CASES SET FOR ORAL ARGUMENT UNLESS OTHERWISE INDICATED

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted
Monday
February 14, 1983

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 9:00 A.M.:

NO. 14,500

Molita E. Parker, Appellee	Ben T. Traub
vs.	
Clifford D. Parker, Appellant	Calvin Hyer, Jr.

NO. 14,538

Lila M. Oliver, Appellee	Toulouse, Toulouse & Garcia Charlotte Mary Toulouse
vs.	
James W. Oliver, Appellant	Thomas J. Clear, Jr.

NO. 14,331

State of New Mexico, Appellee	Jeff Bingaman, Attorney General Marcia E. White, Asst. A.G.
vs.	
James Salvador Chavez, Appellant	Mary Jo Snyder

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 1:30 P.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 14,398

Watkins and Watkins, Appellee	Wilfred Thomas Martin
vs.	
Martha Stribling, Appellant	Query, Fairfield, Reecer, Strotz & Stribling Thomas B. Stribling John E. Farrow

NO. 14,604

Annette Fletcher Smith, Appellee	Barnett & Cochrane Robert V. Cochrane
vs.	
Donald A. Smith, Appellant	Doerr & Knudson Randy Knudson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted
Tuesday
February 15, 1983

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 9:00 A.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 14,527

Karen L. House, Appellee	Juliana Bratun
vs.	
Gary B. House, Appellant	Michael M. Rueckhaus

NO. 14,038

Duana Battaglini, et al., Appellees and Cross-Appellants	Simons, Cuddy & Friedman Daniel H. Friedman for Battaglini Smith & Fisher Robert R. Fuentes for Heiberger
vs.	
The Town of Red River, N.M., Appellant and Cross-Appellee	Eugene Weisfeld Steven Barshov Eaves & Darling Peter F. Lindborg, Amici Curiae

NO. 14,554

Jack Crumpton, et ux., Appellants	Marvey C. Markley
vs.	
Humana, Inc., et al., Appellees	Bob Turner

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 1:30 P.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 14,444

Howard S. Ellsworth, Appellee	Betty Read
vs.	
Betty O. Ellsworth, Appellant	Farlow, Simone & Roberts Norman F. Weiss

NO. 14,534

Ethel May Thompson, Appellee	Kool, Kool, Bloomfield & Hollis John L. Hollis Michael M. Rueckhaus, Special Master
vs.	
John Ross Thompson, Appellant	Michael Schwarz

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted
Wednesday
February 16, 1983

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 9:00 A.M.:

NO. 14504

Western Investors Life Insurance Company, by Receiver, Appellee	Poole, Tinnin & Martin Marshall G. Martin Jason W. Kent
vs.	
New Mexico Life Insurance Guaranty Association, Appellant	Rodey, Dickason, Sloan, Akin & Robb Victor R. Marshall Robert A. Johnson

NO. 14,259

Vincent T. Fiato	Lamb, Metzgar & Lines Larry L. Lamb Jeffrey A. Dahl
vs.	
Donald Kantak, et ux., Appellants	Keleher & McLeod Robert H. Clark Thomas C. Bird

NO. 14,456

GEORGE F. LUJAN, Appellant	David R. Sierra Sarah M. Singleton
vs.	
N.M. State Police Board, Appellee	Robert D. Gardenhire, Asst. A.G. John W. Cassell, Sp Asst AG

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 1:30 P.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 14,359

Robert Casados, et al., Appellants	Kerr, Fitz-Gerald & Kerr Ernest L. Carroll
vs.	
Oil Conservation Commission, et al., Appellees	Campbell, Byrd & Black William F. Carr W. Perry Pearce W. Thomas Kellahin
Alex J. Armijo, Commissioner of Public Lands, Intervenor-Appellee	J. Scott Hall

NO. 14,508

Davis Distributing Co., Appellee	
vs.	
Tom Monroe, et al., Appellants	Trevor McMillan
vs.	
First Northern Savings & Loan Association and Flint's Carpet Center, Defendants Counter-claimants and Cross-Claimants in Intervention-Appellees	Mitchell, Alley & Rubin James S. Rubin Christina L. G. Chavez

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted
Thursday
February 17, 1983

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 9:00 A.M.:

NO. 14,211

State of New Mexico, Appellee	Jeff Bingaman, Attorney General William Lazar, Asst. A.G.
vs.	
Herman Richard Buzbee, Appellant	Michael Dickman, Appellate Defender Lewis Fleishman, Asst Pub Defender

NO. 14,476

Jimmy Duncan, et ux., Appellees	Gutierrez & Brown Avelino V. Gutierrez
vs.	
Arcida P. Maez, Appellant	Williams & Bowman Stephen K. Bowman Anthony J. Williams

THE FOLLOWING CASES WILL BE SUBMITTED TO THE COURT ON BRIEFS ONLY - ORAL ARGUMENT NOT REQUESTED:

NO. 14,560

Joseph A. Vucenic, et al., Appellees	James V. Noble
vs.	
Jerome G. Beery, et al, Appellants	Jerome G. Beery, Pro Se

NO. 14,449

Howard F. Wolfley, Appellant	Elvin Kanter
vs.	
Real Estate Commission of N.M., Appellee	Jeff Bingaman, Attorney General Serapio Jaramillo, Asst A.G.

NO. 14,501

Robert N. Huckins, Jr., et ux., Appellants	Ronald G. Harris
vs.	
Nancy H. Ritter, Appellee	O'Reilly & Huckstep Mel B. O'Reilly

NO. 14,474

Richard Hamill, Appellant	Matthews, Crider, Jeffries, Calvert & Bingham Wayne E. Bingham
vs.	
Employment Security Dept., Appellee	R. Baumgartner
vs.	
Bernalillo County Medical Center, Appellee	

IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, ET AL,	(	
	(	
Plaintiffs-Appellants	(	
	(	
VS.	(	
	(	
OIL CONSERVATION COMMISSION, ET AL,	(	
	(	NO. 14,359
Defendants-Appellees,	(	
	(	
AND	(	
	(	
ALEX J. ARMIJO, COMMISSIONER OF PUBLIC LANDS,	(	
	(	
Intervenor-Appellee	(	

COUNTY OF TAOS

CALDWELL, J.

APPELLANTS' BRIEF IN CHIEF

ERNEST L. CARROLL
Kerr, Fitz-Gerald & Kerr
P. O. Drawer 511
Midland, Texas 79702

ATTORNEY FOR PLAINTIFFS-APPELLANTS

OF COUNSEL:

WM. MONROE KERR
Kerr, Fitz-Gerald & Kerr
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Midland, Texas 79702

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STATEMENT OF THE CASE

Appellants, landowners, pursue judicial review of the Order (R-6446-B) entered on rehearing by the Oil Conservation Commission in proceedings (Case No. 6967) on the application of Amoco Production Company for approval of its proposed Bravo Dome Carbon Dioxide Gas Unit Agreement (Plaintiffs' Petitions, Vol. 1, Tr. 1-135).

Section 70-2-25B, N.M.S.A., 1978, as amended, confers jurisdiction on the trial court and this Court and defines the nature and extent of the judicial review in this case, consolidating three like suits filed in the District Courts of Union, Quay, and Harding Counties, respectively, and transferred to Taos County. The District Court confined the trial to review of the record made before the Oil Conservation Commission, filed by the Commission, and brought forward to this Court, and to argument of counsel (Vol. 2, Tr.)

The trial court entered its Memorandum Decision (1 Tr. 180-183) concluding as a matter of law that the Commission acted within its authority in approving what the Court called a preliminary unitization agreement. (1 Tr. 183)

In its Judgment (1 Tr. 184-185), the trial court again classified the proposed unit agreement as a preliminary unitization agreement.

This case largely hinges on a number of written documents to be found in the Transcript of Commission Proceedings filed in this case and brought forward to this Court, as follows:

	DOCUMENT	LOCATION IN THE RECORD
1.	The Proposed Unit Agreement, in 23 pages, exclusive of Exhibits	Amoco Exhibit 1 in the Commission Transcript
2.	The Commission Order on original hearing (No. R-6446), dated August 14, 1980	1 Tr. 8-10, and in the Commission Transcript
3.	Application for Rehearing before the Commission	1 Tr. 16-24, and in the Commission Transcript
4.	Commission Order on Rehearing (R-6446-B), dated January 23, 1981	1 Tr. 34-40, and in the Commission Transcript
5.	The Trial Court's Memorandum Decision	1 Tr. 180-183
6.	The Trial Court's Judgment	1 Tr. 184-185

The Commission Transcript also includes Appellants' Requested Findings and Brief which may be of some assistance to the Court.

STATEMENT OF PROCEEDINGS

The Proceedings Before the Commission. The operative order of the Commission is the Order it entered on rehearing (1 Tr. 34-40). On rehearing, the Commission found that: Amoco Production Company seeks approval of the Bravo Dome Carbon Dioxide Gas Unit Agreement covering 1,174,225.43 acres of state, federal and fee lands (Finding 2, 1 Tr. 34). Unitized operation and management has advantages over lease-by-lease development in affording more efficient,

orderly and economic exploration, and more economical production, field gathering, and treatment of carbon dioxide gas. These advantages will reduce average well costs, provide for longer economic well life, and result in greater ultimate recovery of gas, thereby preventing waste (Findings 7, 8 and 9, 1 Tr. 35). The unit area is a large area with carbon dioxide potential, some parts of which have experienced a long history of production (Findings 10 and 11, 1 Tr. 35). At the time of the hearing, a number of exploratory wells had been completed in scattered parts of the unit, but the developed acreage is very small compared to the unit area, so the unit must be considered an exploratory unit (Findings 12 and 11, 1 Tr. 36). There are two methods of participation shown in evidence which would protect the corelative rights of owners. One is by formulae under which each owner would share in production from any unit well in the proportion that each owner's acreage interest in the unit bears to the total unit acreage. The other provides for the establishment of participation areas in the unit, based on completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties in interest within designated participating areas sharing in production. Such participation would be based on the proportion of each owner's acreage interest within the participating area as compared to the total acreage in the participating area. Each method has certain advantages and limitations (Findings 14 and 15, 1 Tr. 36). There is no evidence on which to base a finding

that either method is clearly superior at this time. The method of sharing the income from production as provided in the Unit Agreement is reasonable and appropriate at this time (Findings 16 and 17, 1 Tr. 36). There is a clear need for the carbon dioxide projected to be available from the unit in enhanced recovery of crude oil (Finding 18, 1 Tr. 37). Approval of the unit and development of the unit area will not result in excess capacity of carbon dioxide (Finding 19, 1 Tr. 37). The application is not premature (Finding 21, 1 Tr. 37). This is the largest unit ever proposed in the State of New Mexico, and perhaps, the United States. There is no other carbon dioxide gas unit in the State. The Commission has no experience with the long-term operation of either a unit of this size or of a unit for the development and production of carbon dioxide gas (Findings 22, 23 and 24, 1 Tr. 37). The Agreement at least initially provides for development by a method that will serve to prevent waste and which is fair to the owners of interests therein. The current availability of reservoir data does not permit the presentation of evidence or the finding that the Unit Agreement provides for the long-term development of the unit area in a method which will prevent waste and which is fair to the owners of interests. Further development should provide the data upon which such determinations could, from time-to-time, be made. (Findings 25, 26 and 27, 1 Tr. 37) (emphasis added). The Commission is empowered and has the duty with respect to Unit Agreements to do whatever might be reasonably necessary to prevent waste and to protect cor-

relative rights. (Finding 28, 1 Tr. 37). The Commission may and should exercise continuing jurisdiction over the unit relative to all matters given it by law and take such actions in the future as may in the future be necessary to prevent waste and protect corelative rights, including well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the Unit Agreement. (Findings 29 and 30, 1 Tr. 38) (emphasis added). Approval of the proposed unit area with the safeguards provided above should promote the prevention of waste and the protection of corelative rights within the unit area (Finding 37, 1 Tr. 38) (emphasis added).

The Commission then ordered: (1) that the Unit Agreement be approved (1 Tr. 38). (2) that the plan contained in the Unit Agreement for the development and operation of the unit area is approved in principle as a proper conservation measure; provided that notwithstanding any other provision of the Unit Agreement, this approval shall not be considered as waiving or relinquishing in any manner any right, duty or obligation now or hereafter vested in the Commission to supervise and control the operations for the exploration and development of any lands committed to the unit and production of carbon dioxide therefrom, including the prevention of waste and protection of corelative rights (1 Tr. 38-39). (11) Jurisdiction of this case is retained for the entry of future orders, as the Commission may deeem necessary (1 Tr. 40).

The Findings, Conclusions and Judgment of the Trial Court. Following review of the Commission record, and argument of counsel, the trial court, in its Memorandum Decision, found that Plaintiffs are all owners of carbon dioxide property rights within the proposed unit area, in the three counties (Finding 1, 1 Tr. 181). The Commission is a regulatory agency empowered under Section 70-2-1, et seq., N.M.S.A., 1978, to regulate and control production or handling of carbon dioxide (Finding 2, 1 Tr. 181-182). The primary mandate of the Commission is to prevent waste in developing natural resources, and in doing so, protecting correlative rights of owners during exploration of the natural resources (Finding 3, 1 Tr. 182). The petition to the Commission arose out of agreements contained in oil and gas leases with fee owners of land, some of whom are Plaintiffs, requiring review and approval of unit agreements by the Commission. The efforts to unitize in this case are therefore characterized as voluntary unitization where all parties concede that land belonging to fee owners not part of such lease agreements is not included as part of the unit (Finding 6, 1 Tr. 182). The record before the Commission contains (a) adequate geological data showing that the Tubb Formation is within the unitized area as a reasonable geological possibility; (b) inadequate geological data to show the various underground meanderings of the formation and therefore to determine, as a geological possibility, whether certain fee owners are or not entitled to royalties because of the location of that formation, and in what distribution;

(c) the data for such determination will occur during the very exploration and production contemplated within the challenged Commission Orders and at which time much of the waste to protect against would likely occur; (d) the Commission was unable to determine which method of guarantee of correlative rights would be best, because the information on which to reasonably calculate the best method at this time does not exist, and therefore, alternative methods subject to subsequent review by the Commission were approved (Finding 7, 1 Tr. 182-183); and (e) the Commission retained jurisdiction over the unit to reasonably respond as information develops (Finding 8, 1 Tr. 183).

In its conclusions of law, the trial court decided that (1) substantial evidence exists on the record of proceedings to support the Commission's findings; (2) the conclusions reached by the Commission in approving the unitization agreement are supported by the findings of fact; (3) the Commission acted within its authority in approving the preliminary unitization agreement, and properly within its mandate to provide an opportunity for property owners, to produce, insofar as practicable, without waste, a proportion of gas in the formation, insofar as can practically be determined and obtained without waste; and (4) The decision of the Commission should be sustained (1 Tr. 183) (emphasis added).

In its judgment, the trial court found that the Commission's findings of fact are supported by substantial evidence; the conclusions reached by the Commission are

supported by findings of fact; the Commission acted within its authority in approving the preliminary unitization agreement; and the decision of the Commission should be sustained. (1 Tr. 184) (emphasis added).

The Unit Agreement. Appellants particularly call to the attention of the Court the following features of the proposed Unit Agreement (Exhibit 1 in the Commission Transcript):

1. It is a contract.

2. Section 3.3 modifies, amends and conforms all leases and contracts pertaining to oil and gas, including carbon dioxide, on lands committed to the Agreement, including provisions pertaining to drilling, producing, rental and minimum royalties; and provides that development and operation of lands subject to the Agreement under the terms of the Agreement shall be deemed full performance of all obligations for development and operation on each separate tract subject to the Agreement; and extends the term of all leases for the full term of the Unit Agreement. (emphasis added)

3. Section 4.2, pertaining to development, requires drilling not to exceed four wells per year on the more than one million acres during the first two years the Agreement is effective, and the submission of plans for further development thereafter, but nowhere does the agreement provide sanctions if the proposed plans do not meet with the approval of the Commission and the Commissioner of Public Lands;

4. Article 5, pertaining to tract participation, makes each acre in the unit equal to each other acre, without regard to productive quality, recoverable reserves, or

other relative values, and provide for a change within twenty years to eliminate only acreage that contains no Tubb Formation.

5. Section 6.3 expressly allows self-dealing by working interest owners to determine amounts to become due non-working interest owners.

6. Article 11 enlarges the servitudes on the surface estate in the individual tracts making up the unit, grants certain water rights and limits damages to growing crops, timber, fences, improvements and structures.

7. Section 17.1 (b) makes approval of the agreement by the Commission (or its division) a condition precedent to the agreement becoming effective.

8. There is no provision authorizing or appointing agents, ministers or regulatory bodies after the agreement becomes effective, to alter, amend or modify the contract.

The indictment against the proposed unit agreement and an analysis of the format of the proposed agreement are to be found in the Brief of the Appellants on motion for re-hearing in support of their requested findings of fact and conclusions of law contained in the Commission Transcript. This reflects that the agreement was taken partly from the American Petroleum Institute Model Form of Unit Agreement, and partly from the Federal Government's proposed form of Unit Agreement affecting Federal lands, with the elimination of the sanctions, safeguards, checks and balances contained in such forms.

Additional Relevant Facts. There are additional relevant facts in the Commission record that are worthy

of note.

From the July 21, 1980 Commission Transcript, it is to be seen that:

> The proposed unit area consists of about 1,174,000 acres of land, of which 318,000 acres are State lands, 95,000 acres Federal lands, and 761,000 acres are fee or patented lands in 1,568 tracts (Com. Tr. 16, 17). The proposed unit is completely voluntary and is subject to the rules and regulations of the Commission. It can only become effective with the approval of the Commission (Com. Tr. 27-29). Forty-two wells capable of production have been drilled. With 160 acre spacing, such might involve 6,000 acres. The working interest investment may amount to one or one and one-half billion dollars (Com. Tr. 41-43). Amoco Production Company owns about 68%, Amerada Hess owns about 9.54%, and Texas Pacific Oil Company (Sun) owns about 9.87% of the unit working interests. Most of the leases, taken from 1971 through 1980, have primary terms of 10 years or less and are Producer's 88-type leases (Com. Tr. 97-103).
>
> The predominate method of deposition of the Tubb Formation is fluvial, washed off the Sierra Grande Arch (Com. Tr. 54). Cross-sections of the Tubb Formation, Amoco's Exhibits 5-10, and the testimony of Amoco's petroleum geologist, Bruce I. May, (Com. Tr. 53-85) reveal that the Tubb Formation is not uniform in thickness and has material variations running from Westerly to Southeasterly. It is a faulted area affecting the trapping mechanism (Com. Tr. 55-60), perhaps creating numerous traps (Com. Tr. 76-80). Some wells are better than others, and in the Northwest, the formation pinches out, and has a tightness of formation as compared to the central

part of the unit area (Com. Tr. 78-83). Some of the wells are wet rather than productive of gas (Com. Tr. 83-84). Whether other of the wells drilled will be productive depends on completions and tests not yet made (Com. Tr. 84-85).

Unitization of at least 185,000 acres, and perhaps as much as 500,000 acres, of the patented and fee lands depends on the exercise of lease provisions authorizing the lessee unilaterally to commit the leases to unitization agreements approved by governmental authorities (Com. Tr. 92-95; 97-111; 118-128).

Amoco's original time table projected first sales for mid-1984 (Com. Tr. 37).

From the October 9, 1980, Commission Re-hearing Transcript:

No Amoco witness has ever contended that there is one common source of supply, and Amoco stipulates that there may be more than one common source of supply (Com. Reh. Tr. 163-164). Each acre in the Tubb Formation is not identical to each other acre (Com. Reh. Tr. 174)

In the opinion of Appellants' expert witness, the unitized zone is a highly variable and complex depositional environment which is going to contain certain sweet spots, certain areas that will be marginally productive, and others that will not be productive at all. Being a fluvial deposit, one would not expect things to be continuous over large distances, productive, and in communication with each other. Being fluvial, that is a deposit in a riverbed-type environment due to the emptying of rivers into lakes and oceans, one can expect wash outs, and the several reservoirs to be highly variable and limited in extent (Com. Reh. Tr. 160-162).

Only CO_2 In Action, a company with less than 1% of the working interest in the proposed unit, has indicated an interest in selling, (as distinguished from using itself, in its own projects), its share of unit production (Com. Reh. Tr. 208-209).

The Commission did not determine or purport to find how, or to what extent, "waste" would be committed in the next few years before production commences, were the unit to be disapproved at this time. Neither did it determine the extent to which it found Amoco's proffered evidence on "waste" to be meaningful and credible. For instance, see the testimony about enhanced opportunities of truck drivers to hit gas well christmas trees, the more wells there might be drilled under 160 acre spacing rules rather than 640 acre spacing rules (Com. Reh. Tr. 102-132), and the number of additional compression facilities that might be required if Amoco doesn't have the right of free use of the surface of the million acres of land (Com. Reh. Tr. 38-101).

ARGUMENT AND AUTHORITIES

The Commission's Order should be set aside on several grounds. Neither the State of New Mexico nor the Commission has the power and ability the Commission claims for itself to compel drilling and production and re-writing the contract. Since the basic premise of the Commission's Order is that it does have such power, the Order itself should be set aside. Neither is a preliminary agreement or a preliminary contract tantamount

> to approval. There is a defect in notice to interested parties. Further, the Commission lacks the tools with which to properly exercise the powers it has reserved unto itself.

There appears to be but six New Mexico reported opinions dealing with the Oil and Gas Conservation Commisson (or Division). All of these cases are concerned only with gas proration formulae or formation of proration units. These involve only prohibitions which the regulatory bodies can undoubtedly change from time-to-time as additional facts are determined or as the relevant facts change. None of the cases deal with any power of the Commission to compel affirmative acts or to re-write contracts. These cases are:

> Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P. 2d 809 (N.M. Sup. Ct., 1962), dealing with gas proration formulae.
>
> Sims v. Mechem, 72 N.M. 186, 382 P. 2d 183 (N.M. Sup. Ct., 1963), dealing with formation of proration units.
>
> El Paso Natural Gas Company v. Oil Conservation Commission, 76 N.M. 268, 414 P. 2d 496 (N.M. Sup. Ct., 1966), dealing with gas proration formulae.
>
> Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 531 P. 2d 939 (N.M. Sup. Ct., 1975), dealing with gas proration formulae in an undeveloped field.
>
> Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P. 2d 588 (N.M. Sup. Ct., 1975) dealing with description of an area as a separate pool.

Rutter & Wilbanks Corporation v. Oil Conservation Commission, 87 N.M. 286, 532 P. 2d 582 (N.M. Sup. Ct., 1975) dealing with formation of proration units.

Appellants are aware of no cases of the State of New Mexico or of any other jurisdiction dealing with powers which, in this case the Commission has reserved unto itself, to compel the drilling of additional wells, to compel the production of greater quantities of gas than the operator wants to produce, to produce gas at a time when the operator doesn't want to produce it, and to re-write the terms and provisions of ocntracts of private citizens. Neither are Appellants aware of any authority that holds or treats a "preliminary approval", or which characterizes a "preliminary agreement" as the equivalent of "approval" of a contract which has "approval" as a condition precedent to its becoming effective.

