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September 21, 1988

HAND-DELIVERED

Mr. Tom Bahr
Secretary of Energy, Minerals
and Natural Resources
Villagra Building, Room 121
408 Galisteo Street
Santa Fe, New Mexico 87501

Re: Application for Review of Mallon Oil Company, et al.

Dear Secretary Bahr:

Please find enclosed the response of Benson-Montin-Greer Drilling Corp., Sun Exploration and Production Company and Dugan Production Corporation's Opposition to Mallon Oil Company's application for review of certain decisions of the Oil Conservation Commission.

Very truly yours,

WILLIAM F. CARR
WFC:mlh
Enclosure
cc w/enc.: W. Thomas Kellahin, Esq.
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STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPEAL TO
THE SECRETARY OF THE ENERGY,
MINERALS AND NATURAL RESOURCES
DEPARTMENT FOR THE PURPOSES OF
CONSIDERING:

CASES: 7980
8946
8950
9111
9412

THE APPEAL OF OIL CONSERVATION
COMMISSION ORDERS R-8712, R-7407-F,
R-6469-F, and R-3401-B, AFFECTING
THE SPECIAL RULES AND REGULATIONS
OF THE GAVILAN-MANCOS OIL POOL
AND THE WEST PUERTO CHIQUITO-MANCOS
OIL POOL,

OPPOSITION OF BENSON-MONTIN-GREER DRILLING CORP., SUN EXPLORATION AND PRODUCTION COMPANY AND DUGAN PRODUCTION CORPORATION TO THE APPLICATION FOR REVIEW BY MALLON OIL COMPANY, ET AL.

COME NOW Benson-Montin-Greer Drilling Corp., Sun Exploration and Production Company and Dugan Production Corporation and requests that the Secretary deny the Application for Review filed by Mallon Oil Company, et al., dated September 19, 1988 in the above matter. The grounds for opposition to the Application are:

1. APPLICANT HAS FAILED TO RAISE SUFFICIENT GROUNDS FOR REVIEW BY THE SECRETARY

The dispute between the Mallon Group and the Benson-Montin-Greer Group over the methods of production and development of the Gavilan Mancos and West Puerto Chiquito Mancos Oil Pools in Rio Arriba County, New Mexico began in 1983 and has continued to date. These related cases have now involved more than seventeen days of Oil Conservation Commission hearings over some five years. Once again the Mallon Group asks the Secretary to exercise his discretionary power under Section 70-2-26, N.M.S.A. 1978 and rehear this matter. But in support of their application the Mallon Group cites issues similar to those which resulted in denial by the Secretary of their prior applications for review on November 5, 1986 (enclosure 1) and on July 28, 1987 (enclosure 2).

The issues on which the Mallon Group now seek the Secretary's review are matters which were vigorously contested before the Oil Conservation Commission with numerous experts on both sides presenting extensive evidence. While both sides argued for the prevention of waste and the protection of correlative rights, each side did so based upon their analysis of highly technical engineering data. The Mallon Group argued that the pools were best produced by allowing all wells to produce at maximum capacity while the Benson-Montin-Greer Group argued that the pools were best produced by reducing the rates of production to conserve reservoir energy and thus more efficiently produce and maximize recovery.

The Mallon Group now asks the Secretary to substitute his judgment for that of the Commission on these issues which are exclusively within the Commission's statutory jurisdiction under the guise that these Orders contravene the statewide energy plan or the public interest.

The specific details of the Commission Orders which the Mallon Group now contends should be addressed by the Secretary are firmly entrenched within the jurisdiction and responsibility of the Commission to prevent waste and protect correlative rights.

Mallon's contention that the Commission Orders violate the statewide energy plan and contravene public policy, are predicated on the conclusion, rejected by the Commission, that their engineering interpretations are correct. They raise no issue that warrants review by the Secretary and their Application for Review should be denied.

2. SHOULD THE SECRETARY EXERCISE HIS DISCRETION AND GRANT A HEARING, THE SECRETARY MUST CONDUCT A DE NOVO HEARING ON OR BEFORE SEPTEMBER 26, 1988

Pursuant to Section 70-2-26 N.M.S.A. 1978 the Secretary may call a matter before him for hearing. Once this is done, however, this statute specifically requires that the Secretary hold the hearing within twenty (20) days of the Commission's denial of the Rehearing application. This is not a discretional matter and if the Secretary grants a hearing in this case, he must call, conduct and conclude the hearing on or before September 26, 1988.

The Applicants could have filed their Application with the Secretary on September 7, 1988. Instead they waited until September 19, 1988 when most of the time had run for review by the Secretary. As a result of the applicants' delay, it is virtually impossible to schedule such a hearing and give all parties adequate procedural due process.

