

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:)
 APPLICATIONS OF YATES PETROLEUM)
 CORPORATION)

CASE NO. 10,905

10,906

REPORTER'S TRANSCRIPT OF PROCEEDINGSEXAMINER HEARING

BEFORE: JIM MORROW, Hearing Examiner

MAR 21 1994

February 3rd, 1994

Santa Fe, New Mexico

This matter came on for hearing before the Oil
 Conservation Division on Thursday, February 3rd, 1994, at
 Morgan Hall, State Land Office Building, 310 Old Santa Fe
 Trail, Santa Fe, New Mexico, before Steven T. Brenner,
 Certified Court Reporter No. 7 for the State of New Mexico.

* * *

I N D E X

February 3rd, 1994
Examiner Hearing
CASE NOS. 10,905, 10,906

PAGE

Motion by Mr. Kellahin

3

REPORTER'S CERTIFICATE

23

* * *

A P P E A R A N C E S

FOR THE DIVISION:

ROBERT G. STOVALL
Attorney at Law
Legal Counsel to the Division
State Land Office Building
Santa Fe, New Mexico 87504

FOR THE APPLICANT:

LOSEE, CARSON, HAAS & CARROLL, P.A.
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Artesia, New Mexico 88211-0239
By: ERNEST L. CARROLL

FOR NEARBURG PRODUCING COMPANY
AND NEARBURG EXPLORATION COMPANY:

KELLAHIN & KELLAHIN
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P.O. Box 2265
Santa Fe, New Mexico 87504-2265
By: W. THOMAS KELLAHIN

* * *

1 WHEREUPON, the following proceedings were had at
2 11:17 a.m.:

3 EXAMINER MORROW: Call Case 10,905.

4 MR. STOVALL: It's the Application of Yates
5 Petroleum Corporation for compulsory pooling, Eddy County,
6 New Mexico.

7 EXAMINER MORROW: Call for appearances at this
8 time.

9 MR. CARROLL: Mr. Examiner, I'm Ernest Carroll of
10 the Artesia law firm of Losee and Carson, and I'm here
11 today representing Yates Petroleum, the Applicant, and I
12 will have three witnesses.

13 EXAMINER MORROW: Are there other appearances?

14 MR. KELLAHIN: Mr. Examiner, I'm Tom Kellahin of
15 the Santa Fe law firm of Kellahin and Kellahin, appearing
16 today on behalf of Nearburg Producing Company and Nearburg
17 Exploration Company.

18 And after you swear the witnesses I have a motion
19 to make.

20 EXAMINER MORROW: Will the witnesses please stand
21 and be sworn?

22 (Thereupon, the witnesses were sworn.)

23 (Off the record)

24 EXAMINER MORROW: All right, Mr. Kellahin.

25 MR. KELLAHIN: Well, I think I'm about to do us

1 all a favor, I'm not sure. I don't think we need to be
2 here to do this case, and let me tell you why, and then
3 we'll see where we are.

4 Mr. Carroll was in depositions in Roswell
5 yesterday, and his secretary Candy was very kind to talk to
6 me on several occasions. It was my information from my
7 client that they thought they were settling this matter,
8 that they had expectations of doing so, and that was my
9 point of view.

10 Late yesterday afternoon I communicated that to
11 Mr. Carroll, and towards the end of the day, around 4:20,
12 he faxed me back a note, believing in his position that
13 there was no settlement of this matter.

14 I have requested a continuance and/or a dismissal
15 of the Yates pooling matter. I have previously continued
16 the Nearburg case, which is the companion case on your
17 docket. It appears as Case 10,906, I believe. It's the
18 second one down.

19 Let's see if I can set the stage for what I think
20 makes this matter moot.

21 My information is, and I have the correspondence,
22 but the information I have from Nearburg is that by letter
23 dated December 30th of 1993, Mr. Joe Fitzgerald, on behalf
24 of Nearburg, proposed the subject well which both companies
25 have identified as the Boyd "X" State 3 well and submitted

1 a written request to Yates and AFE.

2 I understand that this well or this spacing unit
3 or the idea for a well of this type had been discussed by
4 the parties several months prior. But the latest relevant
5 well proposals, as I understand it, were the offer by
6 Nearburg proposing the well on December 30th.