Unlike in some States, such as Texas, New Mexico has no statute, rule or regulation that unitization agreements must be approved by the Commission in order to become effective. Major reasons, Appellants submit, that the proposed unitization agreement contractually required Commission approval as a condition precedent to effectiveness of the contract, were:

1. As an inducement to landowners by extending them assurances that the state's Oil Conservation Commission with the very expertise and experience that the Commission disclaims (Findings 22, 23 and 24 1 Tr. 37) would protect their interests before granting its "Good Housekeeping Seal of Approval"; and

2. To supposedly allow some of the lessees to unilaterally commit leases to the unitization agreement without further consent of their lessors under powers included in the pooling provisions of their leases. (See Com. Tr. of 7-21-80 hearing, Pages 103-111).

In the absence of a forced unitization statute, unitization is contractual in nature, and is totally dependent upon mutual agreements of those whose interests are bound. See 6 Williams & Myers, Oil & Gas Law, Sections 910-912, Sections 923-938; Raymond Myers, The Law of Pooling and Unitization, Voluntary - Compulsory, Second Edition, Chapter 4. On the subject of waste, it should be noted that waste and the most efficient means of development repeatedly mentioned by the proponents and the Commission, are not synonymous. Sims v. Mechem, 72 N.M. 186, 382 Pacific 2d, 183 (1963).

There can be no doubt that in the exercise of lawful police powers, the State has tremendous powers to regulate oil and gas activities in the name of conservation in order to prevent waste. Some states purport to exercise such lawful powers to a greater or to a lesser extent than some other states, depending on the public policy of the particular state as determined by its legislative enactments.

There can be no doubt that the exercise by a State of its police powers in conservation matters can render, and has rendered, contracts and contractual provisions in contracts impossible of performance and, hence, ineffective as

between parties to the contract. There can be no doubt that such laws and orders, and the schemes of implementing the same, may nullify private contractual provisions, if there is rational justification for the law, regulations, rule or order in relation to the subject matter.

In unitization of oil and gas properties, it is recognized that a particular State may order unitization on such reasonable terms as may have been authorized by statute. In such an eventuality, the unitization is not grounded on a contract of the affected parties, but rather on the exercise by the State of its police powers. In the absence of such a compulsory unitization act of the State, however, unitization depends on mutual agreement of the parties in interest in the form of a contract. Without a contract, and without lawful compulsory unitization, there can be no unitization.

A unitization contract may, and frequently does, contain formulae created by the parties to take into account how to deal with future eventualities and changes in assumptions or known facts. By mutual agreement, such a contract may appoint an agent subsequently to alter the contract to meet such changed assumptions or facts. In the absence of such agreements concerning future modifications, however, such contracts will remain in force during their stated term, as written, subject only to unanimous agreement of the parties to the contract and the successors in interest to alter or amend the same, and to the effective nullification of provisions of the contract by collision of such contract

or its particular terms with lawfully exercised power of the State, to render such incapable of performance.

Appellants are aware of no scheme of regulation of natural resources by either state or federal governments, (acting in a governmental, as distinguished from proprietary, capacity), in the absence of contractual provisions authorizing the same, which cedes to a legislative, or quasi legislative, or other governmental body many of the powers that the Commission in this case claims unto itself. Particularly Appellants refer to the power to re-write the unitization contract of the parties, thereto, and particularly the sharing arrangement thereof, the right to direct the working interest owners to spend their money in drilling more wells, and installing additional facilities, and in compelling the additional production of gas, or the production of gas at a time when the working interest owners do not wish to do so, the existence and reservation of all of which powers the Commission regards as a basic premise in approving the contract of the parties.

Appellants submit that neither the executive, judicial nor legislative branches of the New Mexico government can constitutionally re-write the unit agreement, once the agreement becomes effective according to its terms, much less to adversely affect the interest under the agreement of some of the parties thereto, even though the State can, by its rules, regulations and orders, perhaps, in effect, nullify some of the provisions as impossible of performance.

Under the existing public policy of the State of New Mexico, as expressed in its legislative enactments the New Mexico Oil Conservation Commission has no power, itself, either to create, modify or amend the proposed unit contract, or otherwise to create the unit. The Commission's only permissible functions under the Application Amoco Production Company made to the Commission is either to approve the proposed unit agreement, in the name of conservation, or to disapprove it because of specified deficiencies in the contract having to do with prevention of waste and protection of correlative rights.

The Commission recognizes and candidly admits that on the record before it, it cannot determine that, in fact, the unit will prevent waste in its various aspects and protect correlative rights in the future. (Findings 25, 26 and 27, 1 Tr. 37) For waste to be prevented and correlative rights protected in the future, the Commission recognized that there must be some means of inducing additional development and additional production than that specified in the unit agreement, as well as a different sharing agreement among the parties to the contract. To try to meet this deficiency, the Commission took upon itself, with the agreement of none of the parties to the contract, the power to affirmatively or mandatorily enjoin future action, and to, itself, change the contract. On the record, as made, it can only be determined that the Commission lacks such power.

The contract itself contains an express condition precedent to the agreement becoming effective, namely, that

the Commission give the agreement its "Good Housekeeping Seal of Approval" in the form of an order approving the contract. Once approved by the Commisson and made effective by the operator, as provided in the contract, the agreement becomes jelled, welded in iron, and subject to modification only by the unanimous agreement of those interested in the contract, including those to be adversely affected by the modifications. The agreement does not provide for something in between approval and disapproval called "preliminary agreement" or "preliminary approval". This is for a very good reason. While approval is only preliminary, some of the valuable property rights, like CO_2 produced, water and surface rights and disadvantages from self-dealing have already gone by the board. Before the "preliminary agreement" or "preliminary approval" could turn into either "approval" or "disapproval", what happens about these used up assets after later disapproval? Are they disapproved ab initio, at midstream, and is it for the Commission or the court's determination? All that has been done is the Commission has assumed to itself the power to re-write, as it goes along, a contract, when what it was asked to do was approve or disapprove an existing contract. If re-writing is to be done, the parties to the contract should be the ones to do so, subject to the same approval or disapproval powers of the Commission.

If waste in all its aspects is to be prevented and correlative rights are to be protected under the Commission's order, it is essential that the rule of law be

established, and be binding on all concerned, that the Commission does have the power to do those things which in its re-hearing Order it says it has the power to do in Findings 29 and 30 of such Order. If the basic premise of the Order is false in any material particular, but the approval is nevertheless valid, all is lost, not only for Appellants, but as well for the public policy of the State, except as the State might remedy the same as such affects waste through lawful, and presumably, conventional, negative restraints on the working interest owners. Correlative rights in this unit will by all means be dead, unless against infinitesimally high odds and contrary to facts in the record already known, it should develop that each acre out of the million-plus acres is, in fact, equal to each other acre in terms of relative value. It is herein that Appellants have their greatest concern, inasmuch as it is Amoco Production Company which should be protesting the loudest about the Commission's reserved power over Amoco's purse strings and treasury, but protests not. If it is only in future court proceedings that it is decided that the exercise by the Commission of such controversial powers is illegal, will the unit agreement as written remain in force and effect?

The trial court tried to save the order with all its recognized deficiencies, by treating the proposed agreement as but a preliminary agreement, to be superseded at some later date, either by the unanimous agreement of all of the thousands of persons whose interests are bound by the

unit agreement, including those adversely affected by changes, or by the re-writing of the agreement by the Commission. If the trial court is correct, and the agreement is only preliminary to something else, then the mutual agreement of the affected parties as expressed in the proposed unit agreement never becomes effective because its condition precedent has not been satisfied. If that is the case, the Commission's order is moot for want of a subject contract that becomes effective and operative.

There is also the matter of procedural due process of law. Amoco Production Company sought the order of the Commission (or its Division) approving the contract. Procedural due process of law and Section 70-2-7, N.M.S.A., 1978, require fair notice to interested parties. From the application and presumably the notice actually given to interested parties, nothing would intimate that the Commission's jurisdiction had been invoked so that it might come forth with an Orders abrogating and otherwise re-writing the private contract of the interested parties, to reduce or eliminate their contracted shares in production from the unit area in favor of others whose lands contain a greater share of recoverable reserves. Procedural due process of law requires fair notice of the possibility of impending adverse governmental action. There must be thousands of interested owners who have no inkling, and no cause to suspect, that the Commission has entered an order which could result in their divestment of interest in the benefits of the unit agreement by the Commission's re-write of their

contract.

The Commission has been vested with jurisdiction in the name of conservation to prevent waste and protect correlative rights (Section 70-2-11, N.M.S.A. 1978). If the subject matter of the proceeding is prevention of waste and protection of correlative rights, to some extent the Commission has jurisdiction of the subject matter. See Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P 2d. 939 (1975); Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P 2d, 809 (1962). Waste and protection of correlative rights in carbon dioxide is a Commission function perforce of Section 70-2-34, N.M.S.A., 1978. Correlative rights are defined by statute in Section 70-2-33H, N.M.S.A., 1978, and the Continental Oil Company case just cited.

The New Mexico Legislature, in its expression of the public policy of the State, has enacted a limited forced pooling statute and a very limited forced unitization statute, to avoid the necessity for unanimity of agreement by interested parties to such pooling and to such unitization as are subject to the these Acts. The pooling statute is Section 70-2-17 N.M.S.A., 1978, and is limited to spacing or proration units (in this case, at the time of the Commission hearing, allowing only one well for 160 acres).

The Statutory Unitization Act, first adopted in 1975, is to be found in Sections 70-7-1 through 70-7-21, N.M.S.A., 1978. The Statutory Unitization Act is expressly made inapplicable to exploratory units, the characterization

attributed to the Bravo Dome Unit by the Commission. Section 70-7-1, N.M.S.A., 1978, in its last sentence. It is expressly limited to unitization to carry on pressure maintenance or secondary or tertiary recovery operations (Section 70-7-6A(1), N.M.S.A., 1978) and requires allocation of production, based on relative value of each separately owned tract and its contributing value to the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity in the absence of unit operations, the burden of operations to which the tract is likely to be subjected, or other pertinent engineering, geological, operating or pricing factors, all of which are critical in determining correlative rights to be protected by the Commission. (Section 70-7-6B and Section 70-7-4J, N.M.S.A., 1978). It must also be shown that the unitized reservoir, or parts thereof, to be unitized has been reasonably defined by development (Section 70-7-5B, N.M.S.A., 1978). It is not believed that anyone has ever contended that either the forced pooling or Statutory Unitization Act can serve to create a Bravo Dome carbon dioxide gas unit, because of the express limitations of the Act. The Commission in its Findings 14 and 15 (1 Tr. 36) did, however, completely overlook the statutory means of allocating production in unitization based on relative value not directly related to gross acreage, to reflect a fair means of allocating production, and overlooked the public policy of the State as expressed in the Statutory Unitization Act.

These statutes are the statutory authority authorizing the Commission to order unitization. The limitationss in the statute would be rendered meaningless if the State can re-write the contract of the parties without meeting the specifications of the Statutory Unitization Act. The Statutory Unitization Act sets some standards of unitization, as a matter of public policy, that the proposed agreement does not begin to attain.

Unless New Mexico becomes the first State to hold that its oil and gas regulatory body has the power to create or re-create oil and gas units under the general power to prevent waste, there is no delegation of power to the Commission to create or modify units, except those specified in the Statutory Unitization Act. The fact that the Statutory Unitization Acts is so limited and stringent must dictate the conclusion that the Legislature has not seen fit to establish in government the power to create other units, either by taking the initiative in the first instance, or re-writing unit agreements. In other States, their courts have held that in the absence of explicit statutory authority, neither the courts nor administrative agencies have the power to "force" pool or unitize interests in oil or gas. See Pickens v. Ryan Consolidated Petroleum Corp., 219 SW 2d 150 (Tex. Civ. App., 1949), N.R.E., er. ref.; Republic Natural Gas Company v. Baker, 197 Fed. 2d 647 (C. A. 10, Kans., 1952); Dobson v. Arkansas Oil and Gas Commission, 218 Ark. 165, 235 SW 2d 33 (1950). New Mexico has no contrary holdings.

It is believed that whatever powers the Commission has are police powers. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842, (1952); Marrs v. Oxford, 32 F. 2d 134 (CA 8, Kans., 1929) Cert. Den., 280 U. S. 573, 74 L. Ed. 625, 50 S. Ct. 29, 37 ALR. 2d 436.

The New Mexico statutory scheme of exercising police powers, including oil and gas regulation, and the Commission practice, has heretofore been, except in authorized statutory forced pooling and unitization, to identify and prohibit undesirable practices in its jurisdiction. This is most closely akin to the judicial practice of issuing restraining orders prohibiting, as distinguished from compelling, affirmative action.

Appellants have found no other scheme of regulation of natural resources, state or federal, in the United States, under which the regulatory agency has purportedly proclaimed itself virtual czar to re-write contracts, or compel persons affirmatively to expend their resources and to perform affirmative acts, such as drilling wells and producing gas when such persons don't want to do so. The only lawful government czars with which we are familiar are those in the executive branch of government who act in a proprietary capacity, as distinguished from regulatory capacity, dealing in assets belonging to the government. Not even executive agencies acting under emergency war powers have gone so far as has the Commission in this case.

A government order to Amoco to spend a half billion dollars of its own money in drilling wells it had rather not drill, or to produce and sell gas that it didn't want to sell, should shock the American sense of what are lawful governmental powers. For the Commission to re-write a contract should strike a soft spot in the same senses.

Sanctions against waste by under-development and under-production have traditionally been through enforcement by the judiciary, at the instance of lessors pursuing their enlightened self-interests, of implied covenants of reasonable development and the implied covenant to protect against drainage, through court ordered conditional lease termination, after giving the lessee a reasonable opportunity to drill and produce that which a reasonably prudent operator would drill and produce under the same circumstances. This has been in judicial proceedings in which interested parties have the benefit of advance discovery processes essential to the establishment of the full truth, a process not available in Commission proceedings at this time.

Amoco, of course, has expressly written the checks and balances of implied covenants out of the unit agreement. But instead of disapproving the unit agreement and sending the working interest owners back to restore the appropriate checks and balances, including the implied covenants of oil and gas leases, the Commission has gone to an extreme to set a course in totally unchartered seas, charging itself to re-write the contract and ordering affirmative acts.

In regard to implied covenants, please see 5 Williams & Myers, Oil & Gas Law, Sections 801-869, with citations, the full opinion in Phillips Petroleum Company v. Peterson, 218 F. 2d 926 (CA. 10, 1954) dealing with unitization; and Amoco Production Company v. First Baptist Church of Pyote, 579 SW 2d, 280 (Tex. Civ. App. 1979), er. ref., n.r.e., with opinion, 611 SW 2d 610, (Tex. Sup. Ct. 1980), dealing with marketing gas.

Appellants believe that the exercise by the Commission of the powers reserved by itself in Paragraphs 29 and 30 of its Findings on Re-hearing, cuts across several constitutional limitations. New Mexico, of course, has constitutionally mandated separation of powers among the legislative, judicial and executive branches of its government (Article III, Section 1 of the New Mexico Constitution). It is believed that the Commission is a quasi legislative body. Appellants do not believe that either the legislative or executive branches of government have it in their power to order the divestiture of property interests of one person for the benefit of another person, as would be the case were the Commission to re-write the sharing provisions of the unit agreement. The divestiture of private property can only be applied by the judicial branch of the government, and then in observance of substantive and procedural due process of law, and then in a process that affords trial by jury, as guaranteed by Article II, Section 12 of the New Mexico Constitution. See Fellows v. Shultz, 81 N.M. 496, 469 Pacific 2d 141 (1970); State ex rel Hovey

Concrete Products Co. v. Mechem, 63 N.M. 250, 316 Pacific 2d 1069 (1957); and 4 Nat. Resources J., 350 (1964), on the New Mexico interpretation of Article III, Section 1, of its Constitution.

Article II, Section 20 of the New Mexico Constitution has been held to deny the State the power to take properties from one private citizen for the benefit of another private citizen, with or without compensation. See Kaiser Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 467 Pacific 2d 986 (1970) and see Estate of Waggoner v. Gleghorn, 378 SW 2d 47 (Tex. Sup. Ct., 1964) and Marrs v. Railroad Commission, 177 SW 2d 941, 949 (Tex. Sup. Ct., 1944).

There is also the constitutional limitation on the power of the state to impair the obligations of contracts, contained in Article II, Section 19, of the Constitution of New Mexico, and in Section 10, Article I of the Constitution of the United States.

Additionally, there is the matter of constitutionally protected due process of law under Article II, Section 18 of the New Mexico Constitution, and the Fourteenth Amendment to the Constitution of the United States, having to do with the sufficiency of notice given to those thousands of persons in interest in the proposed unit. Amoco's applications and notices given under Section 70-2-7, N.M.S.A., 1978, can but suggest that the Commission was to either approve or disapprove of the contract as written. Without any additional notice to interested parties, on re-hearing, the Commission actually neither approved nor

disapproved the contract, but, instead, took upon itself the power to re-write the contract without authorization of the parties to the contract. Procedural due process of law surely requires that before such can become effective, fair notice, perhaps notice of a hearing to show cause, should be adequately have been given. See Anderson National Bank of Luckett, 321 U. S. 233, 88 L. Ed. 692, 64 S. Ct. 599 (1944); 2 Am. Jur. 2d, Administrative Law, Section 353, Pages 166-267.

Then there is the matter of mandatory injunction, that is one requiring positive, affirmative action, as distinguished from a prohibitory injunction requiring restraint, especially by a quasi legislative body, such as the Commission. For some good reason, courts have always felt themselves compelled to refrain from issuing mandatory injunctions unless the court has absolutely no other alternative. See 42 Am. Jur. 2d, Injunctions, 745-755. Surely, such good reason dictates that quasi legislative bodies should legally be held to similar restraint and discipline, to exercise such only when there is no other available, adequate remedy to avoid irreparable injury to the interests the Commission is charged to protect. Not the least of the remedies that the Commission had before it was to disapprove the proposed unit agreement, without prejudice, on findings that:

1. The agreement of the parties must include formulae for sharing of production from the unit area which would recognize relative value of each tract within some reasonable

length of time after the development of additional facts, on additional approval, or expressly appointing the Commission, from time to time, to re-write or apply the formulae of sharing so that the same would be binding on all parties whose interests are bound to the Contract.

2. The agreement must provide that implied covenants of oil and gas leases pertaining to reasonable development, protection against drainage through offsets, and fair marketing of gas, will be made applicable to unit operations.

3. Each separate reservoir should be treated as the subject of a separate unit agreement among those having interests in each particular reservoir.

4. The agreement must eliminate authority for self dealing to adversely affect other parties to the agreement.

5. The unit agreement must provide enforceable sanctions if the contractual provisions in which the Commission should be interested are not timely complied with.

6. The unit agreement must be made to contain such other provisions and authorizations as the Commission, in its expertise, can foresee as being things that it might require in the future, not the least of which are contained in the New Mexico Statutory Unitization Act.

To send Amoco back for additional agreements to protect the valid interests of the State and the interests of those whom Amoco serves as operator, including royalty and other non-working interest owners, might create some work and problems for Amoco before it gets what it wants and should have, but such is nothing in a billion dollar plus

project with gigantic benefits for Amoco in unitization. Otherwise the project hangs on entirely dubious, tenuous, unfamiliar and alien powers of the Commission, and an infinite number of additional lawsuits.

In the final anaysis, the unit agreement is, in fact, a contract. It is a solemn and binding obligation between and among the parties thereto which can only be set aside by the parties thereto, unless the parties to the contract have otherwise consented, either in the contract itself or some other agreement. 17 Am. Jur. 2d, Contracts, Section 458.

It also needs to be asked how the Commission, under existing statutes, including appropriation statutes, is to go about the process of deciding what it should affirmatively order or re-write in a project using billion dollar figures. Substantive due process would seem to require that its decisions be based on reason. Reason depends on facts discerned. Facts in turn, depend on evidence presented. Evidence to establish truth requires discovery and meaningful discovery processes, and somebody to go about gathering evidence and presenting the same in a state of advanced preparation, and the expenditure of large sums of money in the process. The existing statutes afford no discovery procedures for the Commission or processes to aid interested parties in gathering evidence in the possession of adverse parties, or in behalf of the Commission. No one, including Amoco, can be expected on its own to prosecute itself in any meaningful way. Cross-examination of Amoco witnesses with-

out pre-discovered facts in hand is hardly productive of the whole truth. The Legislature has never had occasion to appropriate funds for Commission use in affirmatively managing or directing oil and gas operations. Proceedings to order affirmative action and to re-write Contracts is essentially adversary in nature, at least if full truth is to be known with reasonable certainty. Thus, the Commission, with the exercise of its alleged reserved powers, casts itself in a managerial role, an investigatory role, then a prosecutorial role, and ultimately in the decision making role. If the czar role, which the Commission assumes for itself, seems alien, the assumed role of prosecutor, jury and court, all in one, should seem even more foreign. If the New Mexico Legislature or the Governor of New Mexico refuses to have the State pay the Oil and Gas Conservation Commission to act as overseer to compel affirmative action and to undertake the vast reservoir analyses required to protect correlative rights, to be able to know how to revise the contract, where will everyone be insofar as this unit agreement is concerned? Appellants express the fear that they will be subject to a demonstrably deficient agreement with no remedy and the State's valid interests in its one major deposit of carbon dioxide will essentially be dependent upon the self-centered aims and objectives of the 68% owner of the unit. If the landowners, such as Appellants, are going to have to be the prosecutors, how, it fairly may be asked, under existing statutes governing proceedings before the Commission, are they going to become seized and

possessed of the necessary evidence to present to the Commission, assuming they could afford to do so, if Amoco isn't willing to furnish the data? The Commission has provided what at first glance might appear to be an attractive means of curing the obvious deficiencies in the proposed Unit Agreement. In reality, it provides no viable and enduring means at all. The most learned experts have to have facts and to be able to obtain such facts to reach any meaningful conclusions.

CONCLUSION

It is one thing to exercise police powers to effect conservation of natural resources by making rules and regulations and enforcing the same to prohibit undesirable acts. It is yet another thing for the policeman in addition to his other duties, to affirmatively manage and direct business affairs. Appellants are not prepared to say that there never will be circumstances when the policeman may compel affirmative acts. But, Appellants do submit that such can be only in the most dire and compelling circumstances, and as a last resort effort to prevent the occurrence of irreparable, material harm or injury which cannot be averted in any other reasonable way. The Commission in this case acted only on the premise that it has such affirmative power, in the jaws of serious legal and constitutional impediments, on a record that barely develops the facts, rather than adopt worthy alternatives that are eminently

practical and effective. Because the Commission Order rests on a basic premise that it has such powers, the Order should not stand, unless the basic premise on which it is founded stands. In judicial review, it has been said over and over again that constitutional issues should not be decided on less than fully developed factual records and then only if there is no reasonable means of avoiding the constitutional issues. In this case, one such means is to hold that since the Commission could not create this unit due to lack of statutory authority, neither has it the power to re-write the contract even to correct its gross deficiencies. The Commission having acted on a false premise, the order should be set aside, without prejudice, thereby leaving it to the proponents to remedy the defects of the agreement before presenting a properly revised contract to the Commission for its approval. Another tack would be to judicially interpret and hold the order to be merely a preliminary approval which only becomes the approval required in the contract after the impediments of the contract are cured by the parties to the contract, thereby rendering moot the order in this case.