Another matter which is not discretionary with the Secretary, once he decides to hold a hearing under this statute, is that the hearing must be de novo. On this point, the statute is clear. It provides that the hearing "shall be a de novo proceeding". The reason for this is that if the Secretary reviews an order to determine whether or not it is consistent with a state-wide energy plan or the public interest, his jurisdiction is different from that of the Commission and he is necessarily deciding different issues and looking for different facts than those which were properly before the Commission. For this reason, it is essential that any proceeding before the Secretary be de novo.

The suggestion by the Applicant that the Secretary could incorporate the record of the seventeen days of hearing before the Commission into the rehearing, adequately inform himself about this case and render an informed judgment after a four hour hearing is ridiculous and can only lead the Secretary into error.

CONCLUSION

This statutory appeal provision to the Secretary is not designed to correct errors of the Commission, but to assure that OCC actions, though correct from a waste and correlative rights

point of view, do not contravene the state's energy plan or the public interest.

The application fails to show how the intervention by the Secretary will protect either the statewide energy plan or the public interest when the evidence before the Commission was that granting capacity allowables to certain high capacity wells would only result in those wells taking production from adjoining wells and would not result in the recovery of more oil than would otherwise be recovered.

Accordingly, Benson-Montin-Greer Drilling Corp., Sun Exploration and Production Company and Dugan Production Corporation request the Secretary deny the Application for Review filed by Mallon Group.

Respectfully submitted,

KELLAHIN, KELLAHIN & AUBREY

By: _____

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Attorneys for
Benson-Montin-Greer
Drilling Corp.,

CERTIFICATE OF MAILING

I hereby certify that a true correct copy of the foregoing pleading was mailed to all counsel of record on this 21st day of September, 1988.

William F. Carr

ENERGY AND MINERALS DEPARTMENT
STATE OF NEW MEXICO

IN THE MATTER OF THE APPEAL
TO THE SECRETARY OF THE ENERGY
AND MINERALS DEPARTMENT FOR
THE PURPOSE OF CONSIDERING:

THE APPEAL OF OIL CONSERVATION
COMMISSION ORDER R-7407-D AMENDING
THE SPECIAL RULES AND REGULATIONS
OF THE GAVILAN-MANCOS OIL POOL

Oil Conservation
Commission Case No.8946

MEMORANDUM DECISION
BY THE SECRETARY OF ENERGY AND MINERALS

This matter has come before me on the appeal of Mallon Oil Company (Mallon) and Mesa Grande Resources, Inc. (Mesa Grande) from Order R-7407-D issued by the Oil Conservation Commission (the Commission) on September 11, 1986. The appeal is submitted to the Secretary of Energy and Minerals (the Secretary) by Section 70-2-26 NMSA 1978, which explicitly grants the Secretary discretion to convene a public de novo hearing to review orders of the Commission on specified grounds. I have considered the Commission's order, the Notice of Appeal, the correspondence of counsel, the applicable statutes and the state's energy plan. For the reasons stated below, I decline to exercise my discretion to convene the hearing requested by Mallon and Mesa Grande.

This case was initiated on the application of Jerome P. McHugh

and Associates (McHugh) for an amendment to the Temporary Special Rules and Regulations of the Gavilan-Mancos Oil Pool. A similar application was filed by Benson-Montin-Greer Drilling Corporation (Benson) and the two matters were consolidated for the Commission. The amendments were sought to temporarily reduce the limitations on allowables for oil production and the gas-oil ratio limitation factor for that pool. After due public notice, a number of interested parties appeared to present various positions through counsel and testimony in hearings conducted over more than four days.

In its order R-7407-D issued September 11, 1986, the Commission ruled that it will adopt a temporary modification of the limiting-gas oil ratio and of the allowable production limitation in the Gavilan-Mancos Pool. This decision was premised on certain findings which, in essence, hold that these modifications will serve to prevent waste and better protect correlative rights in the subject pool. The Commission also found that reconsideration of the issues raised in the case should occur during or before March of 1987 through either of several designated proceedings.

Mallon and Mesa Grande filed a Motion for Rehearing with the Commission on October 1, 1986, which motion was deemed denied upon the Commission's failure to act within ten days. Mallon and Mesa Grande thereupon filed their timely appeal on a variety of

grounds with the Secretary on October 20, 1986. Because of the lack of precedent or established procedures for conducting an appeal to the Secretary under Section 70-2-26, supra, I sent a letter to counsel requesting comments on certain procedural and jurisdictional issues. Timely responses addressing these questions were filed by counsel for Mallon, Mesa Grande, McHugh, Benson and Dugan Production Corp. In addition, correspondence from representatives or attorneys for Amoco Production Company and Koch Exploration Company has been reviewed. In view of the shortness of time within which the statute permits the Secretary to act, and the potential inconvenience to the parties of having attorneys and witnesses available in anticipation of a possible hearing on short notice, a letter was distributed on October 30 announcing my decision not to conduct a hearing. This memorandum decision describes the reasoning behind that decision.