7 The next item is the item that my client asked me
8 to express concern to you about today and to frame in the
9 form of a motion. The item is their concern that Yates did
10 two things on the same day: that on January 3rd, Yates
11 directed Mr. Carroll to file a force-pooling action in this
12 case, and on the same day proposed this well back to
13 Nearburg.

14 We believe that filing was premature. The
15 parties had not had a full and complete opportunity to
16 reach a voluntary agreement.

17 Since then, I have received by facsimile,
18 yesterday, what I believe to be an acceptance by Nearburg
19 of Yates's proposal. It is my understanding, and I can
20 provide you and Mr. Carroll with what I believe to be
21 Nearburg's signature of the AFE that was submitted to
22 Nearburg by the January 3rd letter.

23 I have by facsimile the signature page of the
24 joint operating agreement, which Yates had submitted to
25 Nearburg, and the only item I was aware of for which there

1 was any type of discussion is what was to be done with
2 produced water.

3 You may remember that the North Dagger Draw Pool
4 produces water in association with the oil, and both
5 Nearburg and Yates have their own separate disposal
6 systems. And so that was an item under discussion.

7 It is my understanding that regardless of how
8 that particular issue has been resolved, that Nearburg has
9 communicated to me what they believe to be an acceptance of
10 Yates as operator of this well, having signed the AFE,
11 having signed the joint operating agreement, and therefore
12 we believe the case is moot.

13 We think, on the first hand, that Yates was
14 premature in filing the pooling case in the fashion they
15 did.

16 I have been at hearings before this body where
17 the Division has scolded operators for shooting too quick,
18 for swinging a force-pooling club as a negotiating device
19 rather than as a last resort when the parties have failed
20 to reach an agreement. And in this case we think Yates has
21 prematurely filed the case.

22 We therefore request that their pooling case
23 either be continued like ours, to make sure all the
24 paperwork comes together properly, or, in fact, that their
25 case be dismissed because it was prematurely filed.

1 EXAMINER MORROW: Are you proposing both be
2 dismissed?

3 MR. KELLAHIN: Mine wasn't prematurely filed, Mr.
4 Examiner, so...

5 EXAMINER MORROW: You're not proposing that
6 10,906 be dismissed, only continued. All right.

7 MR. STOVALL: Wait a minute. Before we get into
8 the battling about the question of whether it was
9 prematurely filed or not -- because that's a decision I
10 think would have to be made based upon some evidence, and I
11 understand that there is some additional evidence that will
12 discuss that issue -- the question I am concerned about,
13 and the one let's make a decision on, is this thing about
14 whether or not Nearburg has communicated acceptance of the
15 Yates proposal, and is it in effect, is it in fact in
16 place?

17 And Mr. Carroll, I would ask your response not to
18 get into the issue of whether or not it's premature or not,
19 because I believe that's a matter of fact which would have
20 to be determined based on evidence.

21 The only question that I really see as important
22 is whether or not there's an agreement.

23 MR. CARROLL: Let me say --

24 MR. KELLAHIN: Just one footnote. I don't know
25 if they've got the documents yet.

1 MR. CARROLL: No.

2 MR. KELLAHIN: It's in the process of being
3 submitted to them. They were faxed to me yesterday, and I
4 don't know what Yates has in their office at this point,
5 but I'm here to tell you that my client thinks they've done
6 it. And but for the fact of being here this morning, we
7 might have all the paperwork in place.

8 MR. CARROLL: Let me state --

9 EXAMINER MORROW: Go ahead, sir.

10 MR. CARROLL: I guess, Mr. Morrow, you really
11 can't see how totally mad I am inside, because you have had
12 one of the most bald-faced jobs, snow jobs, just done on
13 you, not by Mr. Kellahin, because I don't think Mr.
14 Kellahin knows. But what has happened is, just -- It is
15 appalling.

16 By five o'clock there was no fax of these
17 documents to either me or Randy Patterson, because I was
18 down at my office that night after five o'clock. I
19 received a fax from Mr. Kellahin at five o'clock. Mr.
20 Patterson, Ms. Richardson were in their offices at five
21 o'clock. None of these documents came in.