Otherwise, it would appear to be necessary to decide the Constitutional issues. To decide such in favor of the Commission order is to confirm powers that no oil and gas regulatory agency has ever claimed for itself, and which subjects the ownership of private property to heretofore unheard of and never exercised governmental powers, only to uphold a glaringly deficient and over-reaching agreement which should have been cured before it was ever presented to

the Commission in the first place. Put another way, as a matter of precedent, the Commission's way is too tough and too expensive a way to remedy the defects of the unitization agreement.

Appellants have no quarrel with the concept of unitization under a proper unitization agreement which will prevent waste and afford efficient operation, but which will also reasonably guarantee now and in the future the protection of correlative rights of all parties at interest as the knowledge becomes more certain. Agreements that become effective are mutual agreements that are seldom dictated from but one self-centered point of view. If Amoco Production Company wants the Bravo Dome area unitized and the benefits to itself of unitization, let it first devise formulae to be applied in the future when more facts are known to determine fair sharing arrangements, which preserve the protection of implied covenants of oil and gas leases as applied to the unitized area and which eliminates the time recognized evil of self-dealing as determinative of the rights of others. If Amoco Production Company wants to enlarge the servitudes and to claim new rights in surface estates and water from those who own both mineral and surface estates, let the agreement at least include a fair means of compensating for the resulting reduction in value of the surface estates. Put another way, Amoco Production Company needs first to come up with a fair agreement that allows for checks and balances on an otherwise virtually unfettered control over more than of a million acres of land

and the State of New Mexico's one great carbon dioxide deposit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 15 day of September, 1982, a true and correct copy of the foregoing was placed in the United States mails in properly stamped envelopes, addressed to each of counsel of Defendants-Appellees and Intervenor, as follows:

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IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, ET AL,	(	
	(	
Plaintiffs-Appellants	(	
	(	
VS.	(	
	(	
OIL CONSERVATION COMMISSION, ET AL,	(	
	(	
	(	NO. 14,359
Defendants-Appellees,	(	
	(	
AND	(	
	(	
ALEX J. ARMIJO, COMMISSIONER OF PUBLIC LANDS,	(	
	(	
Intervenor-Appellee	(	

COUNTY OF TAOS

CALDWELL, J.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellants reply to the Answer Briefs filed in behalf of Amoco Production Company and the Oil Conservation Commission, to respectfully submit.

Continental Oil Company v. Oil Conservation Commission 70 N.M., 310, 373 P. 2d 809 (N.M. Sup. Ct., 1962) teaches that the duty and authority of the Oil Conservation Commission is to prevent waste and to protect correlative rights, and that to protect correlative rights it is first necessary to know what the correlative rights are that are to be protected. It also teaches that the findings of the Commission must be adequate to reveal how it reaches conclusions that waste will be prevented and correlative rights protected, to enable the courts to judicially review the Commission's findings and orders.

El Paso Natural Gas Company v. Oil Conservation Commission, 76 N.M. 268, 414 P. 2d 496 (N.M. Sup. Ct., 1966) explains and clarifies the type of findings that the Commission must make to support its orders.

Also learned from these two cases is that prevention of waste and protection of correlative rights are the sum and substance of the Commission's functions, duties and authority, and that it is not the Commission's function to weigh business risks or to otherwise act in a proprietary capacity.

Correlative rights are a function of "relative value" of the tracts making up the whole. In the Statutory Unitization Act (Section 70-7-1 through 70-7-21, N.M.S.A. 1978) the Legislature has recognized this by defining "relative value" in Section 70-7-3J as follows:

> J. "relative value" means the value of each separately owned tract for oil and gas purposes and its contributing value to the unit in relation to like values of other tracts in the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity of oil and gas in the absence of unit operations, the burden of operation to which the tract will or is like to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating or pricing factors, as may be reasonably susceptible of determination."

In Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P. 2d 939 (N.M. Sup. Ct., 1975), a case attacking a gas proration formula in an undeveloped field, in which at the time it was impossible to determine the sum of the relative values, much less the parts, the Court recognized that the Commission in devising a proration formula for the existing wells could put correlative rights on the back burner, so to speak, pending the development of additional data by which it might devise enduring proration formulae. We believe that the Commission's action on rehearing has as its basic premise the Grace case theory that the Commission may defer protection of correlative rights pending the development of additional data. The Commission, however, failed to recognize the very substantial difference between a proration formula order that it can change as many times as it deems appropriate, and an act which approves forever an inept sharing arrangement of a defective unitization agreement. The Grace case does not stand for the proposition that the Commission can leave correlative rights stranded forever.

There is nothing in the law of New Mexico that requires unitization agreements to be approved by the

Commission, though there is authority in a Rule of the Commissioner of Public Lands that he may seek the advice and counsel of the Commission in oil and gas matters. This particular Unitization Agreement, however, does provide as a condition precedent to the Agreement's ever becoming effective that the Commission approve the Agreement. The only discernible reason for including this prerequisite in this Unitization Agreement was to afford assurances to the multitudes of affected interest owners in the million plus acres of land that the Agreement would, in fact, protect their respective correlative rights in the sharing arrangement. If it doesn't measure up, the Commission would not approve it since half of the Commission's function is to protect correlative rights while preventing waste of natural resources.

On original hearing, the Commission perfunctorily found that the proposed Unitization Agreement will prevent waste and protect correlative rights and, accordingly, approved the Unitization Agreement. Appellants, on rehearing, challenged the Findings and Order both with respect to waste prevention and correlative rights protection, urging that the approval was premature. On rehearing, the Commission found that there was insufficient data to permit of the presentation of the evidence or the finding that the Unitization Agreement provides for the long term development of the Unit Area in a method which will prevent waste and which is fair to the owners of interests, and that further development will provide the data upon which such determination would, from time to time, be made. (Findings 25, 26 and 27; Tr. 37). While being candid about the "long term", the Commission still made no findings about how it believed

waste could be prevented and correlative rights protected in either the long term or the short term. Neither did it suggest that in the absence of unitization, it would be incapable of preventing waste pending the development of adequate data, by its traditional rule making and order functions which have served it well for more than forty-five years in dealing with all of the oil and gas fields of New Mexico, unitized and ununitized.

In the apparent belief that it could in the future rewrite the Unitization Agreement for the interested parties, and impose affirmative duties and sanctions which were omitted from the Unitization Agreement, the Commission again approved the Unitization Agreement to thereby satisfy the prerequisite condition to its becoming an agreement binding on the parties whose interests had been committed thereto by whatever means.

Undoubtedly unitization under a proper agreement, at a proper time, and at a proper place, allows efficiencies that are desired and desirable by all. An improvident Unitization Agreement at the wrong time and at the wrong place is certainly within the powers of competent interested parties to implement without the stamp of approval of the Oil Conservation Commission. In this case, however, involving an immensely complicated set of facts and circumstances, all interested parties were given the absolute assurance that the agreement would never become effective unless it was approved a designated governmental agency whose only function is to prevent waste and to protect correlative rights. As matters now stand, no one, including the Commission, can tell whether the agreement will either prevent

waste or protect correlative rights. The indications of record are that it cannot and will not do either.

Appellants submit that under these circumstances the Commission could only lawfully deny approval of the Agreement until it could, based on competent evidence, give the unitization its stamp of approval as to prevention of waste and protection of correlative rights. If the proponents of unitization want unitization earlier, they should devise an agreement that eliminates the deficiencies of the present agreement to include formulae for sharing production from time to time which will protect correlative rights in the future and which will assure prevention of waste, including economic waste from underdevelopment. In the alternative, the proponents should unitize by an agreement that does not require Commission approval and which is not advertised as requiring such, so that those who wish to do so may shoot craps with their relative values. From the exhibits before the Commission and from the testimony before the Commission, it can readily be seen that owners of numerous tracts would want to share on an equal acreage basis their holdings with those owning materially greater relative values. But if the Commission's seal of approval continues to be needed, as a matter of law the agreement must measure up in terms of prevention of waste, in all its aspects, and the protection of correlative rights. In the meantime, the Commission can prevent waste by its adoption of field rules and orders adopted just as it has historically done.

Calling the Unitization Agreement "voluntary" and "exploratory", while at the same time invoking Commission

approval as a condition precedent, adds nothing to the proper considerations involved in this case.

That the Commissioner of Public Lands with his substantial and strategically located spread of unit minerals throughout the area chooses as a matter of good business to play the averages does not alleviate the necessity for the Commission to be able to tell how the Unitization Agreement will prevent waste and protect correlative rights, and relieve the Commission of its duties pertaining thereto. That the federal government with its spread of minerals located as they are has chosen to ratify relieves the Commission of no duty or responsibility.

That individual tract owners without the ability to play the averages may have ratified an agreement that require the Commission's Seal of Approval does not lessen the legal duties imposed by law upon the Commission. That marginal owners would prefer to share in the high relative value tracts, if anything, only adds to the onus of governmental responsibilities once assumed.

That the Commission may consider it fair as a business proposition for owners to wager on an equal acreage formula and on the possibilities of economic waste is not an equivalent to the mandatory correlative rights finding required and expected of the Commission. "Fair" is not, on this meager record and lack of data, something that any body of humans can discern with any accuracy.

When the Commission, on rehearing, acceded to the view that it cannot yet tell how the Unitization Agreement will prevent waste and protect correlative rights, it became

incumbent upon it to decline approval, without prejudice to further unitization efforts.

Respectfully submitted,

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P. O. Drawer 511
Midland, Texas

CERTIFICATE OF SERVICE

On this the 23rd day of December, 1982, a true and correct copy of the foregoing was placed in the United States mails in properly stamped envelopes, addressed to each of counsel of Defendants-Appellees and Intervenor, as follows:

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Commissioner of Public Lands

ERNEST L. CARROLL

STATE OF NEW MEXICO

IN THE DISTRICT COURT

COUNTY OF TAOS

ROBERT CASADOS, et al.,

Plaintiffs,

v. 81-176

OIL CONSERVATION COMMISSION, et al.,

Defendants.

BE IT REMEMBERED that on Monday, December 7, 1981, at 10:20 A.M., this matter came on for the taking of a Hearing before the HONORABLE JUDGE JOSEPH CALDWELL at the Santa Fe District Court, Santa Fe, New Mexico, before ANGELA M. ALBAREZ a Certified Shorthand Reporter and Notary Public.

* * * * * * * * * * *

A P P E A R A N C E S

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and

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For the Intervenor The Commissioner of Public Land:

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THE COURT: I must first apologize for the lack of formality. It has been one of those mornings this morning. I see Miss Albarez is here as the court reporter.

This matter is styled Robert Casados, et al., as Plaintiffs versus the Oil Conservation Commission, et al. This is a consolidated case involving various cases which are now designated as Taos County Cause 81-176. As I ask whether or not the Plaintiffs and the Defendants in this case are ready, I will ask that each of the attorneys here state your name and who you represent in this cause.

Beginning with the Plaintiffs, I will ask if the Plaintiffs are ready.

MR. CARROLL: Your Honor, my name is Ernest Carroll. I represent the Plaintiffs. I am associated with Bill Kerr of Kerr, Fitz-Gerald & Kerr of Midland, Texas. With the Court's permission, Mr. Kerr will present the Plaintiffs' side of argument in today's hearing. We are ready for trial.

THE COURT: Whom do you represent, sir?

MR. CARROLL: We represent the Plaintiffs from the Casados group.

THE COURT: This is what I am asking you, Mr. Carroll, is if you can designate your parties as Plaintiffs.

MR. CARROLL: Your Honor, all of the Plaintiffs are represented by Mr. Kerr and myself.

THE COURT: All right, sir.

Are the Defendants ready?

MR. PEARCE: Your Honor, I am W. Perry Pearce appearing on behalf of New Mexico Oil Conservation Commission in this matter.

THE COURT: All right, Mr. Pearce.

MR. CARR: May it please the Court, I am William F. Carr with the law firm of Campbell, Byrd & Black. We represent AMOCO, and I am appearing today in association with Tom B. Conney, Jr., an attorney with AMOCO, a member of the Texas Bar.

MR. KELLAHIN: Your Honor, I am Tom Kellahin from Santa Fe, New Mexico, appearing in association with Miss Wyn Dee Baker, a member of the Oklahoma Bar, and representing Amerada Hess Corporation. In addition, Your Honor, I represent Cities Service Company.

MR. HALL: Your Honor, my name is J. Scott Hall. I am Special Assistant Attorney General representing the Intervenor in this case, the Commissioner of Public Lands.

THE COURT: All right, Mr. Hall.

MR. HALL: We are ready.

THE COURT: Is there any other person who is appearing on behalf of or in representation of any other party, whether Plaintiff or Defendant in this matter, and who has not yet been indicated?

First, as an administrative matter, gentlemen, speaking to Messrs. Pearce, Kellahin and Hall, I must ask if there is any objection to be raised to the representation of

the parties here by Counsel not a member of the New Mexico Bar. I understand that Mr. Conney and Ms. Baker are members of the bars of other states and are appearing here at the request of various members of the New Mexico Bar to represent parties in this action. I will ask them specifically if there is any objection on the part of any party to the representation by those attorneys.

Beginning with you, Mr. Carroll. Is there any objection, sir?

MR. CARROLL: None on behalf of the Plaintiffs, Your Honor.

MR. PEARCE: None on behalf of the Oil Conservation Commission.

MR. CARR: None on behalf of AMOCO.

MR. KELLAHIN: None on our behalf.

MR. HALL: The Intervenor has no objections.

THE COURT: Thank you.

Mr. Kerr, are you ready, sir?

MR. KERR: Yes.

May it please the Court. This case is a direct attack by appeal from an order entered by the Oil Conservation Commission on rehearing of this matter as it appeared before them last year. It is a statutory appeal. It is on the record made before the Commission, as I understand it, so there is no additional testimony or evidence to be admitted at this hearing. The issue involed and the attack is upon the order approving the Bravo Dome Unit or the proposed

Bravo Dome Carbon Dioxide Gas Unit Agreement by the Oil Conservation Commission. The manner in which it was done in its order entered in the rehearing before this body, to give a little background -- I am not too sure to what degree the Court may have this -- but I think, if I may, I will just proceed like the Court had no particular prior knowledge of the matter from the record.

THE COURT: Proceed with your argument, Mr. Kerr.

MR. KERR: The agreement in question, the proposed Bravo Dome Carbon Dioxide Agreement is a unitization agreement which involves as many as perhaps 1,174,000 acres of land, more or less, in three counties in northern New Mexico. It has a delineated limit by identifiable marks on the map or on the ground. It consists of perhaps 1550 different tracts of land, many of which are covered by our oil and gas lease or most, perhaps, of which are covered by the oil and gas lease. In the breakup of the ownership of land, I believe 291,000 acres belongs to the State through its Commissioner of Public Lands. About 90,000, perhaps, belongs to the United States, and the balance belongs to fee land owners. The Unit Agreement would purport to take the various leases covering those various tracts of land and amalgamate them in a unit to be operated and managed as though it were one large lease. In this Unit Agreement, in effect, the surface easements, and so forth, for the use of the surface to

develop the carbon dioxide in the tub formation underneath that land, the only interval underneath that land that is purported to be unitized by this Agreement, that would be made into one large unit or one large tract of land to be developed as though it were under one lease.

In the Unit Agreement itself, it purports to modify the terms of the existing leases on those 1550 tracts, more or less, to whatever extent is required to make them uniform with the terms of the Unit Agreement. Among the provisions of the Unit Agreement, in addition to the modification of the existing leases, are the provisions that it will waive any implied covenants of the leases themselves. As the Court may be aware in the making of an oil and gas lease, the normal situation is not every agreement is expressed in the leases themselves because of the reliance upon the self-interest of the lessee to take care of the interests of the lessor. Among those implied covenants that would normally exist in an oil and gas lease and which this Unit Agreement would purport to eliminate would be the implied covenants to drill offset wells if the lease does not specifically deal with that subject, the implied covenant to reasonably develop the field or the natural resource subject to the lease, and the implied covenant to market fairly the gas production that is obtained from that lease.

Most of the leases in gas, as Your Honor may be

aware, normally do not take in kind gas, but normally those are paid on a dollar based on the market value at the wellhead of the gas; whereas, oil is generally one that is taken in kind or sold by the royalty owner or landowner himself. In the Unit Agreement, the provision was expressly made that the sharing arrangement would be by tracts, so that of the 1550-odd tracts, they comprise the Unit as it is finally formed, or whatever that number would be out of that number, and that each acre would be equal in every respect to each other acre during the first 15 to 20 years of the existence of this Unit.

At the end of 15 to 20 years, the Unit operator, with the approval of the Commissioner of Public Lands, I believe, has the power, and perhaps the duty, under the Unit Agreement to eliminate the nonproductive acres. The method of doing that, of eliminating nonproductive acres from the Unit, that is by determining whether there is any tub section that correlates to anything else that is productive. It doesn't mean that it is productive. It does not mean that it is not water bearing. It does not mean that it will ever produce or that it will produce more or less. It just means that at all times those acres that are in the Unit will be treated as equals in every respect for the purpose of sharing production from the Unit Area.

In the evidence presented at the first hearing

before the Commission which, I believe, all of which is before the Court, there was testimony from the exhibits and explaining the exhibits, at the time of that hearing there had been approximately, I believe, 42 wells drilled in the Unit Area; that under the rules and regulations of the Oil Conservation Commission, a proration or a spacing unit would consist of 160 acres. This is one of those areas that the Commission certainly has in its power, as facts develop, to change their mind if it develops that they were either too conservative or if they overestimated the ability of a well to drain that number of acres. Based on 1,174,000 acres, it is 160 acres per well. That would be approximately 7300 wells that would be required to drill this to density.

At the time of the hearing, approximately 42 had been drilled. Most of those, or many of those, at least, had not even been completed, and almost none of them had been tested. But there was proof before the Commission that some of those are what they call wet wells. While they had the tub section, they were not capable of producing carbon dioxide because of the water content. In effect, they would not be able to produce carbon dioxide.

In those exhibits, if the Court will take those out and look at them, there are geologists explaining the cross sections, trying to show, and I think from that the Court can very plainly see that in this 1,174,000 acres, which I

am going to say essentially form a square, although there are some irregularities in the outer boundaries, it is not a perfect square, but essentially square, that as you start in the northwest part of the Unit Area, that you have a section which is a --

THE COURT: One moment, Mr. Kerr. Specifically what part of the transcript and what exhibit are you referring to?

MR. KERR: The exhibits that I am referring to that show these things, these are the things you stick on the wall, Judge, to see them. They roll out. But 5, 6, 7, 8, 9, and 10, I believe, is what they are, and the transcript of the first hearing. Also the witness, whose name I can't recall, an AMOCO witness, was explaining his method of preparing these and what they purport to portray.

But, in any event, I think, from those, you can see -- and as you go, and in accordance with the testimony which is at that area of the transcript, that expert's testimony -- starting in the northwest and proceeding on the east and southeast, the tub section, the unitized interval thickens considerably. There is some suggestion that the tightness of the formation changes considerably as you take that course generally from west to east and southeast. This, to us, indicates very plainly that the land, while it may all be underlying with the tub formation section, the section that produces carbon dioxide, that there will be a great

disparity, and it could only be assumed there will be a great disparity in the producing capabilities, the quality, if you will, of the various tracts of land that are situated therein. Those on the extreme west side should be expected to be fairly low in recoverable reserves; that as you proceed to the east and southeast, there should be a material change in those producing capacities and capabilities over the life of this field. Yet, going back to the sharing arrangement, each section is treated as an equal, so that if, in the full Unit Area, the full unitized area, a given tract has 10X reserves per acre, it will participate in 1X reserve; whereas, the tract that is either water bearing or non-productive or tight or thin and without much recoverable reserves will also participate in the one. This is the subject of what this attack is mainly about, the correlative rights which is, in effect, the ability within practical limits, I would say, to be certain that a given tract in a unit receives or is entitled to its fair share based on the characteristics of that tract and its ability to produce the substance that is involved; in this case, carbon dioxide.

Now then, in this Unit Agreement, there is, in some states, as the Court may know, some of the states, for example, Texas, my state, does require that its regulatory agency, its equivalent, and the Texas Railroad Commission approve all Unit Agreements. New Mexico does not have that

rule of the Commission. So this matter comes before the Commission in the beginning because the Unit Agreement itself, part of its contract of that Unit Agreement was that it would never become effective unless it was approved by the Oil Conservation Commission or its Division.

This would have been put together, perhaps, without that requirement, it is our view, and we think it stands to reason that the reason it was put in there at all was to give consolation and some assurances to those, in effect, thousands of people that are involved in this Unit Agreement, that this would have the Good Housekeeping Seal of Approval of the Oil Conservation Commission in a matter within its jurisdiction.

Now then, in the matter of the jurisdiction of the Oil Conservation Commission, to start with, it is a creation of the Legislature of the State of New Mexico; in our opinion. I think the cases from other jurisdictions involving similar-type agencies, a quasi-Legislative body exercising under the Constitution of the United States was prescribed as police powers. This is a matter of police powers involving a matter that is within the public interest; namely, the conservation of natural resources of the State. In this, a great deal of power was given to the Commission in the name of conservation to prevent waste and to protect correlative rights. That would be the only function. I believe there are only five or six cases that have ever gone to the Supreme Court

of New Mexico from that body. But, I believe, that is the teaching of all of those.

Incidentally, I have put on your bench and given to opposing counsel a trial brief citing these cases, if it will be of any value to you.

THE COURT: Yes, sir. Thank you.

MR. KERR: In order so that, in our view, going back that this matter of approval by the Conservation Commission required, in the exercise of its jurisdiction to prevent waste and deal with correlative rights, that is not put there to decide if it was a good idea or to decide if it was a more efficient means. Simms v. Mechem says efficiency is not the equivalent of waste. It is, no doubt, more efficient. How does that balance with the private rights of the private property ownership involved in this matter?

Now then, at the first hearing, the Commission entered its order finding that this unit would prevent waste and would protect correlative rights. On behalf of affected landowners in the Unit Area, most of whom are Plaintiffs in this case, we filed a Motion for Rehearing. I think it is extremely important to understand what the Commission did on rehearing because that becomes very much the gist of this direct attack on that order.

On rehearing, the Commission, one, found that there is not a sufficient amount of reservoir data to now permit

the presentation of evidence or the findings that the Unit Agreement provides for the long-term development of the Unit Area a method which will prevent waste. Further development in the Unit Area should provide the data upon which such determinations could, from time to time, be made.