ANALYSIS

The appeal to the Secretary under Section 70-2-26, supra, is actually an inference from the Secretary's discretion to review Commission orders sua sponte. "The secretary ... may hold a public hearing to determine whether an order or decision issued by the commission contravenes the department's statewide plan or the public interest," id. [emphasis added]. It is reasonable to infer therefrom that the Secretary's attention may be called to

such an inconsistency through an appeal by one of the parties to the Commission case, which is the process that has occurred here. Nevertheless the Secretary's authority to conduct such a hearing or to issue a decision requiring revision of the Commission's order may only be premised on the grounds stated in the statute. Unless the secretary believes that the department's statewide plan or the public interest may be violated by the Commission's order, he cannot hold a hearing.

Any attempt to invoke the Secretary's discretion must therefore suggest how the statewide energy plan or the public interest have been contravened by the Commission. I know of no administrative or judicial precedent that addresses how broadly or narrowly this unique standard was meant to be interpreted. In particular, "public interest" is a vague term that may be interpreted in any number of ways. From my reading of the statute, however, I conclude that the standard to be applied by the secretary in this procedure is a narrow one.

A narrow interpretation of this standard would mean that the Secretary is empowered to act only insofar as the interests that he is charged with protecting are different from those within the purview either of the Commission or of the courts. I am quite confident that the statute did not intend to create an intermediate quasi-judicial tribunal with authority to review the

Commission's orders for legal adequacy or compliance with the constitutional dictates of due process of law. Nor could the intent of the statute be to provide for secretarial review of Commission orders on the same standards as those entrusted to enforcement by the Commission itself in the Oil and Gas Act, Section 70-2-1 through 36 NMSA 1978, as amended, since the standards available to the secretary are stated explicitly and are different from those that guide the commission. The only logical reading of Section 70-2-26, supra, is that the secretary is authorized to measure the Commission's decisions, based upon its statutory duties, for their consistency with the policies identified and implemented by the Secretary. The logic of this interpretation is supported by the statutory scheme which places the Oil Conservation Commission within the Energy and Minerals Department, Section 9-5-3 NMSA 1978, but assigns exclusively to the Commission the power to enforce the interests of the Oil and Gas Act, supra. The Secretary's review power is solely intended to ensure consistency between the Secretary's energy policy strategies and the Commission's decisions, so that one component of the state's energy agency could not undermine the efforts of the chief energy officer of the state, Section 9-5-3 and 9-5-5 NMSA 1978.

Proper application of the Secretary's prerogative requires review of the state's energy plan, as promulgated pursuant to Section 9-5-3 (K) and 9-5-6(A)(3), NMSA 1978; and other lawful pronouncements of the state's energy interests as found in the

laws. Were it to appear likely that the Commission's order interfered with the goals or implementation strategies of either of these sources of state energy policy, I would invoke my discretion to conduct a de novo hearing to determine the extent of any such inconsistency. I find no cause to do so, however, and none has been presented to me by the appellants.

The Mallon/Mesa Grande notice of appeal cites numerous grounds for reversal. In summary, these include: the arbitrary, capricious and illegal failure by the Commission to issue findings required by law to change proration rules (Point I); or to issue findings supported by substantial evidence in the record (Points III and V); or to impact correlative rights evenly and fairly (Point II). Point IV of the appeal challenges the Commission's alleged attempt to coerce unitization indirectly without lawful authority, while Point VII claims a violation of due process requirements by the Commission's action eliciting a draft order from only one party. Without commenting on the merits of any of these claims, they all lie clearly within the jurisdiction of the reviewing courts, pursuant to Section 70-2-25B NMSA 1978 and with the Commission in the first instance. While the state laws may well contemplate that any such violation should not go unremedied, nowhere in Section 70-2-26 do I find the legislature to have entrusted that responsibility or authority to me.

Nothing in the Mallon/Mesa Grande appeal alleges any violation of

the state's energy plan, but in view of the Secretary's statutory discretion to act sua sponte I have nonetheless reviewed the appropriate portions of that document, "A Policy Level Plan for the Development and Management of New Mexico's Energy and Minerals Resources," Energy and Minerals Department (9/84). I find no conflict therein to suggest that I invoke my discretion on the basis of that document.

Only Point VI of notice of appeal even attempts to assert a contradiction between Order R-7407-D and the public interest, as that term should be construed in Section 70-2-26. In that point appellants allege, first, discrimination by the Commission's order against out-of-state operators; and, second, that the order would cause the state of New Mexico to lose income from oil production taxes and royalties. On their face such allegations might well prompt concern that the state's energy policy interests could be adversely affected.