22 It seems strange that if this were in fact the
23 deal, that they would have been faxed to their attorney and
24 not faxed to the principal parties, i.e., the company to
25 whom they should have been directed.

1 There is also a problem that the signature page,
2 that the -- The AFE is the latest AFE that was presented by
3 the January 3rd letter that Mr. Kellahin spoke of. But the
4 signature line on the joint operating agreement is not the
5 operating agreement that was prepared contemporaneously.
6 It was the one that was prepared January of 1993 and sent
7 to Mr. Nearburg for this well.

8 Since -- In that year's time, I'm sure several
9 things have been changed, especially the cost of the
10 overhead rates. I think that's one of the reasons Mr.
11 Nearburg is signing this; he's trying to get around what --
12 the obvious consequences of this hearing.

13 So I don't think there's an acceptance, and I
14 think I'm entitled to put my case on.

15 And back to my initial statement to you, Mr.
16 Morrow, this well was originally proposed in August of 1992
17 to Mr. Nearburg. We have prepared numerous exhibits for
18 presentation --

19 MR. STOVALL: Mr. Carroll, we've already said
20 that the issue of whether or not Yates is premature is one
21 which is a factual issue. Please don't -- Let's discuss
22 whether or not --

23 MR. CARROLL: Well, why did Mr. Kellahin get to
24 put the facts before -- I just wanted to know that this
25 thing has been proposed many times during the last year and

1 a half, and those statements are untrue.

2 MR. STOVALL: I understand that, Mr. Carroll.
3 Please. I am going to -- I mean, Mr. Kellahin made a
4 statement. I don't -- I'm going to advise the Examiner
5 that that is argument of counsel and does not go to those
6 facts.

7 I understand that you are upset. But let's
8 figure out what to do about the purported acceptance of
9 Yates's offer. That may be the critical issue to address.

10 MR. CARROLL: Well, the critical -- Until this is
11 presented to us, and this is just a facsimile, I would
12 contend that the authority, the AFE, is not -- it has not
13 been sent to us, the deal has not been accepted.

14 And furthermore, we're in the position, because
15 we've had so many of these examples with the Nearburg
16 Company, we don't know that they won't pull this out from
17 under us.

18 And the signature on the operating agreement --
19 This was an operating agreement that was sent more than a
20 year ago. That time period alone dictates that they can't
21 now come and accept it. We know that the charges have
22 changed and that a new operating agreement would have to be
23 prepared. This thing is 13 months old, and it's just not
24 appropriate. It needs to be rewritten.

25 So I think that it is inappropriate for us to

1 even consider it being accepted.

2 MR. STOVALL: Well, appropriate or not, I guess
3 my question would be -- And it is beginning to sound like
4 we do have a factual question on that issue.

5 My understanding is what is being said -- what
6 you are saying is that Yates made an offer in 1993 -- it
7 appears to be January, according to Mr. Kellahin's
8 submission -- which was accepted in 1994. Now, whether
9 that offer was still open if nothing else had happened
10 would be a question.

11 MR. CARROLL: That's correct.

12 MR. STOVALL: What I understand you to be saying,
13 further, is that at a subsequent time -- and Mr. Kellahin
14 referred to a January 3rd letter, and for the moment let's
15 take that as the date unless you have an objection to it --
16 there was another offer submitted.

17 Now, what happened in the intervening time and
18 whether or not there was negotiation and good-faith efforts
19 is not the question.

20 Am I understanding correctly that you are saying
21 that this acceptance was of an offer that was either
22 revoked by expiration of some period of time, or by a
23 subsequent offer which in effect revoked this offer and --

24 MR. CARROLL: I would have to say that by their
25 filing the force-pooling application -- or making the

1 offer, and then -- Our last offer came in November of 1993,
2 before the January 3rd.

3 MR. STOVALL: Okay.

4 MR. CARROLL: That offer was rejected, because
5 later on a few weeks, Nearburg said, We will accept your
6 offer, contingent on all of the water produced from that
7 well being disposed of through the Nearburg disposal
8 system. That was the counteroffer. I think you have to
9 admit right there that that is a total rejection. New
10 terms were proposed.