In this, it also found, in Finding 25 -- and I have these specifically in our trial brief -- that, at least initially, this is probably fair. Keep in mind that, initially, and until about, at least, mid 1984, which is the earliest date that had been suggested and AMOCO suggested it would be 1984, according to their plan as it existed at that time before there would be first production, the sharing of production isn't really significant because there is not any being sold and probably will not be until 1984. But, in this case, the Commission also found that it should exercise continuing jurisdiction over the matter, and that it would rely upon AMOCO as the Unit operator who owns approximately 68 percent of the leases in the Unit Area and whose Unit operator would report, from time to time, on its plans for development and on how it, AMOCO, was protecting correlative rights of the parties. With this continuing jurisdiction, I think it is implicit in the order that the Commission feels that it has the power and the duty and the authority, from time to time, to require these contractual agreements to be altered, amended, changed, or what have you, to protect those

correlative rights. The thrust of this matter is that this is a contract in which property rights of the people owning interests in those 1550 tracts, more or less, become jelled the instant that this unit becomes legally effective, and that there is no power under the police power; the Legislature itself could not lawfully, much less the Oil Conservation Commission, much less AMOCO, for that matter, cause these to be changed without the unanimous agreement of the thousands of persons owning interest in that unit. That is not within the power of this State and certainly not within the power of AMOCO to go in and to take and tell the man that has been participating in 1X per acre share of production, but because his tract is barren or is virtually barren of carbon dioxide, to cause him to be eliminated or materially reduced in his share of the production.

In other words, I think the thrust of this matter is that the Commission exceeded itself in what it believed to be its lawful powers and duties with respect to the future in matters of preventing waste and protecting correlative rights. Neither it nor AMOCO -- it is on the false premise on its powers as granted that there is a provision of the New Mexico Enactments creating and empowering the Oil Conservation Commission, giving them the power to do whatever is reasonably necessary. But when it comes to telling AMOCO they must drill more wells and spend X million dollars more

in 1983, 1984, 1990, or whatever it is, and produce more gas than they are producing, and to cause AMOCO to change the sharing arrangements so each tract receives the share to which it is entitled, once we know what that share is, it is completely beyond the importance of a quasi-judicial body. I am not even sure it is within the range of the judicial function of the State.

We have separation of powers in New Mexico, as I read it. I am not even sure that a Court could change those property rights from one to another. But certainly there is no quasi-judicial body that can be empowered to do this. Now, I think there are affirmative things that the Oil Conservation Commission can do in the name of the police power. For instance, they can compel and command that a well be plugged that is causing damage to a reservoir or to the surface estate. Just in the same way that a fire department can, perhaps, compel a house to be burned to prevent the smell of a conflagration burning in a city. But I don't believe in the affirmative matters of the Commission acting somewhat as a czar -- and I don't say that disrespectfully -- but be a baseball czar to sit and override and become the person who can control the rate of development since the implied covenants of development have been waived, to drill offsets, to market the gas since that has been waived, and to, in effect, change the sharing arrangement as among these private

parties, I don't believe that that is within their power to do.

That is really the thrust and the essence of our case as the matter came on rehearing. On this matter, if I may address it on the opening remarks, the Commissioner of Public Lands who, as I say, has about 290,000 acres of land which is leased in this matter, at the first hearing, Mr. Jordan, as Counsel for the Commissioner, appeared at the conclusion of the case and made a statement. In that statement, he advised the Commission that the Commissioner had given tentative approval to this unit having exacted from the Unit operator some concessions and some variances off the term of what was in that Unit Agreement. At the second hearing, at the conclusion of this matter, after we had dwelled further into the subject of these correlative rights and the sharing arrangement that had existed, the Commissioner again, through Mr. Jordan, appeared and advised the Commission -- and this is in the record at the end of the rehearing -- these were the last people to testify before arguments commenced, I should say, made a statement that the reason the Commissioner approved this was that with their 291,000 acres displaced as it was through the Unit, that he felt they would come out on average. But, for the landowner who owns only one tract, one or two tracts, or an interest in one or two tracts, that averaging won't get it. In effect,

he is having his correlative rights now and in the future left up for grabs, powerless, without anybody to do anything about it hereafter.

That is why, in the rehearing and in the Commission proceedings, we took the position that this Unit Agreement was premature; that until this field is developed to where you know what the reserves are within realms of practicality, that you know what the producing characteristics of a given well are, until you know how much recoverable reserves, within reason, are attributed to that tract, that you cannot have a fair sharing arrangement that protects the correlative rights that are those involved.

Now, if we didn't have this business about the protection of correlative rights by virtue of the Commission's approval, I would agree, and there have been trial briefs submitted, and you will see them if you have not already, and they make the point this is a voluntary unit. Yes, it is a voluntary unit. If someone is insistent that his unit and interests not be included in the terms of this agreement, then he is excluded unless he is granted a power of attorney to his lessee or arrange to include him in the unit of which a lot of acreage included in a unit under those kinds of arrangements are made. But, nevertheless, those ratifications to this voluntary unit were based on the very basic premise that this unit would never be effective unless the Oil

Conservation Commission of this state approved it. The only base it had to approve it was on the basis of waste and correlative rights.

So I don't think the voluntariness of this has too much to do with it. Granted, if they had not had that, those who wanted to combine their interests, convey, cross assign, enter into contractual arrangements to share, that would have been no business of the State's whatsoever and no business of anybody who didn't join in that contract. I would freely say that is true. I believe people have the right to contract within the limitations of public policy at any time they wish and any manner they wish. But, in this instance, this deal put up the Good Housekeeping Seal of Approval as a prerequisite, and that is what we are talking about, that the Good Housekeeping Seal of Approval did not take care of this.

If the Commission, in fact, can tell AMOCO and the other working interest owners, "In 1984, as an example, you will spend $400,000,000 drilling X number additional wells, and you will produce those wells at so many million cubic feet a day, and you will sell this gas, and you will, as it becomes apparent, change the arrangement on sharing of that production," that might be a good thing. But that is foreign to our system of private property and foreign to the system of separation of powers. It is foreign to the power

of this particular agency to compel such. In our state, it is, and I cite the cases in the brief. When it comes to matters like forced unitization, that is within the power if the Legislature specifically does it.

In New Mexico, in 1975, I believe, if my year is correct, it did authorized forced unitization of an entire field for the purposes of secondary and tertiary recovery of oil. In that, the Legislature laid out very specific ground rules about how those correlative rights would be protected to be sure each property owner received his fair share within the realm of practicality within that unit. That involves fully developed fields where the matter of recoverable reserves, and so forth, is within the range of engineering estimates with meaningful analysis of content and, hence, a sharing arrangement. This instance here, there is no such thing. In the evidence in this case, again going back to the first hearing, and also in the second, the experts testified this is a fluvial deposit which is, in effect, washed out in geologic history from streams in much the same way you would expect. We have different depositions; we have different thicknesses. We have different characteristics all the way through. This is a faulted zone. This is on the testimony of AMOCO that this is a well-faulted zone. It may really consist of several fields, not just one 1,174,000-acre field. Those fault

systems have, in effect, what is a sharing arrangement within the pool that they are being received from, and from where the production might be obtained.

In essence, Your Honor, this matter is absolutely premature. We believe that 42 wells out of 7300 is not anything in so vast an area. We believe the Commission has found this is probably the biggest unit they have had any dealings with. I think they think -- and I think so myself -- this is the largest unit that has ever been or attempted to be put together. There is some evidence in the record to that effect. From my own view, I am not so expressed, I have to say. No one's had any experience with this vast a project. It is a finding of fact in the Commission's Rehearing Order.

There is no reason to hurry this thing up until they have been able to drill enough wells to begin to get a hold on this thing, and then we could come up with the sharing arrangement. This thing might last 100 years, 50 years, 20 years. We are talking about a big shift between landowners, the haves versus the have nots, and that is what the correlative rights are protecting.

So we submit to Your Honor that the Commission entered its order on a false premise about its powers, and that there is no substantial evidence that can support this ability to retain jurisdiction to control these very items

of which I spoke. I am sure the Commission has a lot of persuasion about how its operators in the State handle matters of plugging of wells. Certainly in the matter, when you go into a new field and you drill a well, you need to start producing that. So the Commission certainly has it in its power to prepare proration formuli or a formula for that field which, as the field develops and its perimeters are discovered and the various capacities to produce 10 tanks, the traits and characteristics are developed, they can change that. They can change the 160 acre spacing rule if its later developments should reveal that, in fact, one well will drain, more or less. They can cut it back to $.80 or make it $6.40. They can do all that based on new findings. But, in this instance, they can never change this sharing agreement of this Unit Agreement as they think they can compel. They can never change that. The minute this order becomes final, once this lawsuit is over, that sharing agreement is jelled. AMOCO can't go take it away, take an interest away from one and give it to another. Neither can the Commission do so itself. There is no other state and, I believe in New Mexico, there has been one example wherein in the matter of eminent domain, that we have had problems from time to time where the condemning authority will, in effect, condemn property for the benefit of another private person. That is outlawed. It is said under the condemnation

powers of the Constitution of this state and other states that there is no power of the State to take private property from one citizen and award it to another. That is what would be involved if, in fact, to make this correlative rights thing square once the facts were known, somebody -- either the Commission or AMOCO -- was to try to take from the have nots and give to the haves under this contractual agreement. These people who did ratify this did not ratify an agreement that, in effect, said it was subject to whatever all the changes or amendments the Oil Conservation Commission wanted to make. It is an up or a down. It is all or nothing. The Commission is not given the power to rewrite this Agreement or to make agreements for these people that they themselves did not make and could not even dream of.

The words of the sanctity of the contract is right here, and the Commission is not there to change it. The Commission can change how much a given well can produce, but I don't think they can make an operator drill wells to produce gas. I don't think they can make an operator produce more gas than he is willing to produce. I think that is the flaw of this order on rehearing, is this retained czar function and, again, that is the best way I can describe it. That is not intended to be an affrontry to the Oil Conservation Commission, but that is precisely the role they would retain if they had the ability to make all these changes.

That is fatal to this Unit Agreement.

Under these circumstances, it is our belief, Your Honor, that this is an up or down deal, because it is based on a false premise. It cannot be supported by any substantial premise. That would be the essence of our case.

THE COURT: Mr. Kerr, just to make sure that I understand, though, I see two arguments. One: that the Commission does not have the constitutional or legal power to act as it has in determining the extent of this unit and the correlative rights within the Unit. Now, that's one.

Without saying whether or not I feel that is correct or incorrect at this time, if the Court should find that the Commission did have that power, what is the second basis of your argument, then?

What about the reveiw procedure and, specifically, the record on reveiw here -- that you are basing, as I understand, your second premise -- that there is nothing that would support the Commission --

MR. KERR: Your Honor, the Commission itself has found there is no evidence to determine whether this will protect correlative rights. So I don't have to go into and delve into the record and say the evidence is insufficient to establish that it will protect because they have found that they have no basis. There is no evidence available -- and it is a fact -- which you can determine that this will, in

fact, protect correlative rights. The Commission, by making that finding, has taken all of the evidence and said, "This doesn't add up to protecting correlative rights."

So I am not attacking that finding. I am saying yes, that is true.

But then to go ahead and approve on a premise that is false, that is the thrust of this case.

THE COURT: All right, Mr. Kerr. Thank you.

Mr. Pearce?

MR. PEARCE: May it please the Court. Your Honor, as Counsel for the Oil Conservation Commission at this time, I would like to make a brief statement which I feel is necessary to retrack this proceeding, because I think the question that Your Honor asked of Mr. Kerr is the crucial question.

What is the standard of review of an administrative order?

As Mr. Kerr pointed out, this proceeding began with an application with the New Mexico Oil Conservation Commission for approval of a voluntary carbon dioxide unit. A hearing was held on the propriety of that action and an order was entered. That order found that the Unit Agreement should be approved by the Oil Conservation Commission. Petitioners here and others then filed a petition for rehearing. A rehearing was held and a subsequent order was issued. The second order, on the basis of the same and

additional evidence, found that the Unit Agreement should be approved. The Petition for Review to this Court was then filed. The Petition for Review addresses the standard of review which I believe is in issue in this hearing. The petition claimed that there was not substantial evidence in the record to support the Division of the Oil Conservation Commission and, although in a somewhat crowded statement, I believe that that Commission also claims that the findings made by the Commission are insufficient. The Oil Conservation Commission issues a tremendous number of orders. Some of those orders are appealed and substantial evidence questions are frequent participants in those hearings.

The New Mexico Supreme Court in 1975, in the case of Grace v. The Oil Conservation Commission at 87 New Mexico 205, addressed what the substantial evidence standard of review required. The Court, in that case, found that substantial evidence is such evidence as a reasonable mind might accept to support a conclusion. That is the question for review upon appeal of administrative orders. Is there sufficient evidence so that a reasonable mind might accept the conclusion drawn?

In the Grace case, the Court went further. The Court in Grace said that in resolving substantial evidence questions, it would not weigh the evidence. In addition, the Court in that proceeding found that the body who had issued the order before it, specifically, The Oil Conservation

Commission is not empowered and does not feel competent to resolve private contractual disputes.

At this time, Your Honor, in the interest of clarity and brevity, I will ask the Counsel for the Commissioner of Public Lands to state clearly for the record what the Commissioner's position in this matter is. The Commissioner is an Intervenor and is the largest single land owner in the Unit. Then I will ask Counsel for the applicants before the Commission to summarize this substantial evidence in the record which supports the decision.

We believe that is the appropriate test, Your Honor.

THE COURT: Mr. Pearce, before you do that, I have got a couple of questions for you.

The first one is: In reference to your outlining the review procedure and the limits of the review of this Court -- and just to make sure that I understand it -- is your position that this Court can only review the record and determine whether or not your findings by the Commission are supported by substantial evidence?

MR. PEARCE: Yes, Your Honor. That is our position.

THE COURT: Mr. Kerr raised another problem, and that is whether or not you have the ability to make certain findings or make certain conclusions; that is, in your order arising out of the findings you have made -- specifically having found that there is an insufficient evidence to openly

determine where the gas is located -- whether or not the Commission can enter an order in that manner and approve it in the manner that had been done with this order. To me, that is another standard for review, and I wish you would address the position of the Commission on the Court's ability to make that review.

MR. PEARCE: It is our position, Your Honor, that under Grace, the primary standard under which the Commission operates is the prevention of waste. That is our first statutory duty.

THE COURT: Let me back up a little bit.

I know that. What I'm trying to get at is whether or not you feel the Court can review the legal limitations of the Conservation Commission in entering or in approving the Unit Agreement you have in this case based upon the facts there is insufficient evidence to establish a Unit Agreement.

MR. PEARCE: Your Honor, I believe that, first of all, I believe it is an overstatement to say the Commission found there was insufficient evidence to allow the Commission to act to protect correlative rights because the Commission, in its findings, states that it is acting to do exactly that.

In response to the specific question, I believe that this Court has the power to review whether or not an administrative agency has acted within its scope of authority in issuing orders. I also believe, frankly, that there has been a very severe overstatement of what the Commission's

to determine the basis upon which the ultimate facts were concluded? The reasoning process the Commission used, the Commission refers this Court to Findings Number 8 and 9 in regard to prevention of waste and, particularly, to Findings 13 through 17 on the issue of correlative rights, and again, to Findings 25 and 37.

The third part of the Fasken test on the review of findings is: Does the record contain substantial evidence to support those findings? That is the first point that was raised in the Petition for Review before this Court.

Mr. Kerr has spoken as length this morning on matters which relate almost entirely to correlative rights. Certainly, there is not information in the Commission's record that the Commission would want. The reason that information is not there, as Mr. Kerr pointed out, is because the information is not yet available. Yet the Commission was presented with a situation in which waste would occur very quickly unless the Commission issued an order. The Commission issued the order approving the Unit Agreement, and although it would like additional information about correlative rights, the case of Grace v. The Oil Conservation Commission addresses a similar problem. In that case, the New Mexico Supreme Court said -- and if you will excuse me, I will read it -- "Prevention of waste is paramount and private rights such as drainage not offset by

counter drainage and correlative rights must stand aside until it is practical to determine the amount of gas underlying each producer's tract or the pool."

I believe, Your Honor, that is the situation presented to the Oil Conservation Commission. The Commission was presented with an agreement that would prevent waste in substantial measure, and that had an equitable -- at least, at the current state of knowledge -- an equitable sharing arrangement. The Commission approved that agreement.

I feel compelled to respond to Mr. Kerr's statements that the New Mexico Oil Conservation Commission wishes to act as a czar in this or any other matter. I would simply refer this Court to the order portion of Order 6446B which sets out the requirements upon the applicant before the Commission to submit periodic reports for approval. The Commission does not in that order, and would not in any other order, I believe, argue that it has the power to change private contractual agreements between private parties. The Commission, at some future hearing, may refuse to approve a plan of development for the Bravo Dome Carbon Dioxide Unit. I assume that if the New Mexico Oil Conservation Commission does, in fact, refuse to draft an agreement, parties will move out of what Mr. Kerr calls the quasi-judicial branch of government and move to the full judiciary branch of government. The New Mexico Oil Conservation

Commission, that was a body of experience, technical competence, and specialized knowledge, and, as such, its orders should be given special credence.

That seems to me that is the test under which Your Honor is called upon to judge the challenge of substantial evidence. Is there reasonable evidence to support the conclusion?

The second part of Petitioner's challenge is a challenge to the findings. I think it is fair to say, Your Honor, that the Oil Conservation Commission was taken to school by the New Mexico Supreme Court in a case called Fasken v. The Oil Conservation Commission reported at 87 NM 292. The Supreme Court found in that case that the Findings entered by the Oil Conservation were insufficient, and it set forth the tests that it applied in determining whether or not findings were adequate. It said that first the order must contain findings of ultimate fact, such as a finding that the order prevents waste or protects correlative rights. In regard to that, Findings 9, 25, and 37 of Order Number R6446B entered by the New Mexico Oil Conservation Commission state, "The approval of the Bravo Dome Carbon Dioxide Unit operates to prevent waste and protects correlative rights."

The second part of the Fasken test of findings is: Are there sufficient findings to enable the reviewing body

order does or purports to do. But, yes, I believe you also have the right to review our statutory authority data.

THE COURT: All right.

Mr. Hall?

MR. HALL: Your Honor, my name is Scott Hall. I represent the Commissioner of Public Lands in this proceeding who comes, more or less, as a landowner, but somewhat uniquely situated as apart from the other people in this lawsuit.

I would like to state, as a preface, I think Counsel for the Oil Conservation Commission has ably presented arguments about the standard and scope of review. I will not address those at length here, although I would like to make one statement -- and Counsel hit upon this -- that is, I think, Mr. Kerr may have fudged a little bit in his oral argument about the issues presented in his Pleadings. I would object to consideration by the Court of any subject matter beyond the Pleadings except what is specifically stated there. Specifically, I wonder if really it is before the Court today to address the specific authority of the Commission and whether arguments have been presented in the Pleadings about the Commission acting in excess of its authority. I frankly just don't find those in the Pleadings.

I think it would be helpful to the Court at this time if I set out the interests and institutional parameters of the Commissioner of Public Lands in this case. I am sure

the Court is quite well aware that the Commissioner acts under the ambit of the New Mexico Constitution in an enabling act that placed him in the position of a constitutional agent for the State of New Mexico in administering lands that the State had acquired from the Congress of the United States. Specifically, the Constitution states that the Commissioner shall administer the lands for the benefit of some 24 specifically enumerated trust beneficiaries; in essence, he was placed in the position of a true trustee in administering the lands. Furthermore, there is statutory and legislative-mandated directives in his administration of estate trusts lands. They are found in Chapter 19 of the New Mexico Statutes Annotated generally. Specifically, as concerns this proceeding, Chapter 19, Subchapter 10 addresses oil and gas lands. There is a specific statute that is directly relevant to the Commissioner's participation in the Unit, and that is Section 19-10-46. That statute sets out three basic findings that the Commissioner must make.

If I might take a half-second of the Court's time, I would like to read into the record the thrust of that Statute, if there is no objection. 19-10-46 basically Part A states that, "Such agreement will tend to promote the conservation of oil, gas, and the better utilization of reservoir energy." Under the operations proposed, the State, and each beneficiary of the lands involved, will

receive its fair share of the recoverable oil and gas in place under its land in the area affected, and the agreement is, in other respects, for the best interests of the State.

Now, the thrust of that statute has been adopted in the Commissioner's Administrative Rules. I would direct the Court to Administrative Rule 45. I have attached a copy of that to my trial brief which I placed on your bench this morning. In that Rule 45, it sets out again the basic findings required by the statute. I think the significance of those findings to the Court today is that they parallel almost exactly the findings that are required to be made by the Oil Conservation Commission insofar as prevention of waste is concerned. There are other requirements, too, that require the Commissioner to find that the Unit is indeed in the best interests of trust beneficiaries whose lands are committed to the Unit. Also notable is Rule 46 which requires, "Any applicant presenting a voluntary unit to the Commissioner for his consideration to predetailed petroleum engineering and geologic data for review and synthesis by the Commissioner's own inhouse expert staff."

AMOCO, in fact, did that, I believe, as far back as 1978 when this unit was first produced.

Another notable rule is Rule 47. It is key in this proceeding because it sets out the manner in which the Commissioner of Public Lands may conduct his decision making.

Scott Hall

It is his decision-making process. Rule 47 states, "The Commissioner may delay his decision until the Oil Conservation Commission receives its own evidence and digests that and comes out with its order approving or disapproving."

The Commissioner may also look at the evidence brought before the Oil Conservation Commission and have his own expert staff evaluate that. In essence, I think the thrust of that Rule 47 is that it places the Commissioner in somewhat a position of that of the Court today. The Commissioner looks at the record of the OCC, and if he finds substantial evidence warranting his approval of the Unit, then he will, in most cases, go ahead and enter into the Agreement.

That is, in fact, what he did in this proceeding. His expert staff, over many months' time, and after attending the Oil Conservation's hearings themselves, participating in the hearings, reviewed the Commission's evidence and found nothing at all in there that would warrant his disapproval of the Unit. I think that is a significant finding in this case. The significance to the Court lies in effect that the two findings somewhat parallel each other and, in fact, augment each other. You have the Commissioner acting almost as a quasi-judicial or administrative body in this proceeding. He undergoes his own synthesis of evidence and comes up with his own conclusion. So, at the very least, I think that would

offer substantial and persuasive proof that there was substantial evidence in the OCC record to warrant his approval.

That is the conclusion of my statement. I would stand for questioning at this time or whatever the Court desires.

THE COURT: Mr. Hall, I take it your comments relative to the Commissioner's review of the evidence submitted to the Commission only goes so far as the Commissioner of Public Lands, of participation in the Unit.

MR. HALL: That's correct.

THE COURT: Does the Commissioner of Public Lands take any position about the Unit itself other than the effect upon the Commissioner of Public Lands and the Public Lands of New Mexico?

MR. HALL: Yes, sir, insofar as he is directed by that Statute in that he is required to make that finding that there is prevention of waste by the Unit. That's correct.

I also point out to the Court that the Commissioner of Public Lands is one of the three Oil Conservation Commissioners by Statute, although he did not participate in this proceeding.

THE COURT: All right, sir. Thank you, Mr. Hall.

Mr. Kerr?

MR. KERR: I will present the case for AMOCO.

May it please the Court. I would initially like to address the Court briefly concerning the authority to enter certain of the findings which he has specifically challenged; particularly those findings which relate to conditions subsequently imposed by the Commission in this order.

In this, Section 7-2-11 of the New Mexico Statutes Annotated this section is style "Powers of Commission and Division to Prevent Waste and Protect Correlative Rights." It reads "The Division is hereby empowered, and it is its duty to prevent waste prohibited by this Act and to protect correlative rights as in this Act provided.