I do not, however find sufficient substance to these assertions to invoke my discretion to conduct a de novo hearing. Counsel for McHugh points out rather persuasively that appellants' own data are only partially consistent with the notion that the order discriminates against out-of-state producers. But even if the data were to reveal consistently more favorable results for in-state over out-of-state producers, a greater, initial showing of prejudice would be necessary to induce me to invoke the Secretary's discretionary review power. Results alone may

suggest the possibility of discrimination, but in this case the Commission has clearly premised its action on principles that were differently motivated. So long as the chips were permitted to fall where they might, it is not discriminatory that they landed disproportionately outside the state. If the Commission had acted solely out of malice toward foreign companies, and had lacked substantial legitimate evidence or rationale for its decision, as appellants imply, then that issue may be addressed by the judiciary. It is clearly not the Secretary's function to conduct such a review under Section 70-2-26.

The other asserted violation of the public interest in the order is the economic detriment to the state from the allegedly unnecessary and arbitrary reduction in allowable oil production resulting from the order. There can be no question that the state benefits from petroleum production, and an order limiting production without justification would be a proper subject for the Secretary's review. But the Commission's order considered the reduced production and balanced that consequence against valid competing policy interests. In particular, the loss of some immediate production revenues, while undesirable in itself, may be quite tolerable if the result is to increase the total production that will ultimately derive from the pool. The Commission's order reveals that it weighed considerable technical evidence and argument presented by several parties before concluding that this long-term benefit would be precisely the

result of its short-term sacrifice. Whether its judgment was right or wrong, its reasoning is certainly consistent with the state's interest "to protect and preserve the extractive resources of the state of New Mexico for present and future generations," Section 9-5-3(A), supra [emphasis added]. The statutory language authorizing the Secretary to review the commission's action explicitly requires his consideration of conservation, Section 70-2-26. To the extent that the highly experienced Commission and its staff may have lacked the expertise or judgment to weigh accurately the technical evidence that led it to its conclusion, there is little reason to believe that the Secretary could do any better.

Finally, I note that the Commission limited the duration of its decision so that by March, 1987, if not sooner, it will be reconsidered through one of several designated procedures. Even if appellants have correctly identified defects in the order, time and further measurements of reserves and flows may reveal results that relieve some of the controversy. As far as I am concerned the Commission's judgment should at least be given the deference of several trial months before being subjected to review on the accuracy of its readings of the available data.

DECISION

The Commission's order does not appear to give rise to issues requiring the Secretary to invoke a hearing to determine

consistency with the state's energy plan or the public interest, as that term is contemplated in Section 70-2-26, supra, because the order already gives due consideration to some of the same energy policies that the Secretary is charged with developing and implementing. Any errors asserted by appellants are properly addressed to the process of judicial review. I see no basis for exercising the Secretary's limited authority to convene a public hearing to determine whether Oil Conservation Commission Order R-7407-D contravenes the department's statewide plan or the public interest, and accordingly dismiss the appeal.

NEW MEXICO ENERGY AND MINERALS DEPARTMEN

11/5/86
DATE

Paul L. Biderman
PAUL L. BIDERMAN
SECRETARY

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
STATE OF NEW MEXICO

IN THE MATTER OF THE APPEAL TO
THE SECRETARY OF THE ENERGY, MINERALS
AND NATURAL RESOURCES DEPARTMENT FOR
THE PURPOSE OF CONSIDERING:

OIL CONSERVATION COMMISSION ORDER NO. R-7407-E	AND	OIL CONSERVATION COMMISSION CASE NOS. 7980, 8946, 9113, 9114 AND 8950
ORDER NO. R-6469-D		

MEMORANDUM DECISION
BY THE SECRETARY OF ENERGY, MINERALS AND NATURAL RESOURCES

This matter has come before the Secretary of Energy, Minerals and Natural Resources (the Secretary) on the application of Mallon Oil Company and Mesa Grande Resources Inc. (the Applicants) for review of the Oil Conservation Commission (the OCC) in the above-referenced matter. The application for review was submitted to the Secretary pursuant to Section 70-2-26 NMSA 1978, which grants the Secretary discretion to convene a public de novo hearing to review orders of the OCC on specified grounds. I have considered the OCC's order, the Application for Review, the correspondence and pleadings of counsel, the applicable statutes and the state's energy plan. For the following reasons I decline to exercise my discretion to convene the hearing requested by Mallon and Mesa Grande.

1) The review established under Section 70-2-26 NMSA 1978 is entirely discretionary with the Secretary.

2) The Applicants have attempted to formulate issues which would meet the statutory standards of review which could cause the Secretary to exercise his discretion. However, in my view the issues raised in applicants applications for review are technical issues within the expertise of OCC which may be appealed to District Court. The issues raised are not the types of policy issues contemplated by Section 70-2-26 NMSA 1978.

Therefore I decline to exercise discretion in this case.

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT:

July 28 1987
(DATE)

TOM BAHR, SECRETARY