11 Now, Mr. Kellahin is correct, there was some
12 negotiation yesterday about this water deal. It has been
13 held out, Nearburg wants that -- wants the water disposed.
14 Yates, as part of its case, will show why it is not
15 economic to do that for Yates. It will only benefit
16 Nearburg. They cannot accept that term.

17 There has been no agreement, and so the -- with
18 respect to this offer, that they're now trying to come --
19 after they had rejected it, I think you can only consider
20 it was rejected. Then if you can say, Well, maybe we made
21 a new one on January 3rd when they filed the force-pooling
22 application, on the same location as we have, that was
23 subsequent to the January 3rd, that also has to be a
24 rejection of -- if you consider ^{JM} its offer, rejection,
25 another offer, then you've got another rejection.

1 So I think any way you consider it, there has
2 been no acceptance of any offer made by Yates.

3 There have been counteroffers which Yates has, as
4 of yesterday, informed Nearburg, about 4:30, that we cannot
5 accept the terms of that counteroffer. That is, allowing
6 all the water to be disposed.

7 MR. STOVALL: Okay, now that we've had all the
8 lawyer talk --

9 MR. KELLAHIN: Well, you decide what you want to
10 do. Just one brief comment.

11 MR. STOVALL: Okay, just to the issue of whether
12 there's an agreement at this time.

13 MR. KELLAHIN: That was the basis for my request
14 for a continuance and/or a dismissal, is so that the
15 parties have a chance to hash this out and don't bring to
16 you an issue it could be dispositive of by rule. It's my
17 understanding that Nearburg thinks it's dispositive.

18 The force-pooling case I filed, if you read the
19 Application, is simply reactive to Mr. Carroll's
20 application so we have a pooling case on the docket.

21 I am aware of no reason that this case can't be
22 continued for two weeks so that Mr. Carroll and I can
23 really find out if my opinion is correct that there is an
24 agreement.

25 And if not, then we'll come and duke it out, I

1 guess. I don't know what else to tell you. But I think
2 we're wasting your time.

3 MR. STOVALL: Well, hold on before you respond
4 Mr. Kellahin. Let's get one thing in the record, and we
5 can take administrative notice of the fact that Yates and
6 Nearburg have had plenty of business dealings with each
7 other, and so we're not dealing with an isolated situation.
8 I think that is -- The Commission is not going to be
9 ignorant of the context of that.

10 But I want to talk to the Examiner for just a
11 second.

12 (Off the record)

13 MR. STOVALL: Gentlemen, I've made a
14 recommendation to the Examiner, and I'll state it to you in
15 my words, and then let him dwell on it.

16 Again, recognizing that this is not an isolated
17 case and we're dealing the first time with parties that
18 don't have a relationship that we're aware of, before we
19 act further on anything, I've recommended that we take a
20 break until one o'clock, get on the phone, find out if
21 we've got an agreement between the parties to participate
22 in a well, talk to the principals, come back here at one
23 o'clock.

24 And my recommendation to the Examiner is that at
25 that time we will proceed -- If there is no agreement, if

1 your parties haven't communicated to you an agreement, then
2 we can proceed.

3 The issues upon which the motion to dismiss or
4 continue are made are subject to -- are based upon some
5 factual matters which are not yet in the record, and we can
6 at least hear the land testimony, the -- I presume it would
7 be in the area of the land testimony --

8 MR. CARROLL: Yes, sir.

9 MR. STOVALL: -- regarding prior discussions and
10 what's going on, and effectively rule at that time.

11 But the inclination is that probably Yates would
12 be permitted to present its case, but -- certainly the land
13 portion of the case, because I think that's a -- I don't
14 think we can rule on the reasons for the motion that Mr.
15 Kellahin has raised without hearing some evidence regarding
16 the facts stated in the argument in support of the motions.

17 MR. CARROLL: May I seek a clarification? What
18 you're asking us to do -- You want us to call Yates to see
19 what they have received or see if there's been any further
20 negotiations toward reaching an agreement, and that's what
21 I'm to report back?

22 MR. STOVALL: Correct.

23 MR. CARROLL: Is that where it stops?

24 MR. STOVALL: Correct.

25 MR. CARROLL: Okay.

1 MR. STOVALL: And I guess -- I realize you've got
2 a time-zone problem, Mr. Kellahin, but I think we need
3 to...

4 MR. KELLAHIN: Well, it would be helpful to me to
5 understand what if any material differences Mr. Carroll
6 contends exist between the joint operating agreement we've
7 executed and what they now think they want.