To that end, the Division is empowered to make and enforce rules, regulations, and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act whether or not indicated or specified in any section hereof."

Now we would submit to you that if any of the horror stories Mr. Kerr related ~~by~~ about the Commission taking property rights from one side and passing them to another, if any of these stories ever came to pass, AMOCO would be before you with Mr. Kerr challenging that action. But we look at the order, and if you read the order, you find the Commission has clearly the right to continued jurisdiction over this order and to review it from time to time.

THE COURT: Let me stop you, Mr. Carr. I hate to interrupt

your argument, but I have got a question I need to ask you while it is on my mind, and that is: Is your position that the Commission has the power to review this based upon their statutory authority or based upon the contracts which indicated that it must be reviewed by the Commission?

MR. CARR: We believe it is under their statutory authority.

THE COURT: Let's hear your argument.

MR. CARR: Under our statutory authority, they can do whatever is reasonably necessary or proper to effect the purposes of the right to prevent waste, to protect correlative rights, and, as such, they can, from time to time, review it to see if, in fact, the review agreements are accomplishing those ends. We don't believe they could alter property rights, but we believe they could rescind their approval at any time.

That is our argument on that point. As Mr. Pearce pointed out, my purpose today is to review for you the basic issues which were presented to the Court in the Petition to Appeal. Those were whether or not the findings on waste and correlative rights are supported by substantial evidence. That was in Paragraph 6 of the Petition to Appeal, and Paragraph 7 attacks the sufficiency of the findings on both these points.

It is important, therefore, Your Honor, to review the standards to be employed by the Court when the sufficiency of the findings is in issue. Twice before, the Supreme Court

of New Mexico has been called upon to review an order of the Commission when the sufficiency of the findings were challenged in Continental v. The Oil Conservation Commission. This was a case involving a prorationing matter. The Court found that although formal and elaborate findings are not absolutely necessary, basic jurisdictional findings supported by the evidence are required. Then, at a later time, in David Fasken v. The Oil Conservation Commission, the Court again was asked to review the sufficiency of the findings of the Commission order and the order stated the order must contain sufficient findings to disclose the reasoning of The Oil Conservation Commission in reaching its ultimate findings that waste will be prevented and correlative rights protected.

Then it went on to state that the findings must be sufficiently extensive to show the basis of the Commission's order. So this is the standard we believe to be applied by the Court when reviewing sufficiency of the findings.

Also, as Mr. Pearce noted, the findings have been attacked on the grounds that they are not supported by substantial evidence. He noted that the Supreme Court has given really the general definition of substantial evidence in a previous case involving an Oil Conservation Commission order. The Court of Appeals of New Mexico in Martinez v. Sears, Roebuck and Company defined the standard of review in deciding whether or not a finding has substantial support.

In that case, the Court of Appeals stated, in deciding whether a finding has substantial support, the Court must review the evidence in the light most favorable to support the finding and reverse only if convinced that the evidence thus viewed together with all reasonable inferences to be drawn therefrom cannot sustain the finding. In making this review, any evidence unfavorable to the finding will not be considered.

The Supreme Court extended these standards to decisions of administrative boards in United Veterans Organization v. New Mexico. All of these cases are fully cited in the trial brief which AMOCO Production Company has previously submitted to the Court. I think it is important, therefore, Your Honor, for us to now look at the waste question and then at the correlative rights question to see if, in fact, the findings and the record support the order of the Commission.

First, let's look at waste. Waste is defined in several ways in the Oil and Gas Act. Two definitions of waste are particularly relevant to the proceeding pending before the Court. Waste is described in one way as underground waste. This definition includes the locating, spacing, drilling, equipping, operating, or producing of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from the pool.

Waste is also defined as surface waste. When they talk about surface waste, they are talking about, among other things, evaporation, seepage and leakage. The definition of surface waste includes loss or destruction incident to or resulting from the manner of spacing, equipping, operating, or producing a well or wells.

Now, these definitions, although they speak in terms of oil and natural gas, have been extended by the Statute to also apply to carbon dioxide gas.

I would now like to direct the Court's attention to the waste findings in this order. They're Findings 8, 9, and 37. Finding 8 reads in part that the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease-by-lease basis; a more efficient, orderly, and economic exploration of the unit area. Witnesses for AMOCO, for City Services Company, and for the Plaintiffs all testified that unitized operation and management was the best method for developing this field. F.A. Calloway, a reservoir engineer called by the Plaintiffs stated, and I quote: "I have always been an advocate of field-wide unitization. I feel that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons; in this case, gas, and operates under the most efficient circumstances."

Now, there is a substantial amount of evidence in this transcript supporting this portion of Finding 8. I

will not burden the Court by reading all of the transcript references. As I noted before, this has been fully briefed for the benefit of the Court. I would, with the Court's permission, offer the basic information that the unitized operation and management of the proposed unit has the following advantages over development of this area on a lease-by-lease basis: (a) More efficient, orderly and exonomic exploration of the Unit Area; and (b) More economical production, field gathering, and treatment of carbon dioxide gas within the Unit Area.

Evidence was presented by the Unit Agreement that it will provide for orderly development of the Unit Area; that it will enable the operator to develop the Unit by drilling wells in the most desirable locations; that this will enable the operator to drain the reservoir in an effective manner with the most efficient spacing pattern; that Unit management will avoid wasteful drilling and practices; that it will enable the operator to only drill the wells necessary to produce their reserves and, therefore, will avoid the drilling of unnecessary wells.

Finding 8(b) provides that unitized operation and management of the proposed unit will, and I quote: "Provide for more economical production, field gathering, and treatment of carbon dioxide gas within the Unit Area."

Jim Allen, Sr., Petroleum Supervisor for AMOCO

Production Company, testified that Unit management was the most efficient way to produce CO_2 from the Bravo Dome Unit Area. For the company, CO_2 would be produced by using fewer surface facilities, and this would, in turn, result in reduced production costs. Max Coker, a consulting petroleum geologist with extensive experience in unitization, was called by AMOCO Production Company. He testified as to the primary factors which result in the surface loss of a product in the oil fields or, in this case, in the CO_2 field. He stated the principal causes were mechanical misfunction and manmade accident. He concluded his testimony by stating there would be a substantially greater risk of surface loss if this area were developed on a lease-by-lease basis than if it were operated under a plan of unitization.

Finding Number 9 in this Commission order provides that said advantages will reduce average well costs within the Unit Area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

Mr. Allen testified that Unit operations, only six surface facilities would be required as opposed to as many as 4,435 such facilities if the area had to be developed on a lease-by-lease basis. He testified that fewer facilities result in lower cost; that lower costs extend the economic well lives of the wells involved; that the longer well lives

result in the increased recovery of the product which prevents waste and is consistent and in line with the statutory definition of underground waste. He further stated that the savings that would be accomplished in the area of surface facilities was only indicative of a number of other savings that would result from unitized operations.

We submit to you that the Oil Conservation Division findings clearly disclose the Commission's reasoning that approval of this Unit Agreement will prevent waste. Their reasoning was it is more efficient. This results in savings which extends lives of the wells involved, which increases the ultimate recovery of the product, and that, by definition, prevents waste. Each of these findings is supported by substantial evidence.

Now let's look at correlative rights. I think initially it is important to focus on the definition of correlative rights. It is defined by Statute as the opportunity afforded so far as it is practicable to do so to the owner of each property in a pool to produce, without waste, his just and equitable share of the oil or gas or both in the pool. That definition then goes on to explain how that should be calculated.

In the Continental decision, the Supreme Court stated that correlative rights are not absolute or unconditional but noted that the Legislature has enumerated in

the definition of correlative rights, which we just read, certain elements containing such a right. Then the Court went on to prescribe certain specific correlative rights, findings that should be made by the Commission prior to the entry of an order so far as it is practicable for the Oil Conservation Commission to do.

Now Mr. Kerr would like us to return to the standard announced in Continental and prohibit the Oil Conservation Commission from entering an order protecting correlative rights until the full extent of the reserves are known. This is not the first time a decision of the Oil Conservation Commission has been attacked on these grounds. Witter and Willbanks v. The Oil Conservation Commission, the Commission approved two nonstandard or proration agreements. Those were unusually large, and it went to the Supreme Court. In ruling for the Commission, the New Mexico Supreme Court stated the following, and I would like to read this.

"When the Commission exercises its duty to allow each interest owner in a pool his just and equitable share of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights is subject to the qualification as far as it is practicable to do so. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We

cannot say that the exhibits, statements, and expressions of opinion by the applicants do not constitute substantial evidence or that the orders were improperly entered or that they did not protect the correlative rights of the parties so far as could be practicably determined."

That is very important to this case, Your Honor, for we have a very similar situation here. Certain additional evidence, of course, would be desirable. But what we have is an exploratory unit, and that evidence is not, as yet, obtainable. If we wait until all of the data is in, it will be too late to derive the benefits of unitization thereby preventing the waste which we have previously discussed.

Mr. Kerr has indicated that this Unit Agreement and this order is premature. We would submit to you that that is impossible with an exploratory unit. You have got to unitize for the purpose of exploring and development. You unitize before you know what the reserves are because then you are not hamstrung by offsetting drilling obligations and matters which really, in the final analysis, result in wasteful development of a natural resource. But we don't profess to stand before you and say this record is devoid of the issue of correlative rights. I think it is important to look at the correlative rights findings in this matter.

Finding Number 14 reads: "That the evidence presented demonstrated that there are two methods of

participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the Unit; these methods are as follows: (a) A formula which provides that each owner in the Unit shall share in production from any well(s) within the Unit in the same proportion as each owner's acreage interest in the Unit bears to the total Unit acreage, and

(b) A method which provides for the establishment of participating areas within the Unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production."

That is the other method for which evidence was offered at the Commission hearing.

Neil Williams, a petroleum consultant, testified for AMOCO Production Company about both of these types of participation methods in voluntary Unit Agreements. These two types were generally concurred in by Mr. Calloway, Plaintiffs' witnesses, and were also discussed in a statement presented on behalf of the Commissioner of Public Lands.

Finding Number 15 provides: "That each of the methods described in Finding Number 14 above was demonstrated to have certain advantages and limitations."

Bruce Landis, Regional Unitization Superintendent for AMOCO, testified as to the benefits of the proposed method of participation. He also testified about possible problems that arise when you are dealing with the participating area approach. Testimony was also received from Mr. Calloway, the Plaintiffs' witness, about problems with both of these types of proposed methods of participation and problems that were also outlined in the statement offered by Oscar Jordan on behalf of the Commissioner of Public Lands.

Finding 17 reads: "That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time."

Mr. Williams testified in response to questions as to the reasonableness of an undivided participation formula like that in the Bravo Dome and said it was probably the most ideal situation to have when we're dealing with an exploratory unit.

He went on to say, and I quote: "Geology is not an exact science so, therefore, by all the parties voluntarily agreeing to sharing whatever there might be is the ideal situation in my opinion, regardless of where the production is, because you don't know that to begin with."

The Commission, in Finding 25, stated: "That the evidence presented in this case establishes that the unit

agreement at least initially provides for the development of the unit area in a method that will serve to prevent and which is fair to the owners of interests therein."

Then it entered its ultimate finding on waste and correlative rights and said: "That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area."

The Oil Conservation Commission's reasoning, we submit, is clear. They have said evidence was presented on two approaches, all equating the production, two approaches that would protect correlative rights. But the method in the Bravo Dome unit was reasonable and appropriate, and the method was there to interest owners; that it would protect correlative rights. We submit there is substantial evidence to support these findings.

As we started out on correlative rights, we noted it is defined as "the opportunity to produce one's just and fair share of one's reserves."

We submit that, in this case, the interest owners have the opportunity to produce their share of the CO_2. They have exercised that right and have availed themselves of the opportunity by voluntarily joining, contracting, and joining in the Unit Agreement. It is a voluntary unit. This is important because they have voluntarily committed

their interests and have mutually agreed as to how they will produce their fair share of the reserves. Those who have not joined the Unit are not affected but are protected by the terms of their individual lease agreements.

We submit to you, Your Honor, that this Unit Agreement has been approved by the Oil Conservation Commission, and the Commissioner of Public Lands, and by the United States Geological Survey. It is here before you to be reviewed to determine whether or not it is consistent whether the orders are consistent with the statutory authority of the Commission; whether the findings disclosed the reasoning of the Commission, and whether those findings are supported by substantial evidence. We believe that our review of the records clearly shows the findings are supported by the evidence; but they are consistent with the Commission and stand firm.

I stand for any questions.

THE COURT: Just one, and it is real elementary, so you must forgive me.

How did the Commission determine the exterior boundaries, the surface boundaries of the Unit to begin with?

MR. CARR: The surface boundaries of the Unit were presented to the Commission by AMOCO Production Company, and in the transcript on the original hearing, a number of cross sections were offered. Although admittedly there isn't sufficient evidence to determine how many reserves are under each

individual tract, they had testimony showing that within the area they were seeking to designate as the Unit Agreement in the tub formation, there appeared to be greater prospects for production of CO_2 that in the areas outside the area that was defined as the Bravo Dome Unit.

THE COURT: This was based on what kind of exploration?

MR. CARR: Cross sections done from geologic data, well logs reviewed, and from these well logs, they tried to extrapolate and determine the extent of the carbon dioxide producing formation.

THE COURT: So when Mr. Kerr was referring to some 41 wells, are those the wells you were referring to?

MR. CARR: That's correct, Your Honor. Those are the wells from which data was drawn for the purposes of trying to determine the extent of the reservoir. It was primarily geologic considerations that were used to establish where the boundaries of this Unit should be.

One other point in that regard, Your Honor. There is a discrepancy as to the number of acres in the Unit. We're talking about 1,033,000 acres, and that is because, in our brief, I don't want that to be confused. Certain acreage has been contracted out.

THE COURT: Once you get over a million acres, Mr. Carr, it is just a lot of land.

MR. KELLAHIN: Your Honor, I represent two oil and gas companies

that were involved in this proceeding, the first of which is Amerada Hess. They own about 9.5 percent of the acreage committed to this Unit, and they support the Court's reaffirmance of the Division's order. The second company I represent is Cities Service Company. They have about one-half of one percent of the acreage committed to the Unit. They also support affirmance of the order.

In preparation for the hearing today, Your Honor, I understood from the Petitioner's Petition for Review, that this was to be an ordinary garden-variety appeal from an Oil Commission Order, a question of substantial evidence and sufficiency of the findings. That standard as set forth in Faskens has been articulated for you by Mr. Pearce. It is my understanding that is what we were to discuss today. The question of whether there was substantial evidence to support the findings and whether, in the second point, those findings were certainly sufficient to articulate the reasons of the Commission. I learn, in coming to Court today from Mr. Kerr's argument and from his Petition which I read this morning, that he raises for, I believe, the first time, the question concerning the jurisdiction of the Commission. As the Court knows, the scope of review before this Court is determined by those issues presented in the Petitioner's Application for Rehearing. That is specifically set forth in 70-22-25. If I may, I will read you the appropriate

section.

"The scope of review is in the District Court. That the questions reviewed on appeal shall be only questions presented to the Commission by the Application for Rehearing."

There is a question, I think, before you today, Your Honor, as to whether any issues outside that can now be presented for your review. It would be our position that Mr. Kerr and his clients are limited to those questions raised in the Application for the Petition for Review as set forth in the Application for Review.

THE COURT: Mr. Kellahin, I keep asking that. Mr. Kerr has raised a jurisdiction question of the Commission. When does the party have a right to raise an issue of jurisdiction before a judiciary body? Does it follow the same as in Courts in that it can be raised on any order?

MR. KELLAHIN: I suspect the choices are two. They have to be presented before the administrative agency to alert them, "Say, fellows, you are exceeding your jurisdiction of review. Why don't you do something about that?"

They have some obligation, I think, to alert the agency that at least one party feels that what they're doing exceeds their authority. However, as you know, fundamentally in District Court proceedings, you can raise jurisdictional issues at any time. I am not sure what Mr. Kerr has said is, in fact, one of those classic jurisdictional questions that

can be appealed at any time.

THE COURT: I know, but his argument is that the ultimate order exceeded the authority of the Commission, either legally or constitutionally, or otherwise. That is one of his arguments, as I hear it. I don't see how you can raise that before you get the order here in the first place.

I was just hoping you could enlighten me a little bit about what the law said on that subject.

MR. KELLAHIN: Perhaps I haven't, Your Honor.

The business about a voluntary unit, I think, deserves some clarification. Admittedly, this is probably one of the largest voluntary exploratory units ever presented to the Commission for review. But the Court should know that, as a matter of routine, all voluntary exploratory units come to them as they come to them, first of all, in one of three ways. One is statutorily. The Oil Commission prevents waste and, generally governs oil and gas because in New Mexico. These cases will come to them for that type of order under that statutory provision. Second of all, the contract, as it does in this case, provides for review by the Division. This case came to the Division in both those kinds of concepts. A third way, as stated by Mr. Hall, is when the Commissioner of Public Lands asks that it be done. He asked that because he does not have the expertise to determine those questions set forth in the statute. He

defers to the expertise of the Oil Conservation Division.

In regard to Mr. Kerr's statement that there are findings in the Order that it either explicitly or implicitly says that the Commission lacks or has failed to find that there is sufficient evidence, or there is no evidence to protect correlative rights, I think that exceeds what this order, in fact, says.

I have, again, reviewed the Order in terms of what Mr. Kerr has said, and I cannot find the kinds of findings that he cites that support that conclusion. It would appear to me that those findings that are addressed to the lack of evidence are addressed to which of the two formulas, either of which is acceptable to the Division, will ultimately determine how the product is to be allocated among the interest owners. In fact, that is true of all exploratory units. The method of allocation of production, and the extent that each acre is underlying by a given amount of hydrocarbons can only be determined after development is completed.

It is with those points in mind, then, and I think specifically trying to answer a question raised to them by the Commissioner of Public Lands, one of those questions is whether the Unit Agreement is going to provide the State of New Mexico and its beneficiaries with a fair and reasonable share of the production.

If you read that in this light, then you will find the justification for the continuing jurisdiction of the

Commission. In other words, at some point in the future, that information, when it comes available, will be presented to them and they can determine, at that date, whether the participation formula is fair. That does not mean to say that either one of these is not fair and appropriate to protect correlative rights and prevent waste.

We believe, for those reasons, as well as other reasons stated today, that the Commission's Order ought to be affirmed.

THE COURT: Thank you, Mr. Kellahin.

I believe I have heard from everyone. Mr. Kerr, your response, please.

MR. KERR: May it please the Court. In the matter of unitization, we did have an expert -- and I don't think that there is probably any doubt about it -- that unitization, as such in the last concept of the unitization, is a sufficient orderly thing; that it makes good sense. I don't know that anybody exactly is opposed to unitization just for the sake of unitization. In the subject of unitization, there are probably 100,000 different ways to go about forming a unit. In this particular instance, in the proceedings before the Commission, we indicated, for example, that they had taken, in the preparation of this Unit Agreement, perhaps an American Petroleum Landman's form with a Federal Unit form as prescribed by the Geological Service or the Federal

Government Land Department.

In that instance, we showed, as an example, that in federal exploratory units, that they have a provision where you have a supervisor who is there in a proprietary capacity; mainly, as a landowner. As the field is developed and the pools are defined, there would be a sharing among the owners in that particular pool without getting off into all these things because that was a matter of contract. If, in fact, those things were not done, that the supervisor of the Federal Government, under a proprietary capacity, would have a right to revoke the unitization. That would be one thing. We have cited in the footnote a case, and when we come in now, we come up with a vast area, a million acres, or whatever the number is, a big one, anyway, with fluvial deposits, where we already have dry holes, thickening from the thing; we know that from testimony that was presented the first day. We know these things are not equal. Not all acreage is born equal.

In the matter of carbon dioxide, we know these things, so we come up with the Unit Agreement or a sharing agreement that is fixed and jelled forever for all intents and purposes on a sharing basis that can never protect correlative rights. In addition to that, we go in and eliminate the safeguards that landowners would have if there is insufficient development of the field to go to the

Courthouse, and seeing the cancellation of their lease on the grounds, there was insufficient development as a reasonably prudent operator would do. The Court would give them so much time to do that if the Court found that, in fact, because the Court has been doing this for 50 or 75 years in the oil fields. If, in fact, there was an unfair sharing agreement, if under that business of unilateral sharing, they could be made to solve those problems. In this instance, we come up with a Unit Agreement, and they just picked a Unit Agreement that can't ever take care of the correlative rights on the record that we see here before us. That doesn't mean there can't be a Unit Agreement; that doesn't mean there can't be a proper one for that field. It just means you can't go and do it the simplest way and give it the least thought and come up with a bag of bones and say because it is unitization, that is holy and, therefore, the exception. That is exactly what I think has happened in this case.

Now then, in this thing, orderly development, and all of this, that Simms v. Mechem case, which is cited in the trial brief, one of those six cases went to the Supreme Court from the Commissior, or maybe seven, it makes a point that is not the prevention of waste. Efficiency and orderliness is not synonymous with prevention of waste. I am saying to them if they would get back to the boards,

they could probably work this matter out to have a formula to take care of it. If you have 20 reservoirs, the people with those 20 reservoirs would share it. If you have net acre feet -- would want to get into that -- but there are ways to do this on net acre feet; 20 different ways. You need hard-job type of decisions made by numbers pertinent to who would have a vital vested interest, and you work those out. But you just don't slam them down.

THE COURT: Let me ask you something, Mr. Kerr.

Specifically what in the Commission's Order prevents that kind of proceeding at some time in the future?

MR. KERR: I would like to say, if my Pleadings are insufficient to get to this business from the conclusion, that I would like to make an amendment to make them conform to my briefs, the argument I am making.

THE WITNESS: Let's hear your argument.

MR. KERR: The argument is that, in this case -- let me go to Finding 17; "That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time."

The Commission finds that, at least initially, the development of the Unit Area in a method which will serve the owners of the interests therein. At the time, we have no production. That was speaking of initially.

Then I will go on, paraphrasing, that there is no

data available to determine whether or not long-term developments of the Unit is a method which will prevent waste and which is fair. Finding 27 states: "That further development within the Unit Area should provide the data upon which such determinations could, from time to time, be made."

Then it goes on, in Finding 28: "That the Commission is empowered and has the duty with respect to unit agreements to do whatever may be reasonably necessary to prevent waste and protect correlative rights."

"To do whatever may be reasonably necessary." That is what I am saying they don't. The Commission should exercise continuing jurisdiction in the future so that they can take those steps required to prevent waste and protect correlative rights. Among those things they can do in the future is well spacing, requiring wells to be drilled, requiring elimination of undeveloped or dry acreage from the unit area, and modification of the unit agreement. That is Finding Number 30.

Then in Finding Number 37: "That approval of the proposed unit agreement with the safeguards provided above should promote the prevention of waste and the protection of correlative rights within the unit area.

In the interim, they put in findings that AMOCO, as the unit operator, should make reports, come back and get approvals, and all this kind of business. In this, they

have operated on a basic premise they can make people drill wells, that they can require modification of the Unit Agreement in such matters, I presume, of correlative rights. In that, this is where they got out in left field. That is just not one of the powers that they constitutionally have or can have, in effect, as to requiring modification of the contractual agreements.

