William Aycock Prior pooling hearings	10 minutes	None
Lisa Woodward Well revenues and expenses and allocation among working interest owners.	10 minutes	None
Garold Bowlby (By deposition) H. Olsen review of expense and revenue records.	30 minutes	None

PROCEDURAL MATTERS

Hartman's Motion to Dismiss is hereby expressly renewed before the Commission.

GALLEGOS LAW FIRM

By _____
J.E. GALLEGOS
JOANNE REUTER
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

ATTORNEYS FOR
DOYLE HARTMAN, OIL OPERATOR

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF HOWARD OLSEN TO REOPEN CASE NOS. 8668 AND 8769, LEA COUNTY, NEW MEXICO

RECEIVED
JUN 16 1989
OIL CONSERVATION DIVISION

RESPONSE TO APPLICATION AND MOTION TO DISMISS

DOYLE HARTMAN ("Hartman") hereby submits this Response to the captioned Application filed by Howard Olsen ("Olsen"). While Olsen asks the Oil Conservation Division ("Division") to reopen the earlier proceedings, in reality Olsen seeks to avoid the nonconsent penalties imposed upon him by Order Nos. 8668 and 8769. Hartman hereby moves the Division to dismiss the Application for the following reasons:

1. After proper notice and hearing, Order Nos. 8668 and 8769 were duly entered by the Division on September 27 and December 6, 1985, respectively. Olsen did not timely request a rehearing, but instead instituted this Cause approximately two years later seeking to overturn the action of the Division. Olsen may not now collaterally attack those Orders.

2. Olsen initiated this Cause in September of 1987. On April 15, 1989, the OCD notified Olsen's counsel that this Application would be scheduled for hearing and dismissed. Olsen's attorney requested a further continuance. Olsen has utterly failed to prosecute this Cause with due diligence and is prolonging the administrative process in an attempt to subvert a judicial resolution of other legal disputes with Hartman.

3. At the same time Hartman sought the compulsory pooling Orders attacked herein, he was negotiating with Olsen and arrived at an agreement for the purchase of

Olsen's interest. Hartman relied upon Olsen's agreement to sell his interest, but Olsen later reneged on that agreement. Olsen is equitably estopped from asserting any technical noncompliance with the provisions of Order Nos. 8668 and 8769.

4. Hartman drilled the wells authorized by the Orders at issue, undertaking all the financial risks and managerial responsibility for the benefit of the interest owners within the pooled lands. Hartman conscientiously complied with the terms and conditions imposed by Order Nos. 8668 and 8769. The policy underlying the conservation laws mandates that Olsen also abide by the terms of those Orders, including the payment of his share of drilling costs subject to the nonconsent penalty.

WHEREFORE, Hartman requests this Motion be set for hearing on the Division's docket for July 12, 1989, and the Division dismiss the Application for the foregoing reasons.

Respectfully submitted,

By Harry T. Nutter

J.E. GALLEGOS
HARRY T. NUTTER
300 Paseo De Peralta
Suite 100
Santa Fe, New Mexico 87501
(505) 983-6686

Attorneys for Respondent
Doyle Hartman

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response was served on this 16th day of June, 1989, to all counsel of record.

Harry T. Nutter
HARRY T. NUTTER

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:

CASE NO. 8769 (REOPENED)
ORDER NO. R-8091-A

THE APPLICATION OF DOYLE HARTMAN FOR COMPULSORY POOLING, LEA COUNTY, BEING REOPENED UPON THE APPLICATION OF HOWARD OLSEN TO RECONSIDER THE PROVISIONS OF DIVISION ORDER NO. R-8091

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Pre-Hearing Statement was served via U.S. Mail, postage pre-paid to T. Calder Ezzell, Jr., Esq., Counsel for Howard Olsen, this 22nd day of February, 1991.

GALLEGOS LAW FIRM

By _____
J.E. GALLEGOS
JOANNE REUTER
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

ATTORNEYS FOR
DOYLE HARTMAN, OIL OPERATOR

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

BRUCE KING
GOVERNOR

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87504
(505) 827-5800

April , 1991

HINKLE, COX, EATON,
COFFIELD & HENSLEY
Attorneys at Law
700 United Bank Plaza
400 North Pennsylvania
Roswell, New Mexico 88202

RE: CASE NO. 8769 and CASE NO. R-8668
ORDER NO. R-8091-B and ORDER NO. R-8031-B

Dear Sir:

Enclosed herewith are four copies of the above-referenced Division orders recently entered in the subject cases.

Sincerely,

Florene Davidson

Florene Davidson
OC Staff Specialist

FD/sl

cc: BLM - Carlsbad
William Carr
J. E. Gallegos