8 MR. STOVALL: Well, it sounds like the main one
9 that Mr. Carroll has pointed out may be overhead rates. I
10 suspect that that's --

11 MR. CARROLL: The -- let me -- I can tell --

12 MR. STOVALL: Okay.

13 MR. KELLAHIN: Because I don't know what they
14 are.

15 MR. CARROLL: -- if -- Tom, if you can get this,
16 one, that they've accepted the new AFE, which is that --
17 Yeah, that would be the 11-10 AFE that the operating
18 agreement -- there was an operating agreement prepared and
19 dated January 15th, 1993.

20 There was a second one sent with the same outside
21 date, January 15th, 1993, but it had the overhead rates
22 changed, I believe, to 5400/540. And that's -- If they are
23 saying they have accepted that operating agreement changed
24 to effect those, then we would be willing, if there are no
25 other conditions, that the water be disposed of according

1 to the operator's desires. Now, that's the thing we don't
2 want hanging out, because we --

3 MR. STOVALL: We're not going to make a decision
4 on that anyway.

5 MR. CARROLL: Well, I mean, just so it is
6 understood there are no other conditions. This is an
7 unequivocal acceptance of Yates's proposal. If the parties
8 later want to negotiate the disposal of that water through
9 a different system, certainly the parties are agreed. But
10 we don't think we're going to do it. I mean, we haven't
11 bound ourselves.

12 EXAMINER MORROW: Well, earlier you said the
13 water thing was a rejection of your agreement. Would that
14 still be the case or not?

15 MR. CARROLL: Well, by making -- by agreeing to
16 what I just said, they're withdrawing the -- They said our
17 acceptance was subject to the water agreement.

18 I'm saying now, the presentation of these two
19 signed instruments are not subject -- the delivery is not
20 subject to an agreement on the water. It's an absolute
21 delivery without any further conditions. The parties are
22 allowed to negotiate anything further that they wish to.

23 MR. STOVALL: I would agree that -- to the effect
24 that -- what you're saying is that unconditional acceptance
25 of the agreement, and --

1 MR. KELLAHIN: Well, I guess I'm confused. I
2 don't want to sit here and agree with Mr. Carroll on some
3 kind of modification of the terms and conditions of
4 whatever operating agreement it is. You know, these guys
5 have got experts that read that stuff. I don't want to
6 read it.

7 MR. STOVALL: I'm not asking you to, Mr.
8 Kellahin. All we would want you to do is to contact -- for
9 each of you to contact your respective clients and say,
10 Have you agreed on the same instrument unconditionally, so
11 it's not a conditional contract, it's a firm agreement?
12 And you just come back -- You're the messengers at this
13 point. I'm not asking you to interpret or --

14 MR. KELLAHIN: To expedite the process, the
15 change between the first and the second drafts is a change
16 in overhead rates?

17 MR. CARROLL: In overhead rates.

18 MR. KELLAHIN: And everything else is the same?

19 MR. CARROLL: As I understand it, that's true.

20 MR. KELLAHIN: Okay, that's an easy phone call to
21 make. Thank you.

22 EXAMINER MORROW: All right, we'll do that.
23 We'll be back at one, then, if that suits everyone.

24 (Off the record)

25 EXAMINER MORROW: All right, we're in recess till

1 1:00 p.m.

2 (Thereupon, a recess was taken at 11:40 a.m.)

3 (The following proceedings had at 1:12 p.m.)

4 EXAMINER MORROW: Call the hearing back to order
5 and ask for reports from Mr. Carroll and Mr. Kellahin.

6 MR. CARROLL: As I understand it, Mr. Examiner, I
7 think the -- No new negotiations have happened with my
8 client. Mr. Patterson had been in a meeting all day today
9 and hadn't had any contact with Nearburg.

10 At 9:30 this morning, the same AFE and signature
11 page to a JOA were faxed into Yates's offices, but I
12 think -- Mr. Kellahin has just given me a letter, I think,
13 whereby they have agreed to the terms that we discussed
14 just prior to --

15 EXAMINER MORROW: Go ahead and read that, and
16 then you -- or give us time to read it too.

17 MR. CARROLL: It appears, and I think this is
18 what Mr. Kellahin has represented to me, that they have
19 accepted to join in the well unconditionally. In other
20 words, no other conditions other than them signing the AFE
21 and the joint operating agreement and this change.