Now then, Mr. Carr raises an interesting subject, and that is if they start producing in 1990, 1984 -- or whenever it might be -- and there is some development in the meantime, and we find out the nature of the field is such that the correlative rights are really not being attended to in a practical matter -- that the Commission can revoke the Unit Agreement. Maybe they can; I don't know. That is an interesting question.

I would imagine they could come closer to revoking it before they can start commanding modification of the Unit Agreement. I think that would be, in a continuing jurisdiction sense, very possible. What do we do then? Do we go back and have, among 1400 people, a lawsuit to see who is going to collect the back royalties that were paid, with the surface uses combined, and all of this thing? In other words, I think that would be a bigger mess than anything we could possibly have. But the Commission hasn't considered this. The Commission considers, and its whole

order was based on the very basic premise it could control these matters now and for the life of carbon dioxide formation from the tub formation in that field. I would personally think AMOCO -- if that is what the Commission said, and that is what it says in Finding 29 -- I think AMOCO would have to, if they thought they could be compelled by the Oil Conservation Commission, to change their rights in this thing. If the Court, in fact, is going to hold that is true, maybe that gives us a safeguard. But I can't believe that it is a valid exercise by any concept of the powers of regulatory agencies; at least, as practiced up to this time. This is foreign to anything that I personally -- and I think probably anybody in this room -- has ever had to cope with, of having a regulatory agency impose its powers on a Unit Agreement.

In one of these things, to go and tell AMOCO to spend $500,000,000 this year drilling wells, as they indicated they have a right to do, as the Commission indicates in Finding 29, it is unbelievable. We are dealing, and the record will show, the bucks are big in this operation.

When it comes down to it, this needs to be sent back, and AMOCO, if they want unitization with these folks, need to come up with a scheme to protect these correlative rights if they want to unitize it now. This is not such an exploratory unit that we are dealing with something under

North Pole that nobody has any siesmology on. But you have been producing in small areas of this, about 6,000 acres for 30, 40 years. We know something about this, plus these 42 wells indicate we have got vast disparities in the quality of the reserves and, hence, the recovery that a particular tract is entitled to. In effect, this has come up too halfcocked. They came up with a plan of sharing that will not work, and they waived out too many requirements that this Commission is trying to plug up. God bless them for trying, but they haven't got the power.

Now then, I would like to say that Mr. Kellahin raised an interesting question. In this first hearing before the Commission -- not the rehearing but the first hearing -- we filed, and I believe it is in the record, a Motion for Rehearing and submitted a brief in support thereof. It was attacking the orders as they then existed, which said,"We find that correlative rights are protected if the prevention of waste will be prevented"; ergo the Order is approved effective whatever the date was. It was very short. It is in the record, also.

Then on Rehearing, taking into account our Motion, I assume -- I take some credit for that -- they then go back to the drawing boards because I think it is so obvious that the correlative rights issue is going begging as well as this matter of reasonable development which the State's got

a right smart interest in, too, in this deal. They come up with this thing, this theory that they will retain this right, and they will, in the future, be able to enter orders requiring wells to be drilled, elimination of acreage, and modification of the Unit Agreement. That is a false, false premise on which they acted. That so permeates, Your Honor, this entire order, the order that was entered starting at the bottom of that page, on which I just read that thing from. If the Commission were to be authoritatively told, "Gentlemen, you do not have the power to require modification of the Unit Agreement," I think the Commission itself would be up here asking to pull this thing down. We are dealing with the one great carbon dioxide development that this State has. This has got lots of ramifications to it. I am not trying to overdo that, but they asked to pull this down themselves. If they know they don't have that power, as a matter of law, that the general language of the act of the Legislature saying they have the power to do these things, to take care of things like spacing rules, proration formula; all of these things which they do and do a good job of. But they don't have the power to go in and start modifying contracts. If they understood that, I think they would pull it down themselves because this is serious business we are talking about here.

The language we are talking about, all of these wells and the costs and the recoveries expected, we are

talking about a gigantic thing. We are also talking about a resource that is essential to the State of New Mexico in this matter. Whenever we got it where AMOCO has 68 percent of the Unit, can control the rate of growth, production, and so forth, and if the Commission can't go in there and say, "Go drill more wells, produce more gas," we got a problem on our hands, Judge.

THE COURT: Mr. Kerr, one question sir. I still have to ask it because I don't have any answer yet.

You indicated as you read to me certain Findings that the Commission would retain jurisdiction and would review. As I understand the order to be, the apportionment of gain to be received from these wells as exploration should develop a reasonable formula. That is the way I read it. Am I right or wrong?

MR. KERR: When it says "The powers they reserve are the right to modify the Agreement," and I am assuming because the subject is correlative rights to a very large degree, I am assuming they are assuming they have the right to require the modification of the contract in regard to sharing, which is what correlative rights are all about.

THE COURT: So, to understand your argument, it isn't the issue that the method of apportionment is fixed forever, but that the right of the Commission to fix that method or approve it is such --

MR. KERR: Not really. I am saying, in fact, they have come up with something that is fixed and jelled. That is to the contrary.

In the future, the minute that Landowner X or Company Y gets themselves reduced in their sharing, because of the Commission's act or the operator's act, unilateral act of trying to adjust correlative rights, I think that the courts of this state are going to say that that was not the power, duty, or function of the Commission, and certainly not of AMOCO, or whoever it might be that did it, and that in effect, this is jelled.

The minute that this deal got the Good Housekeeping Seal of Approval, if you wanted to attack it, you had to attack it now while it is a direct attack; no collateral attacks. If you want to raise that issue, you better raise it now or forever hold your peace. I think that's where we are. I don't believe that we can take from Landowner X, when it develops that his property is marginal property in this thing, and cut his sharing arrangement by act of this Commission. Yet Findings 29 and 30 are exactly what this Commission is basing this premise on with these safeguards. They consider them safeguards, and they may be, if they have the power. But they don't have the power. I think before this case is all over, it is going to probably take a ruling. If they have the power to do that, then I think probably my appeal is wasted. Probably I would have to almost concede

that. If they have the power to change these things, that is one thing. But I think it will have to take a court hearing for some force of law.

MR. KELLAHIN: Your Honor, might I respond to your question?

THE COURT: No, sir, not yet. Let me do this in turn or I will get lost.

Thank you, Mr. Kerr. Mr. Pearce?

MR. PEARCE: Thank you, Your Honor. I will resist the temptation to be repetitive. I would refer the Court specifically to Findings 29 and 30 which state: "That the Commission may and should exercise continuing jurisdiction over the unit correlative to all matters given it by law."

In addition to that, I would refer the Court to the Order portions rather than the Findings portions of the Order; specifically 6446-B.

Mr. Kerr, perhaps we should be honored that he thinks we should take charge of private contractual disputes between individuals because perhaps he feels we are particularly competent, and we appreciate any statement of our competence. The Oil Conservation Commission is not authorized to state --

THE COURT: Let me state that may not have the total agreement of the people in this room.

MR. PEARCE: Yes, sir, but if I have Mr. Kerr's, I will take all I can get.

The Oil Conservation Commission does not, did not, and will not enter into private contractual disputes. If the parties to this Unit Agreement or outside the Unit Agreement have contractual disputes, they proceed to other forums than the New Mexico Oil Conservation Commission.

Thank you, sir.

THE COURT: All right, sir. Mr. Hall, I believe you were next in order of argument.

MR. HALL: Your Honor, yes, sir, and it will be brief.

I would like to respond a little bit that we seem to be keying in on two issues; one, correlative rights, and the second being the authority of the parties really to submit their contract, refer elements of their contract to findings of an administrative body. I would like to state again that I request the authority of the Plaintiffs to raise this particular point at this time. However, I have not briefed the issue, and I know of nothing in the law that would prevent any parties that contract in referencing any part of their agreement to a finding of the Commission or whomever.

Another point on correlative rights: As I have pointed out, the Commissioner of Public Lands does not particularly concern himself with determining correlative rights. Although State land is scattered almost equally throughout the Unit, that does not mean we do not take into consideration findings regarding correlative rights. In

fact, we do. If we had found anything in the Oil Conservation Commission's record that would put us in the position of placing the correlative rights of the State land trust beneficiaries' properties in jeopardy, we would be on the side of the Plaintiffs here today. However, we simply did not find those in the record.

I would like to point out one thing to the Court; that the issue of correlative rights and waste have been defined by the New Mexico Supreme Court before. If you have one, the courts seem to say you have another. If I could point out Continental Oil Company, 70 NM 310, I would like to read one particular line out of that. Starting in mid sentence: "but the basis of its powers" -- speaking of the OCC -- "is founded on the duty to prevent waste and to protect correlative rights. Actually, the prevention of waste is a paramount power inasmuch as this term is an integral part of the definition of correlative rights."

So if it is submitted to by Mr. Kerr, or any other party, that the correlative rights of anyone here, including the State, were not protected by the Oil Conservation Commission, we just did not find that in the record. Otherwise, we would have joined in the Plaintiffs in this proceeding.

That is all I have, Your Honor.

THE COURT: Thank you, Mr. Hall.

Mr. Carr?

MR. CARR: Very briefly.

Mr. Kerr indicated efficiency was not tantamount to prevention of waste. We do think it is important to note, however, that the definitions of waste provide that waste is caused by anything which does not tend to produce the ultimate recovery of a resource, and that the efficiencies that will be accomplished by the unitization will result in greater oil recovery, and thereby do fall within the definition of the prevention of waste. Mr. Kerr has indicated there may well be a day when a question needs to be brought before this Court if the Oil Commission should tell AMOCO to drill wells, cut production, or whatever, and I submit that is not really a question before the Court today. The questions were the questions in this Petition to Appeal. Mr. Kerr has said what AMOCO created is an unworkable scheme. If that is so, 100 percent of the working interests in the Bravo Dome Agreement have ratified this agreement, and the vast majority of the interest owners have done so. We submit that they have agreed as to how their correlative rights will be protected.

THE COURT: I don't suppose you want to take a vote today?

MR. CARR: I would very much like to defer the vote, Your Honor.

THE COURT: Mr. Kellahin?

MR. KELLAHIN: Your Honor, a small point, but I think it is

significant.

What we're doing here today, Your Honor, is reviewing an order of the Oil Conservation Division, and we are not litigating the contractual disputes or difference of Mr. Kerr's clients who might have interests in this acreage. At the time of the hearing, it was 91.5 percent of the interests voluntarily committed to the Unit which resulted in 86 percent of the royalty. It is our position that the people who have become signatories of the Unit Agreement are the ones who have contracted concerning their correlative rights. We are satisfied that the correlative rights to those people are properly protected. As to those people that are not participants in the Unit as being signatories, I am at a loss to understand why Mr. Kerr wants to protect those interests in this order, because, as I see it, they are not affected by this Order.

THE COURT: Thank you, Mr. Kellahin.

Gentlemen, let me thank you for your presentations and their brevity and their clarity during the course of this hearing on all sides. It seems to me that there are a couple of issues that I must defer at the moment because they have been raised. Whether they were raised in the Pleadings or not I am a little unclear about on reading the Pleadings. But very clearly, a part of this lawsuit is going to get up to the Supreme Court on one side or the

other, regardless of what I do today; whether or not the Commission has the power to provide for the kind of preliminary, exploratory unitization agreement that this appears to be, and making an effort to provide, in the Commission's view, for the least wasteful means of exploration and ultimate determination of the apportionment process for the proceeds and the gain to be derived in that exploration. That is specifically what the Commission did, was feel that it has that power.

Since that is not directly briefed, I believe I must defer any kind of decision on that question and allow the parties in this case a period of 10 days or so to brief that question and submit briefs to the Court on that specific jurisdictional question. I will determine it during the course of this proceeding. It seems that I must, since that is the primary argument that has been raised by the Plaintiffs here.

I must agree with you, Mr. Kerr, that is basically dispositive of most of your agreements since everyone seems to concede that the Findings themselves are supported by substantial evidence inasmuch as this is an exploratory stage of the entire unit and determining just exactly where the deposits are located under the ground.

The specific legal arguments that I would request, then, would be the power of the Commission to provide for

a preliminary exploratory unitization agreement or a final unitization agreement with preliminary findings before the limitations of a field have been determined to a geologic probability. I believe that's what you have got in this case. If you can submit those to the Court, then I will decide this case.

I know a lot of you have traveled a long ways just for the benefit of this couple of hours of hearing, but I will decide this case before the end of the year, if you can submit your briefs on time.

Is there anything else at this time by any of the attorneys?

Court will be in recess.

(Whereupon, the hearing was concluded at 12:20 o'clock P.M.)

STATE OF NEW MEXICO)
) ss
COUNTY OF TAOS)

I, ANGELA M. ALBAREZ, a Certified Shorthand Reporter and Notary Public, DO HEREBY CERTIFY that I did therfore report in stenographic shorthand the questions and answers set forth herein, and the foregoing is a true and correct transcription of the proceeding had upon the taking of this Hearing.

I, FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case.

I, FURTHER CERTIFY that the cost of this transcript is $ _____ to the _____.

_____
Certified Shorthand Reporter
and Notary Public.

My Commission Expires: _____

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October 22, 1982

Ms. Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico
P. O. Box 948
Santa Fe, New Mexico 87501

Re: Cause No. 14,359 Appealed from the District Court of Taos County, New Mexico; Robert Casados, et al vs Oil Conservation Commission, et al

Dear Ms. Alderete:

Here are eleven copies of Answering Brief to the Motion of Amoco Production Company to Strike Issues on Appeal. I believe that the Amoco Production Motion to Strike Issues on Appeal and Brief supporting the same and the enclosed brief is now ready to be submitted to the Court for its action in respect of the motion. I don't know whether Amoco's motion tolls the time for filing briefs on the merits by the Appellees.

As per the Certificate of Service appearing at the end of the enclosed brief, copies have been mailed to the opposing counsel.

Thank you very much.

Very truly yours,

Ernest L. Carroll

Enclosures

ELC/cc

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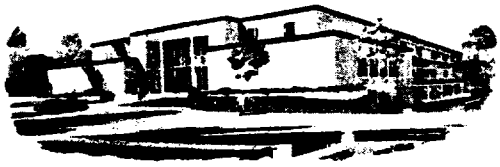

Commissioner of Public Lands

JIM BACA
COMMISSIONER

P.O. BOX 1148
SANTA FE, NEW MEXICO 87504-1148

January 6, 1983

Mrs. Rose Marie Alderete, Clerk
New Mexico Supreme Court
Supreme Court Building
Santa Fe, New Mexico 87501

RE: Robert Casados, et al. Oil Conservation Commission and Commissioner of Public Lands

Dear Mrs. Alderete:

Presented herewith for filing are the re-ordered Answer Briefs of the Intervenor-Appellee Commissioner of Public Lands. Through error, that portion of the brief addressing correlative rights was inadvertaintly mislocated thereby causing some of the pages to be misnumbered. The enclosed briefs have been re-ordered and properly paginated. The text and substance of the brief remains unchanged.

Thank you for your cooperation in making this correction.

Very truly yours,

J. SCOTT HALL
LEGAL COUNSEL

JSH/br

Enclosure

cc: All Counsel of Record w/enclosure

IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, ET AL.,	)	
Plaintiffs-Appellants,	)	
v.	)	
OIL CONSERVATION COMMISSION, ET AL.,	)	
Defendants-Appellees,	)	No. 14,359
and	)	
ALEX J. ARMIJO, COMMISSIONER OF PUBLIC LANDS	)	
Intervenor-Appellee	)	

COUNTY OF TAOS

CALDWELL, JR.

ANSWER BRIEF

OF

INTERVENOR-APPELLEE

COMMISSIONER OF PUBLIC LANDS

J. SCOTT HALL
Special Assistant Attorney General
P.O. Box 1148
Santa Fe, New Mexico 87504-1148

I N D E X

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Appellants herein seek further judicial review subsequent to the judgment of the District Court for Taos County of May 6, 1982, affirming Oil Conservation Commission Orders No.'s R-6446 and R-6446-B. Order No. R-6446 was entered on August 14, 1980, and was modified by Order No. R-6446-B on January 23, 1981.

Appellants bring this appeal pursuant to Section 70-2-25, NMSA, 1978.

STATEMENT OF PROCEEDINGS

The Record on Appeal before this Court consists of the Transcript of the Record Proper, the Transcript of Proceedings in the District Court, and the Transcript of Proceedings before the Oil Conservation Commission, inclucing exhibits, at both the hearing of July 21, 1980, and the rehearing of October 9, 1980. References in this Answer Brief to the above will be in the following manner:

The two volume Transcript of the Record Proper: (Tr. 00).

The Transcript of Proceedings of the July 21, 1980, Oil Conservation Commission Hearing: (Tr. H. 00).

The Transcript of Proceedings on Rehearing: (Tr. R. 00).

In this Brief, the Plaintiffs-Appellants will be referred to as "Appellants." The Defendants-Appellees will be referred to as "Oil Conservation Comission or OCC." The Intervenor-Appellee Commissioner will be referred to as "Commissioner."

On January 8, 1980, the Commissioner of Public Lands gave preliminary approval to the Bravo Dome Carbon Dioxide Unit Agreement presented by Amoco Production Company ("Amoco"), the proposed unit operator (Tr. H. 27). The voluntary Unit Agreement called for the exploration and development of Carbon Dioxide Gas on approximately 1,035,000 acres of federal, state, and fee lands in Harding, Quay, and Union Counties, in northeastern New Mexico.

Within the boundaries of the Bravo Dome Unit are included

approximately 318,000 acres of state land (Tr. H. 17). The State of New Mexico acquired title to those tracts of land within the Bravo Dome upon approval of the U.S. Government's survey, by virtue of the New Mexico Enabling Act (Act of June 20, 1910, 36 Statutes at Large 557, Chap. 310). Under that particular Act of Congress, the State of New Mexico was granted lands to be held in trust for the support of the State's common schools. The Commissioner administers such lands under the authority of the New Mexico Constitution, Article XIII. The state's carbon dioxide resources were leased pursuant to Article XXIV of the New Mexico Constitution and administered under Article 10 of Chapter 19 of the New Mexico Statutes, specifically Section 19-10-2, NMSA, 1978. Several statutes specifically address the Commissioner's authority to commit state trust lands to voluntary exploration and development units. (See, Sections 19-10-45, 19-10-46, and 19-10-47, NMSA, 1978, as well as Sections 19-10-53 and 19-10-54 concerning pooling and communitization agreements.) Under the above-mentioned statutes, approval of the Oil Conservation Commission is not a specific condition precedent to the commitment of state lands to voluntary unit agreements. However, before he may give his consent to such agreements, Section 19-10-46, supra, mandates that the Commissioner make certain findings of his own. The text of that statute states:

> [COOPERATIVE AGREEMENTS; REQUISITES FOR APPROVAL.]
>
> No such agreement shall be consented to or approved by the commissioner unless he finds that:

A. such agreement will tend to promote the conservation of oil and gas and the better utilization of reservoir energy;

B. under the operations proposed the state and each beneficiary of the lands involved will receive its fair share of the recoverable oil or gas in place under its lands in the area affected; and

C. the agreement is in other respects for the best interests of the state.

The substance of Section 19-10-46, supra, has, as well, been adopted in the administrative rules and regulations of the Commissioner, most notably in Rule 1.045 under the ambit of "Cooperative and Unit Agreements" - "Requisites of Agreements."

In addition to the requirement that the interests of the state trust beneficiaries are protected, the Commissioner makes his own finding that the unit agreement promotes conservation and assures best utilizaiton of reservoir energy: in essence, the finding must be that "waste," as defined by Section 70-2-3, NMSA, 1978, is prevented.

The Commissioner's approval is based upon extensive geologic and engineering data presented by the unit applicant and analyzed by the Commissioner's in-house staff.

Although there is no "record" of the staff's analysis, per se, recommendations are made to the Commissioner in view of his required finding and the Commissioner acts accordingly.

In his decision making process, the Commissioner may delay his finding pending an analysis of the data by his staff and

by the Oil Conservation Division (Rule 1.047), in essence, deferring to the specialized expertise of the Oil Conservation Commission. The Commissioner, in fact, chose to conduct his decisional procedure in this manner, delaying his final approval until the OCC made its investigation as per Bravo Dome Unit Agreement, Article 17(B), delaying the effective date until the approval of both the OCC and the Commissioner.

On May 28, 1980, Amoco made application to the OCC for formal approval of the unit. Following public hearing, the OCC approved the unit by its Order R-6446 (Tr. 8-15), setting out its effective date as 60 days following the approval by the Director of the United States Geological Survey and the Commissioner of Public Lands (Tr. 9). The Commissioner gave his formal approval on August 28, 1980, and the unit agreement became effective on November 1 of that same year.

In the interim, on September 2, 1980, the Appellants herein requested a rehearing of Order R-6446 pursuant to Section 70-2-25, NMSA, 1978 (Tr. 16). The primary allegations in the Appellant's Application for Rehearing were:

1) Lack of substantial evidence to support the findings and orders.

2) Lack of sufficient findings.

3) Failure of order to prevent waste and protect correlative rights.

4) That the Order is premature.

5) That the Order is arbitrary and capricious (Tr. 17-24).

By Order R-6446-A (Tr. 32-33), the Oil Conservation

Commission granted rehearing in the case and framed the issues as follow:

(a) prevention of waste within the unit area;

(b) protection of correlative rights within the unita area as afforded by the unit agreement, its plan and participation formula; and

(c) whether the unit agreement and its plan are premature.

The rehearing was held on October 9, 1980. On January 23, 1981, the Oil Conservation Commission issued its Order R-6446-B affirming Order R-6446, but with additional findings and requirements such as retention of jurisdiction by the OCC over the unit and periodic review of plans of development and operation (Tr. 34-45).

Thereafter, Appellants filed Petitions to Appeal from Order No.'s R-6446 and R-6446-B with the District Court for Harding, Quay, and Union Counties (Tr. 1-135). By consolidation and transfer, these appeals were docketed in the Taos County District Court. Although he was not named in those Petitions, it was determined that the Commissioner's ability to administer the state lands committed to the unit would be significantly affected by the outcome of this litigation, thereby making him a necessary and indispensable party under the authority of Swayze v. Bartlett, 58 N.M. 504, 273 P.2d 367 (1954). Consequently, in order to preserve the jurisdiction of the Court and allow all parties a full and fair hearing, the Commissioner sought and was allowed intervention in this proceeding by the

Court's Order of October 5, 1981. Following hearing, that Court entered its judgment affirming the Orders of the OCC on May 27, 1982. Following the filing of the Brief-in-Chief by Appellants, this Court ruled on Amoco's Motion to Strike Issues on Appeal and ordered that the issues herein be restricted to those raised at the Rehearing before the Oil Conservation Commission.

ARGUMENT AND AUTHORITIES

POINT I

SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FINDINGS AND ORDERS OF THE OIL CONSERVATION COMMISSION. THE ORDERS ARE NEITHER ARBITRARY NOR CAPRICIOUS.

Appellants have assailed Orders R-6446 and R-6446-B of the OCC for the reason that the record lacks sufficient and substantial evidence to support findings that waste will be prevented and correlative rights protected. Of course, a reasoned consideration of Appellants' allegations requires and examination of the OCC's legislative charge and authority.

The authority of the OCC to carry out its legislative mandate of conservation of oil and gas, prevention of waste and protection for correlative rights is found generally at Section 70-2-6 et seq, NMSA, 1978.

The definition of "waste" under the Oil Conservation Commission's statutes is found at Section 70-2-3, NMSA, 1978, which states in part:

> As used in this act, the term "waste" in addition to its ordinary meaning, shall include:
>
> A. "Underground waste" as those words are generally understood in the oil and gas business and in any event to embrace the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of

> crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas . . .
>
> B. "Surface waste" as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however cause, of natural gas of any type or in any form or crude petroleum oil,or any product thereof, but <u>including the loss or destruction, without beneficial use, resulting from</u> evaporation, seepage, leakage or fire, especially such <u>loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells</u>, or incident to or resulting from the use of inefficient storage or from the production of crude petroleum oil or natural gas in excess of the reasonable market demand.

Additionally, "correlative rights" has been defined in Section 70-2-33(H), NMSA, 1978:

> "Correlative rights: means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil and gas, or both, under such property bear the total recoverable oil and gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy;"

In the review and approval of exploratory and developmental units brought before it, the OCC, within its authority, must make a finding that the unit will indeed act to: (1) prevent waste, and (2) protect correlative rights. The Commission's duties in this regard were considered by the New Mexico Supreme Court in the case of <u>Continental Oil Company v. Oil Conservation</u>

Commission, 70 N.M. 310, 373 P.2d 809, wherein the court stated:

> The Oil Conservation Commission is a creature of statute, expressly defind, limited and empowered by the law creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and and to protect correlative rights. * * * Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights. [Emphasis supplied.]

See, also, Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963). And, by virtue of Section 70-2-34, NMSA, 1978, the Commission was charged with applying those same duties to the conservation of carbon dioxide gas.

STANDARD OF REVIEW

On appeal, the Court is required to review the evidence in the record and must sustain the orders appealed from if they are supported by "substantial evidence." The present day standard of review in New Mexico goes further than requiring a finding of "any" substantial evidence (ICC v. Louisville & N.R.R., 227 U.S. 88 [1913]), but looks to a review of a finding based on the record as a whole. Ribera v. Employment Security Commission, 92 N.M. 694, 594 P.2d 742 (1979); Jones v. Employment Services Division, 619 P.2d 542, 545 (1980).

It is asserted here that the record "as a whole" is replete with evidence supporting the Commission's findings and orders, undergoing not only the primary expert review by OCC staff prior to promulgation, but also submission to scrutinization by the Commissioner of Public Land's expert staff prior

to his approval.

It has been difficult throughout to ascertain from the Appellant's pleadings as to what exactly constitutes the evidentiary deficiency. Appellant seems to allege that because the Oil Conservation Commission did not "define" the extent of waste that the record is unable to show that the evidence is sufficient to support a finding by the OCC that such can be prevented.

A like argument was made to the New Mexico Supreme Court in Rutter & Wilbanks Corp. v. Oil Conservation Com'n, 87 N.M. 286, 532 P.2d 582 (1975). In Rutter, the appellant from an order of the OCC argued that because the Commission failed to establish the "type" of waste contemplated from the record, there was no "substantial evidence" supporting the order. The Court in Rutter, supra, simply quoted Continental Oil Co. v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962), which stated that the Commission is required to make only "basic conclusions" from the record. The court said, in essence, that the Commission's findings regarding waste in even a generic sense imply protection against any waste contemplated by the statutes. Here, as in Rutter, supra, an attempt to reposture the findings relationship to the record cannot be "seriously argued," Rutter, Id. at 289. Instead, an attack upon the sufficiency of the evidence must, by virtue of the law, be limited to scrutinization of what appears on the record. That scrutiny does not require that evidence be weighed against definitional or extraneous standards, but only that the evidence be looked to "to determine whether it implies a quality of proof which includes the

conviction that the order was proper or furnishes a substantial basis of facts from which the issue tendered could be reasonably resolved." Landowners Oil, Gas and Royalty Owners v. Corporation Commission, Okla, 415 P.2d 942 (1966).

Hence, a review of the record by this Court will show sufficient "quality of proof" to provide a substantial basis for the Commission's findings.

OCC FINDINGS ON PREVENTION OF WASTE:

The Oil Conservation Commission's conclusion that the unit agreement will prevent waste of carbon dioxide is based upon findings 8 and 9 of Order R-6446-B (Tr. 35). Those findings set out:

> (8) That the unitized operation and management of the proposed unit has the following advantages over the development of this area on a lease-by-lease basis:
>
> (a) More efficient, orderly and economic exploration of the unit area; and
>
> (b) More economical production, field gathering, and treatment of carbon dioxide gas within the unit area.
>
> (9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

Throughout both the July 21 and October 9, 1980, hearings, the expert witnesses offered extensive testimony on the subject of waste. Almost without exception, those witnesses were of the convincing opinion that the unit agreement would serve to prevent waste, thus substantiating Findings 8 and 9, above.

Amoco's Regional Unitization Superintendent testified extensively on the savings realized as a result of unitization (Tr. H. 11-52). At the original hearing of July 21, Bruce Landis stated:

> A. "All right. First of all, with respect to conservation of CO2. Where you have an orderly and efficient development, where it can be planned ahead, and where you are not running into competitive operators who have desperately to drill offset obligations, and so on, you are conserving the unitized substances. You are preventing waste in the drilling process. You are preventing waste in the completion process.
>
> From there, you are handling that in the most orderly fashion with respect to the reservoir, producing whatever fluids there are from the best places possible, et cetera.
>
> There are many reasons why we would have conservation of these unitized substances and prevention of waste."

As well, Amoco offered the expert testimony of Bruce May, its Petroleum Geologist (Tr. H. 53-86); Neil Williams, a professional Petroleum Engineer (Tr. 11-37); and James Allen, its Senior Petroleum Engineer on the subject of production equipment requirements on the Bravo Dome with and without unitization (Tr. R. 38-101). The savings on drilling and surface installations to be realized from unitization is dramatically apparent:

> Q. "All right, sir, I'm going to jump back again on you, as I've been doing all the way through my direct presentation, and I apologize for that, Mr. Allen, but going back to our bar graph, our comparison, our Exhibit RH-7, in your opinion would six surface facilities installations serving 324 wells

each be able to to operated a longer economic life than 4435 individual surface facility installations serving this unit area on a lease basis?"

A. "In my opinion, Mr. Buell, I think it would be considerably cheaper to operate on a unit basis and, as such, we would have a longer individual life, well life."

Q. "So under unit operation a greater amount of CO2 would be recovered than would be recovered under individual lease operations."

A. "Yes, sir, in my opinion."

Q. "That would thus prevent reservoir waste in that you'd be recovering the maximum amount of CO2 possible."

A. "Yes, sir."

The comments of Mr. Walter Healey, counsel for Amerigas, a working interest owner in the Bravo Dome which has been unable to negotiate commitment to the unit with its lessors (Tr. H. 133) were compelling:

MR. HEALY: "In a nutshell, Amerigas strongly supports formation of the unit as long as basic rights of all working interests and royalty interests are protected. As stated at the last hearing, rather eloquently by Mr. Buell, this is a unique opportunity for the Division to approve unified development of an entire field. Amerigas believes formation of the unit will promote conservation and prevent waste of a very valuable resource, carbon dioxide, that is now commonly recognized as one of the most effective and economic means of increasing recovery of oil."

Indeed, even the Appellant's own expert witness, F. H. Callaway, an expert reservoir engineer and oil producer from Midland, obviously leaned toward the view that unitization

would be the better means of exploration and development of carbon dioxide:

> Q. "Now, then, in your background have attitudes developed as a petroleum engineer working as a reservoir engineer? Do you have any particular points of view about the subject of unitization as a whole?"
>
> A. "I've always been an advocate of Field-wide unitization. I feel like that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons, in this case gas, and operates under the most efficient circumstances."
>
> Q. "Have you formed an opinion about whether this proposed unit will expedite utilization and development of carbon dioxide?"
>
> A. "It's sort of a homily in the oil business that most leases owned by major oil companies don't get drilled till close to the expiration date. I think that certainly from the testimony we've heard, and my own experience in dealing with oil and gas companies, small and large, that we might expect a more rapid development of this resource on a unitized basis than we would on a competitive individual lease basis."
>
> Q. "Do you conceive in your own mind that the necessity to avoid lease expirations by the drilling of 339 wells in this unit area, as depicted this morning, is-- constitutes waste?"
>
> A. "I don't-- it's difficult for me to see that expiration of a lease which is productive of a valuable resource would constitute waste."
>
> Q. "Would the effect of drilling more rapidly than they might otherwise, the operators might otherwise wish to do so, does that constitute waste in any definition you're familiar with?"

A. "Well, in a sense it might. Money has certain value and it's always nice to be able to time your expenditure till the last moment that you need them. It has some good common sense behind it. It must be weighed against the other factors that are involved, such as protecting correlative rights and the expedition of the utilization of a very valuable resource."

The record is replete with evidence, then substantiating the finding that waste will be prevented under unitization by allowing for orderly development in an economic manner while avoiding the drilling of unnecessary wells and the attendant duplicity of surface facilities. As well, the evidence is compelling that carbon dioxide can be efficiently and effectively produced in a manner most likely to optimize the utilization of reservoir energy.

OCC FINDINGS ON THE PROTECTION OF CORRELATIVE RIGHTS:

The concept of correlative rights in oil and gas law evolved from that particular body of case law that sought to prevent conduct in the oil field which could cause damage to others having ownership interests in the same producing reservoir. (See, 1 Williams and Meyers, Oil and Gas Law, Section 204.6.) In essence, correlative rights has come to mean the opportunity for an owner to produce his fair share of oil or gas. Indeed, that is the meaning of correlative rights embodied by Section 70-2-33 (H), supra.

The findings in Order R-6446-B directed at correlative

rights were:

> (14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:
>
> (a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
>
> (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.
>
> (17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

At hearing before the OCC, it was explained at length that unit is exploratory in nature (Tr. R. 34) with geologic information being less that complete. Consequently, witness testimony corroborated the finding (17) that when unitization is attempted with limited knowledge of the actual producing characteristics of the field, a participation formula based upon surface acreage is a "reasonable and appropriate" means of assuring an equitable distribution of production or proceeds.

Again, Amoco's witness Bruce Landis addressed means of

protecting correlative rights here:

> Q. (Mr. Padilla) . . . "My concern with this this line and type of questioning involves correlative rights where someone, say in the -- committed to the unit in the northwest section of the unit participates equally with someone, say, in the southeast, irrespective of geology or -- or engineering. Would you elaborate or do you have any comment on that?"
>
> A. "Yes. Many, many such type units, that we are talking about here today, have been formed on the same basis of participation that we're using here, which is the acreage, because there is not at the outset sufficient information upon which to base -- make any other judgment.
>
> Here we have the one positive thing that we can measure directly and put everybody in on the same basis.
>
> Now, this agreement, as I testified previously, does have a provision to correct this if there is such inequity in the beginning, after the period of time that I mentioned, because then you are going to have the information available that will tell you where the productive acres are. There is nobody in the world that can tell you where the productive acres today.
>
> Now, there's more testimony that relates to that particular feature of this coming up, but ceratinly this -- the correlative rights are protected. Everybody has had his opportunity to join. We are not forcing anybody. If he doesn't like it, he simply stays out we have another set of obligations with him to protect his correlative rights. But certainly all those committed have protection of their correlative rights." (Tr. H. 36-37)

As well, Amoco's Petroleum Engineer, Neil Williams, characterized the 100% acreage participation formula as "...probably the most ideal situation to have in exploratory units." (Tr. R. 16).

Additional evidence was presented to show that even for those lease tracts where the lessors did not consent to unit ratification, their correlative rights would continue to be

protected by their lessees on an individual lease contract basis, as well as by the conservation laws of this state.

The OCC's findings were further corroborated by the findings of the Commissioner of Public Lands on the matter of correlative rights. Pursuant to Section 19-10-46 NMSA, 1978, the Commissioner, upon the recommendaiton of his expert staff, made the following finding in his approval of the unit agreement:

> (b) that under the proposed agreement, the State of New Mexico will receive its fair share of the recoverable Unitized Substance in place under its land in the area. (Tr. R. 183, Ex.8)

This finding of the Commissioner, along with the extensive testimony of the many expert witnesses, sufficiently establishes that the OCC's findings relative to protection of correlative rights were meritorious.

POINT II

THE OIL CONSERVATION COMMISSION POSSESSED THE REQUISITE AUTHORITY TO APPROVE UNITS ON THE BASIS OF PRELIMINARY INFORMATION. THE ORDERS WERE NOT PREMATURE.

In their Application for Rehearing, (Tr. 16), the Appellants have attacked Order No. R-6446 as being "premature" and have questioned the authority of the Oil Conservation Commission to approve the Bravo Dome Carbon Dioxide Unit on the basis of preliminary data relating to conservation, prevention of waste and protection of correlative rights. (Tr. 23).

In order to properly examine the issue, reference must be had to the enabling authority of the OCC found generally at Sections 70-2-11 and 70-2-12 NMSA, 1978. The broad powers delegated to the OCC necessary for it to achieve its statutory objectives are set out in Section 70-2-11, supra, which provides:

> A. The division is hereby empowered, and it its its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.
>
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law.(emphasis supplied)

Hence, the OCC possesses broad discretionary powers in the administration and enforcement of the legislative policies concerning conservation, waste and correlative rights. By reasonable interpretation, the OCC's powers"...to do whatever may be reasonably necessary..." must, by the very nature of the technical complexities of the oil and gas business, include the authority to approve such voluntary units on the best information available, even if 'preliminary' in nature. Indeed, the Commission's enabling statute does not expressly prohibit or limit to certain types, the kinds of data which may provide the basis for its findings.

In the creation of an exploratory unit such as the Bravo Dome, it is desirable to define the vertical extent of the unit as closely as possible to the actual production limits of the gas reservoir. But even with the best available technology, no geologist, engineer, or conservation agency can positively define the absolute reservoir boundaries. Indeed, in such exploratory units, it is one goal to explore for and find those limits. Consequently, there will always be a reasonable margin of doubt as to the exact reservoir limits at the time of unitization and agency approval. That this manner of operation of an exploratory unit is accepted industry practice, however, is beyond doubt. At the rehearing before the OCC, Amoco's expert witness, Neil Williams, a specialist at unitizations, testified:

> Q. (Mr. Buell) "All right, sir, based on your experience with voluntary units, in

your opinion could a voluntary unit ever be premature?"

A. "No, sir, the very nature of being voluntary makes it pertinent to the time."

Q. "How would you define the Bravo Dome Unit after looking at our unit agreement and reading the transcript of the hearing that transpired on July 21?"

A. "The Bravo Dome Unit is a voluntary unit where all the parties got together to operate the unit as one property."

Q. "In your opinion is the Bravo Dome Unit an exploratory unit by its very nature and concept?"

A. "It is."

Q. "All right, sir. Let me ask you this. Since you have read the transcript and have studied the unit agreement, was there any attempt on the part of Amoco as unit operator to force or compel anyone to join through an order of the Oil Conservation Division or Oil Conservation Commission?"

A. "Not to my knowledge."

Q. "It appeared to you from the unit agreement and the transcript that it would be purely voluntary?"

A. "It's a voluntary unit and I believe it does not come under the purview of the State regulatory Commission."

Q. "All right, sir, based on your experience in other jurisdictions, what standards have state agencies consistently applied prior to their approval of exploratory type units? Have they had any standard, like geological prospects, something of that nature?"

A. "All units with which I am familiar, the agency requires that the unit outline cover the geological feature."

Q. "All right, sir, do these agencies apply another standard, like sufficient voluntary commitment to have--give effective control to the unit operator, such that he could execute or effectuate the purposes of the exploratory unit?"

A. "The usual requirement is that the operator have reasonably effective control in order to operate the unit."

Q. "All right, sir, based on your analysis of the record, in your opinion does the Bravo Dome Unit meet the first standard, that the Bravo Dome unit area is a geological prospect for the drilling, production, and recovery of CO_2?"

A. "It does, sir."

(Tr. R. 13-15)

As well, Amoco's Senior Petroleum Engineer, James C. Allen, under cross-examination by Counsel for Appellants, addressed the issue of prematurity"

Q. (Mr. Kerr): "Now then, if one of the issues -- I'm just telling you this, I'm not asking you -- was that the Commission, when they granted this rehearing was the subject of prematurity as distinguished from never being, but prematurity. And in this situation where you do drill, might be required to protect your lease expirations, some 339 -- or drill 339 wells to protect, what, maybe 250 leases?"

A. "No, I think to protect that many leases that we'd probably be drilling closer to 339 wells. Now, I really don't know the precise number but it would be close"

Q. "Those, of course, would give a petroleum engineer, such as yourself, a great deal of information."

A. "Yes, sir, it will."

Q. "And will be able to take out of the realm of rank speculation some greater

degree of certainty, some of the aspects about whether or not land is productive at all; or whether it will produce, a given tract will produce at a greater rate or a lesser rate; will have a greater reserve than another tract; and so on, is that not true?"

A. "Mr. Kerr, in general, yes, it is true, and of course you'd always like to have production data. But we're looking at a substantial area to be developed, and I certainly don't see how it can be premature. We can't wait, you know, until after all the wells that are necessary to be drilled, that really aren't necessary are already drilled.

In my opinion in this particular unit everything is voluntary. It's been joined on a voluntary basis, and I really don't see that -- I don't think it's premature at all, in my opinion."

Needless to say, in the operation of any unit systematic development is looked upon to be the primary means of achieving economic as well as physical conservation of gas reserves as well as surface resources. Where the plan of unit development must be premised upon limited data available from only partial or exploratory development, preliminary efforts are made to reach agreement upon the extent and character of the reservoir. From that point, unit participation is enjoyed by all tracts whether drilled or not, and it is customary that adjustments are made as drilling progresses under the unit plan and more field data obtained. (Tr.R.32-33). Such unitization has tremendous advantages as there is orderly, economic and intelligent development of the field from the inception of the plan. (Tr.R. 87-101). This type of unitization method has long been recognized by

industry in exploratory and development units and is commonly referred to as the "Benton Plan". [See, generally, Kirk, "Content of Royalty Owners' and Operators' Unitization Agreements," Third Annual Institute on Oil and Gas Law and Taxation, Southwest Legal Foundation, 1952; Section 12.1.3 of the A.P.I. Model Form of Unit Agreement; Texaco, Inc. v. Vermilion Parish School Board, 152 S.2d 541 (La. 1963).

It is the recognized rule and practice, irrespective of the express or implied meaning of authority granting statutes, that conservation agencies possess the power to review, modify, supplement or set aside its conservation orders at any time. Continental Oil Co. v. Oil Conservation Comm'n., 70 N.M. 310, 373 P.2d 809 (1962); Aylward Production Corp. v. State Corporation Comm'n., 176 P.2d 861 (Kan. 1947); And see, Section 70-2-11 and 70-2-12 (B) (12) NMSA, 1978.

Indeed, particularly where orders approving exploration and development units have been issued, regulatory agencies of all the states are continually amending, supplementing, setting aside, or granting exceptions to their orders because of change of condition, inadequacies or errors in existing orders, improved technologies or because additional knowledge is brought to light.

The authority to apply such a fluid concept in administering its actions and orders is inherent in the conservation agencies' general powers and continuing responsibility to prevent waste and protect correlative rights. Indeed, Texas case law has stated that "... the principle is so well established as to require no citation of authority." Railroad

Comm'n. v. Humble Oil and Ref. Co., 193 S.W. 2d 824 (Tex. Civ. App. 1946). To hold otherwise that the Oil Conservation Commission is without the power to make its findings and issue its orders on the basis of the best information available to it and then later modify its orders would be to render powerless the agency and defeat its statutory purposes.

With this view toward the public policies underlying the various conservation laws, it has become the inclination of the law that regulatory agency orders should not be subject to the rigid strictures of the doctrine of res judicata and be set in concrete. See, Hartman v. Corp. Comm'n., 529 P.2d 134 (Kan. 1974), 2 K. Davis, ADMINISTRATIVE LAW TREATISE Sections 18.03, et. seq. This legal theory is premised on the nature of such regulatory orders as being prospectively legislative rather than retrospectively adjudicatory in nature. 2 K. Davis, supra, section 1803.

However, even where, as alleged here, the agency order may be thought of as adjudicating previously vested rights such as allocation and unit participation, the res judicata doctrine can be relaxed and the order modified by the agency, as opposed to the rather harsh alternative of having to set the order aside. The case of Corley v. State Oil and Gas Board is directly on point and presents strong parallels to the issue at bar. Corley v. State Oil and Gas Board, 105 So. 2d 633 (Miss. 1958).

In Corley, the Mississippi Oil and Gas Board, on the

basis of available evidence, issued an order approving a voluntary unitization with a 100% acreage participation formula. Subsequently, the conservation agency modified its order and increased the maximum efficient rate of production while it enlarged the size of individual drilling units, effectively expanding the unit area to include additional acreage. Consequently, the effect of the agency's second order was to reduce the participation of the mineral owners under the original order, thus generating an appeal by some of those owners.

Of necessity, the field expansion order in Corley was based upon reservoir information that was unavailable at the original hearing. The Mississippi Supreme Court's response in Corley, nonetheless, was to reaffirm that the original order, 'though based upon preliminary data at the time, was in fact adequately supported by substantial evidence and was subject to refinement upon additional data. The court stated:

> What the Board in fact did was to redefine the field and reservoirs according to the facts if found at the hearing. It increased the size of the field, because the undisputed evidence reflected that the increased area was underlain with oil of varying depths. Clearly, the Board had the power to define the zero isopach line of the pool. Corley v. State Oil and Gas Board, supra.

Unquestionably, the initial approval and subsequent mondification of the unit was proper and reasonably necessary in order to comport with the policy behind the state's

conservation agency's authority to act in such a manner is reasonably found by implication within the general ambit of its overall statutory mandate to prevent waste and protect correlative rights.

This view is shared by the New Mexico Supreme Court:

> Nothing we have said to now is contrary to Continental Oil, supra. When the Commission exercises its duty to allow each interest owner in a pool "his just and equitable share" of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by Section 65-3-29 (11), N.M.S.A. 1953, is subject to the qualification "as far as it is practicable to do so." See Grace v. Oil Conservation Comm'n. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet obtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute "substantial evidence" or that the orders were improperly entered or that they did not protect the correlative rights of the parties "so far as [could] be practicable determined" or that they were arbitrary or capricious. (Emphasis supplied). Rutter and Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286 at 292, 532 P.2d 582 (1975).

See, also, Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962); Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939 (1975).