22 And with that acceptance, Yates Petroleum is
23 prepared to accept it. And I see no, then, need for
24 further hearing.

25 MR. STOVALL: I guess what that means at this

1 point is that we would -- I guess Yates would move to
2 dismiss the Application.

3 MR. CARROLL: I think both parties would move to
4 dismiss.

5 MR. STOVALL: I was going to say that. Nearburg
6 obviously would not be in a position to seek a force-
7 pooling on the same track at this point.

8 MR. KELLAHIN: Well, there's no point in having
9 either hearing.

10 My client was working with the January 15th,
11 1993, operating agreement and, as he's expressed, the
12 modification he had was to the commencement date.

13 But I hope we're talking the same thing now,
14 we're still using that same agreement with this additional
15 change. And my understanding is, it's a voluntary
16 agreement between the parties at this point.

17 And I would propose to dismiss the Nearburg
18 pooling case.

19 MR. STOVALL: Hold on just a second before we do
20 that. Let me...

21 Mr. Carroll, what I'd like to do is -- I know
22 you've been conferring with Ms. Richardson on this, and --
23 make sure that she, as the company land representative, is
24 of the same understanding that you are, since she's here.

25 You know, I'm not even -- Well, you've been

1 sworn, so I guess it doesn't matter whether you're under
2 oath or not.

3 Ms. Richardson, you are the Yates land
4 representative; is that not correct?

5 MS. RICHARDSON: Yes.

6 MR. STOVALL: And you've had an opportunity to
7 review the letter, February 3rd, letter, addressed to Mr.
8 Kellahin regarding this matter?

9 MS. RICHARDSON: Yes, I have.

10 MR. STOVALL: And is -- the statements in there
11 essentially correct, without any discussion whether or not
12 your modifications for a change of rate -- Is it the same
13 AFE? Are you guys talking the same instrument?

14 MS. RICHARDSON: Yes. Yes, it is.

15 MR. STOVALL: Okay. Well, I think that -- that
16 would dispose of the case, I would think.

17 EXAMINER MORROW: Both cases.

18 MR. STOVALL: Both cases, dismiss.

19 MR. KELLAHIN: We concur.

20 MR. CARROLL: Yes.

21 EXAMINER MORROW: Well, if it's satisfactory,
22 then, both cases, with the parties, Cases 10,905 and 10,096
23 will be dismissed at Applicant's request.

24 MR. CARROLL: Thank you, Mr. Examiner.

25 EXAMINER MORROW: Thank you both. That was a

1 pleasant surprise.

2 All right, nothing further in Docket 4-94, the
3 hearing stands adjourned.

4 (Thereupon, these proceedings were concluded at
5 1:18 p.m.)

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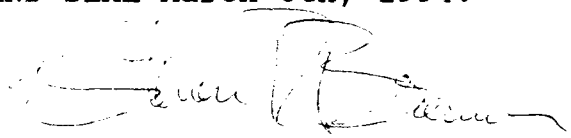
CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter
and Notary Public, HEREBY CERTIFY that the foregoing
transcript of proceedings before the Oil Conservation
Division was reported by me; that I transcribed my notes;
and that the foregoing is a true and accurate record of the
proceedings.

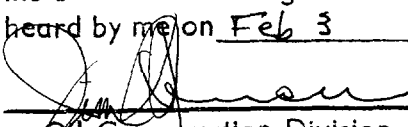
I FURTHER CERTIFY that I am not a relative or
employee of any of the parties or attorneys involved in
this matter and that I have no personal interest in the
final disposition of this matter.

WITNESS MY HAND AND SEAL March 6th, 1994.


STEVEN T. BRENNER
CCR No. 7

My commission expires: October 14, 1994

I do hereby certify that the foregoing is
a complete record of the proceedings in
the Examiner hearing of Case No. ¹⁰⁹⁰⁵⁺10906,
heard by me on Feb 3 1994.


Oil Conservation Division, Examiner