Moreover, in aid of an administrative agency's jurisdiction and authority to accomplish its statutory duties, the New Mexico Supreme Court has held: "...the authority of an agency is not limited to those powers expressly granted by

statute, but includes all powers that may be fairly implied therefrom." Wimberly v. New Mexico State Police Bd., 82 N.M. 757 at 758, 497 P.2d 968. The Supreme Court has further stated in Public Service Co. of New Mexico v. New Mexico Environmental Imp. Bd., 98 N.M. 223, 549 P.2d 638, that "... the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." 89 N.M. at 223. Surely, then, it is within the authority of the Oil Conservation Commission to consider its orders on the basis of even preliminary data where it deems appropriate. Because of the very nature of the technical subject matter it regulates, it cannot be said that the manner in which the OCC has deliberated and made its decision in approving the Bravo Dome Carbon Dioxide Unit was "premature".

CONCLUSION

Following lengthy hearings amassing extensive evidence and expert testimony, the Oil Conservation Commission applied its specialized expertise in deliberating whether the Bravo Dome Carbon Dioxide Unit Agreement would prevent waste of CO_2 gas and protect the correlative rights of the interest owners in the area. An examination of the record shows, without doubt, that the OCC's findings that the unit agreement will indeed serve to prevent waste and protect all interests, is well supported by a substantial body of technical and practical

evidence. In fact, the OCC's findings were corroborated by a similar evaluation conducted by the Commissioner of Public Lands before the commitment of state lands to the unit was approved.

As well, the record dispells any notion that approved of this exploratory carbon dioxide unit was premature.

For the foregoing reasons, it is respectfully requested that the Orders of the Oil Conservation Commission approving the Bravo Dome Carbon Dioxide Unit Agreement be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Intervenor-Appellee Commissioner of Public Lands was mailed to all the following counsel of record this 22nd day of December, 1982:

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IN THE SUPREME COURT

STATE OF NEW MEXICO

ROBERT CASADOS, et al., Plaintiffs-Appellants, v. OIL CONSERVATION COMMISSION, et al., Defendants-Appellees, and ALEX J. ARMIJO, COMMISSIONER OF PUBLIC LANDS Intervenor-Appellee	No. 14,359

COUNTY OF TAOS

CALDWELL, J.

ANSWER BRIEF

OF

INTERVENOR-APPELLEE

COMMISSIONER OF PUBLIC LANDS

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I N D E X

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Appellants herein seek further judicial review subsequent to the judgment of the District Court for Taos County of May 6, 1982, affirming Oil Conservation Commission Orders No.'s R-6446 and R-6446-B. Order No. R-6446 was entered on August 14, 1980, and was modified by Order No. R-6446-B on January 23, 1981.

Appellants bring this appeal pursuant to Section 70-2-25, NMSA, 1978.

STATEMENT OF PROCEEDINGS

The Record on Appeal before this Court consists of the Transcript of the Record Proper, the Transcript of Proceedings in the District Court, and the Transcript of Proceedings before the Oil Conservation Commission, inclucing exhibits, at both the hearing of July 21, 1980, and the rehearing of October 9, 1980. References in this Answer Brief to the above will be in the following manner:

The two volume Transcript of the Record Proper: (Tr. 00).

The Transcript of Proceedings of the July 21, 1980, Oil Conservation Commission Hearing: (Tr. H. 00).

The Transcript of Proceedings on Rehearing: (Tr. R. 00).

In this Brief, the Plaintiffs-Appellants will be referred to as "Appellants." The Defendants-Appellees will be referred to as "Oil Conservation Comission or OCC." The Intervenor-Appellee Commissioner will be referred to as "Commissioner."

On January 8, 1980, the Commissioner of Public Lands gave preliminary approval to the Bravo Dome Carbon Dioxide Unit Agreement presented by Amoco Production Company ("Amoco"), the proposed unit operator (Tr. H. 27). The voluntary Unit Agreement called for the exploration and development of Carbon Dioxide Gas on approximately 1,035,000 acres of federal, state, and fee lands in Harding, Quay, and Union Counties, in northeastern New Mexico.

Within the boundaries of the Bravo Dome Unit area included

approximately 318,000 acres of state land (Tr. H. 17). The State of New Mexico acquired title to those tracts of land within the Bravo Dome upon approval of the U.S. Government's survey, by virtue of the New Mexico Enabling Act (Act of June 20, 1910, 36 Statutes at Large 557, Chap. 310). Under that particular Act of Congress, the State of New Mexico was granted lands to be held in trust for the support of the State's common schools. The Commissioner administers such lands under the authority of the New Mexico Constitution, Article XIII. The state's carbon dioxide resources were leased pursuant to Article XXIV of the New Mexico Constitution and administered under Article 10 of Chapter 19 of the New Mexico Statutes, specifically Section 19-10-2, NMSA, 1978. Several statutes specifically address the Commissioner's authority to commit state trust lands to voluntary exploration and development units. (See, Sections 19-10-45, 19-10-46, and 19-10-47, NMSA, 1978, as well as Sections 19-10-53 and 19-10-54 concerning pooling and communitization agreements.) Under the above-mentioned statutes, approval of the Oil Conservation Commission is not a specific condition precedent to the commitment of state lands to voluntary unit agreements. However, before he may give his consent to such agreements, Section 19-10-46, supra, mandates that the Commissioner make certain findings of his own. The text of that statute statute states:

> [COOPERATIVE AGREEMENTS; REQUISITES FOR APPROVAL.]
>
> No such agreement shall be consented to or approved by the commissioner unless he finds that:

A. such agreement will tend to promote the conservation of oil and gas and the better utilization of reservoir energy;

B. under the operations proposed the state and each beneficiary of the lands involved will receive its fair share of the recoverable oil or gas in place under its lands in the area affected; and

C. the agreement is in other respects for the best interests of the state.

The substance of Section 19-10-46, supra, has, as well, been adopted in the administrative rules and regulations of the Commissioner, most notably in Rule 1.045 under the ambit of "Cooperative and Unit Agreements" - "Requisites of Agreements."

In addition to the requirement that the interests of the state trust beneficiaries are protected, the Commissioner makes his own finding that the unit agreement promotes conservation and assures best utilizaiton of reservoir energy: in essence, the finding must be that "waste," as defined by Section 70-2-3, NMSA, 1978, is prevented.

The Commissioner's approval is based upon extensive geologic and engineering data presented by the unit applicant and analyzed by the Commissioner's in-house staff.

Although there is no "record" of the staff's analysis, per se, recommendations are made to the Commissioner in view of his required finding and the Commissioner acts accordingly.

In his decision making process, the Commissioner may delay his finding pending an analysis of the data by his staff and

by the Oil Conservation Division (Rule 1.047,) in essence, deferring to the specialized expertise of the Oil Conservation Commission. The Commissioner, in fact, chose to conduct his decisional procedure in this manner, delaying his final approval until the OCC made its investigation as per Bravo Dome Unit Agreement, Article 17(B), delaying the effective date until the approval of both the OCC and the Commissioner.

On May 28, 1980, Amoco made application to the OCC for formal approval of the unit. Following public hearing, the OCC approved the unit by its Order R-6446 (Tr. 8-15), setting out its effective date as 60 days following the approval by the Director of the United States Geological Survey and the Commissioner of Public Lands (Tr. 9). The Commissioner gave his formal approval on August 28, 1980, and the unit agreement became effective on November 1 of that same year.

In the interim, on September 2, 1980, the Appellants herein requested a rehearing of Order R-6446 pursuant to Section 70-2-25, NMSA, 1978 (Tr. 16). The primary allegations in the Appellant's Application for Rehearing were:

1) Lack of substantial evidence to support the findings and orders.

2) Lack of sufficient findings.

3) Failure of order to prevent waste and protect correlative rights.

4) That the Order is premature.

5) That the Order is arbitrary and capricious (Tr. 17-24).

By Order R-6446-A (Tr. 32-33), the Oil Conservation

Commission granted rehearing in the case and framed the issues as follow:

(a) prevention of waste within the unit area;

(b) protection of correlative rights within the unita area as afforded by the unit agreement, its plan and participation formula; and

(c) whether the unit agreement and its plan are premature.

The rehearing was held on October 9, 1980. On January 23, 1981, the Oil Conservation Commission issued its Order R-6446-B affirming Order R-6446, but with additional findings and requirements such as retention of jurisdiction by the OCC over the unit and periodic review of plans of development and operation (Tr. 34-45).

Thereafter, Appellants filed Petitions to Appeal from Order No.'s R-6446 and R-6446-B with the District Court for Harding, Quay, and Union Counties (Tr. 1-135). By consolidation and transfer, these appeals were dockets in the Taos County District Court. Although he was not named in those Petitions, it was determined that the Commissioner's ability to administer the state lands committed to the unit would be significantly affected by the outcome of this legislation, thereby making him a necessary and indispensable party under the authority of Swayze v. Bartlett, 58 N.M. 504, 273 P.2d 367 (1954). Consequently, in order to preserve the jurisdiction of the Court and allow all parties a full and fair hearing, the Commissioner sought and was allowed intervention in this proceeding by the

Court's Order of October 5, 1981. Following hearing, that Court entered its judgment affirming the Orders of the OCC on May 27, 1982. Following the filing of the Brief-in-Chief by Appellants, this Court ruled on Amoco's Motion to Strike Issues on Appeal and ordered that the issues herein be restricted to those raised at the Rehearing before the Oil Conservation Commission.

ARGUMENT AND AUTHORITIES

POINT I

SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FINDINGS AND ORDERS OF THE OIL CONSERVATION COMMISSION. THE ORDERS ARE NEITHER ARBITRARY NOR CAPRICIOUS.

Appellants have assailed Orders R-6446 and R-6446-B of the OCC for the reason that the record lacks sufficient and substantial evidence to support findings that wase will be prevented and correlative rights protected. Of course, a reasoned consideration of Appellants' allegations requires an examination of the OCC's legislative charge and authority.

The general authority of the OCC to carry out its legislative mande of conservation of oil and gas, prevention of wate and protection fo correlative rights is found generally at Section 70-2-6 et seq, NMSA, 1978.

The definition of "waste" under the Oil Conservation Commission's statutes is found at Section 70-2-3, NMSA, 1978, which states in part:

> As used in this act, the term "waste" in addition to its ordinary meaning, shall include:
>
> A. "Underground waste" as those words are generally understood in the oil and gas business and in any event to embrace the inefficient, excessive, or improper use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of

crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas . . .

B. "Surface waste" as those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however cause, of natural gas of any type or in any form or crude petroleum oil,or any prodeuct thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destriction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resultinf from the use of inefficient storage or from the production of crude petroleum oil or natural gas in excess of the reasonable market demand.

Additionally, "correlative rights" have been defined in Section 70-2-33(H), NMSA, 1978:

"Correlative rights: means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil and gas, or both, under such property bear the total recoverable oil and gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy;"

In the review and approval of exploratory and develpmental units brought before it, the OCC, within its authority, must make a finding that the unit will indeed act to: (1) prevent waste, and (2) protect correlative rights. The Commission's duties in this regard were considered by the New Mexico Supreme Court in the case of Continental Oil Company v. Oil Conservation

Commission, 70 N.M. 310, 373 P.2d 809, wherein the court stated:

> The Oil Conservation Commission is a creature of statute, expressly defind, limited and empowered by the law creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and and to protect correlative rights. * * * Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights. [Emphasis supplied.]

See, also, Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963). And, by virtue of Section 70-2-34, NMSA, 1978, the Commission was charged with applying those same duties to the conservation of carbon dioxide gas.

STANDARD OF REVIEW

On appeal, the Court is required to review the evidence in the record and must sustain the orders appealed from if they are supported by "substantial evidence." The present day standard of review in New Mexico goes further than requiring a finding of "any" substantial evidence (ICC v. Louisville & N.R.R., 227 U.S. 88 ([1913]), but looks to a review of a finding based on the record as a whole. Ribera v. Employment Security Commission, 92 N.M. 694, 594 P.2d 742 (1979); Jones v. Employment Services Division, 619 P.2d 542, 545 (1980).

It is assertedhere that the record "as a whole" is replete with evidence supporting the Commission's findings and orders, undergoing not only the primary expert review by OCC staff prior to promulgation, but also submission to scrutinization by the Commissioner of Public Land's expert staff prior

to his approval.

It has been difficult throughout to ascertain from the Appellant's pleadings as to what exactly constitutes the evidentiary deficiency. Appellant seems to allege that because the Oil Conservation Commission did not "define" the extent of waste that the record is unable to show that the evidence is sufficient to support a finding by the OCC that such can be prevented.

A like argument was made to the New Mexico Supreme Court in Rutter & Wilbanks Corp. v. Oil Conservation Com'n, 87 N.M. 286, 532 P.2d 582 (1975). In Rutter, the appellant from an order of the OCC argued that because the Commission failed to establish the "type" of waste contemplated from the record, there was no "substantial evidence" supporting the order. The Court in Rutter, supra, simply quoted Continental Oil Co. v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962), which stated that the Commission is required to make only "basic conclusions" from the record. The court said, in essence, that the Commission's findings regarding waste in even a generic sense imply protection against any waste contemplated by the statutes. Here, as in Rutter, supra, an attempt to reposture the findings relationship to the record cannot be "seriously argued," Rutter, Id. at 289. Instead, an attack upon the sufficiency of the evidence must, by virtue of the law, be limited to scrutinization of what appears on the record. That scrutiny does not require that evidence be weighed against definitional or extraneous standards, but only that the evidence be looked to "to determine whether it implies a quality of proof which includes the

conviction that the order was proper or furnishes a substantial basis of facts from which the issue tendered could be reasonably resolved." Landowners Oil, Gas and Royalty Owners v. Corporation Commission, Okla, 415 P.2d 942 (1966).

Hence, a review of the record by this Court will show sufficient "quality of proof" to provide a substantial basis for the Commission's findings.

OCC FINDINGS ON PREVENTION OF WASTE:

The Oil Conservation Commission's conclusion that the unit agreement will prevent waste of carbon dioxide is based upon findings 8 and 9 of Order R-6446-B (Tr. 35). Those findings set out:

> (8) That the unitized operation and management of the proposed unit has the following advantages over the development of this area on a lease-by-lease basis:
>
> (a) More efficient, orderly and economic exploration of the unit area; and
>
> (b) More economical production, field gathering, and treatment of carbon dioxide gas within the unit area.
>
> (9) That said advantages will reduce average well costs within the unit area, provide for longer economic well life, result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste.

Throughout both the July 21 and October 9, 1980, hearings, the expert witnesses offered extensive testimony on the subject of waste. Almost without exception, those witnesses were of the convincing opinion that the unit agreement would serve to prevent waste, thus substantiating Findings 8 and 9, above.

Amoco's Regional Unitization Superintendent testified extensively on the savings realized as a result of unitization (Tr. H. 11-52). At the original hearing of July 21, Landis stated:

> A. "All right. First of all, with respect to conservation of CO2. Where you have an orderly and efficient development, where it can be planned ahead, and where you are not running into competitive operators who have desperately to drill offset obligations, and so on, you are conserving the unitized substances. You are preventing waste in the drilling process. You are preventing waste in the completion process.
>
> From there, you are handling that in the most orderly fashion with respect to the reservoir, producing whatever fluids there are from the best places possible, et cetera.
>
> There are many reasons why we would have conservation of these unitized substances and prevention of waste."

As well, Amoco offered the expert testimony of Bruce May, its Petroleum Geologist (Tr. H. 53-86); Neil Williams, a professional Petroleum Engineer (Tr. 11-37); and James Allen, its Senior Petroleum Engineer on the subject of production equipment requirements on the Bravo Dome with and without unitization (Tr. R. 38-101). The savings on drilling and surface installations to be realized from unitization is dramatically apparent:

> Q. "All right, sir, I'm going to jump back again on you, as I've been doing all the way through my direct presentation, and I apologize for that, Mr. Allen, but going back to our bar graph, our comparison, our Exhibit RH-7, in your opinion would six surface facilities installations serving 324 wells

each be able to to operated a longer economic life than 4435 individual surface facility installations serving this unit area on a lease basis?"

A. "In my opinion, Mr. Buell, I think it would be considerably cheaper to operate on a unit basis and, as such, we would have a longer individual life, well life."

Q. "So under unit operation a greater amount of CO2 would be recovered than would be recovered under individual lease operations."

A. "Yes, sir, in my opinion."

Q. "That would thus prevent reservoir waste in that you'd be recovering the maximum amount of CO2 possible."

A. "Yes, sir."

The comments of Mr. Walter Healey, counsel for Amerigas, working interest owner in the Bravo Dome which has been unable to negotiate commitment to the unit with its lessors (Tr. H. 133) were compelling:

MR. HEALY: "In a nutshell, Amerigas strongly supports formation of the unit as long as basic rights of all working interests and royalty interests are protected. As stated at the last hearing, rather eloquently by Mr. Buell, this is a unique opportunity for the Division to approve unified development of an entire field. Amerigas believes formation of the unit will promote conservation and prevent waste of a very valuable resource, carbon dioxide, that is now commonly recognized as one of the most effective and economic means of increasing recovery of oil."

Indeed, even the Appellant's own expert witness, F. H. Callaway, an expert reservoir engineer and oil producer from Midland, obviously leaned toward the view that unitization

would be the better means of exploration and development of carbon dioxide:

> Q. "Now, then, in your background have attitudes developed as a petroleum engineer working as a reservoir engineer? Do you have any particular points of view about the subject of unitization as a whole?"
>
> A. "I've always been an advocate of Field-wide unitization. I feel like that is the optimum method for operation in order to achieve the maximum recovery of hydrocarbons, in this case gas, and operates under the most efficient circumstances."
>
> Q. "Have you formed an opinion about whether this proposed unit will expedite utilization and development of carbon dioxide?"
>
> A. "It's sort of a homily in the oil business that most leases owned by major oil companies don't get drilled till close to the expiration date. I think that certainly from the testimony we've heard, and my own experience in dealing with oil and gas companies, small and large, that we might expect a more rapid development of this resource on a unitized basis than we would on a competitive individual lease basis."
>
> Q. "Do you conceive in your own mind that the necessity to avoid lease expirations by the drilling of 339 wells in this unit area, as depicted this morning, is-- constitutes waste?"
>
> A. "I don't-- it's difficult for me to see that expiration of a lease which is productive of a valuable resource would constitute waste."
>
> Q. "Would the effect of drilling more rapidly than they might otherwise, the operators might otherwise wish to do so, does that constitute waste in any definition you're familiar with?"

A. "Well, in a sense it might. Money has certain value and it's always nice to be able to time your expenditure till the last moment that you need them. It has some good common sense behind it. It must be weighed against the other factors that are involved, such as protecting correlative rights and the expedition of the utilization of a very valuable resource."

The record is replete with evidence then substantiating the finding that waste will be prevented under unitization by allowing for orderly development in an economic manner while avoiding the drilling of unnecessary wells and the attendant duplicity of surface facilities. As well, the evidence is compelling that carbon dioxide can be efficiently and effectively produced in a manner most likely to optimize the utilization of reservoir energy.

POINT II

THE OIL CONSERVATION COMMISSION POSSESSED THE REQUISITE AUTHORITY TO APPROVE UNITS ON THE BASIS OF PRELIMINARY INFORMATION. THE ORDERS WERE NOT PREMATURE.

In their Application for Rehearing, (Tr. 16), the Appellants have attacked Order No. R-6446 as being "premature" and have questioned the authority of the Oil Conservation Commission to approve the Bravo Dome Carbon Dioxide Unit on the basis of preliminary data relating to conservation, prevention of waste and protection of correlative rights. (Tr. 23).

In order to properly examine the issue, reference must be had to the enabling authority of the OCC found generally at Sections 70-2-11 and 70-2-12 NMSA, 1978. The broad powers delegated to the OCC necessary for it to achieve its statutory objectives are set out in Section 70-2-11, supra, which provides:

> A. The division is hereby empowered, and it its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.
>
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law.(emphasis supplied)

Hence, the OCC possesses broad discretionary powers in the administration and enforcement of the legislative policies concerning conservation, waste and correlative rights. By reasonable interpretation, the OCC's powers"...to do whatever may be reasonably necessary..." must, by the very nature of the technical complexities of the oil and gas business, include the authority to approve such voluntary units on the best information available, even if 'preliminary' in nature. Indeed, the Commission's enabling statute does not expressly prohibit or limit to certain types, the kinds of data which may provide the basis for its findings.

In the creation of an exploratory unit such as the Bravo Dome, it is desirable to define the vertical extent of the unit as closely as possible to the actual production limits of the gas reservoir. But even with the best available technology, no geologist, engineer, or conservation agency can positively define the absolute reservoir boundaries. Indeed, in such exploratory units, it is one goal to explore for and find those limits. Consequently, there will always be a reasonable margin of doubt as to the exact reservoir limits at the time of unitization and agency approval. That this manner of operation of an exploratory unit is accepted industry practice, however, is beyond doubt. At the rehearing before the OCC, Amoco's expert witness, Neil Williams, a specialist at unitizations, testified:

> Q. (Mr. Buell) "All right, sir, based on your experience with voluntary units, in

your opinion could a voluntary unit ever be premature?"

A. "No, sir, the very nature of being voluntary makes it pertinent to the time."

Q. "How would you define the Bravo Dome Unit after looking at our unit agreement and reading the transcript of the hearing that transpired on July 21?"

A. "The Bravo Dome Unit is a voluntary unit where all the parties got together to operate the unit as one property."

Q. "In your opinion is the Bravo Dome Unit an exploratory unit by its very nature and concept?"

A. "It is."

Q. "All right, sir. Let me ask you this. Since you have read the transcript and have studied the unit agreement, was there any attempt on the part of Amoco as unit operator to force or compel anyone to join through an order of the Oil Conservation Division or Oil Conservation Commission?"

A. "Not to my knowledge."

Q. "It appeared to you from the unit agreement and the transcript that it would be purely voluntary?"

A. "It's a voluntary unit and I believe it does not come under the purview of the State regulatory Commission."

Q. "All right, sir, based on your experience in other jurisdictions, what standards have state agencies consistently applied prior to their approval of exploratory type units? Have they had any standard, like geological prospects, something of that nature?"

A. "All units with which I am familiar, the agency requires that the unit outline cover the geological feature."

Q. "All right, sir, do these agencies apply another standard, like sufficient voluntary commitment to have--give effective control to the unit operator, such that he could execute or effectuate the purposes of the exploratory unit?"

A. "The usual requirement is that the operator have reasonably effective control in order to operate the unit."

Q. "All right, sir, based on your analysis of the record, in your opinion does the Bravo Dome Unit meet the first standard, that the Bravo Dome unit atea is a geological prospect for the drilling, production, and recovery of CO_2?"

A. "It does, sir."

(Tr. R. 13-15)

As well, Amoco's Senior Petroleum Engineer, James C. Allen, under cross-examination by Counsel for Appellants, addressed the issue of prematurity"

Q. (Mr. Kerr): "Now then, if one of the issues -- I'm just telling you this, I'm not asking you -- was that the Commission, when they granted this rehearing was the subject of prematurity as distinguished from never being, but prematurity. And in this situation where you do drill, might be required to protect your lease expirations, some 339 -- or drill 339 wells to protect, what, maybe 250 leases?"

A. "No, I think to protect that many leases that we'd probably be drilling closer to 339 wells. Now, I really don't know the precise number but it would be close"

Q. "Those, of course, would give a petroleum engineer, such as yourself, a great deal of information."

A. "Yes, sir, it will."

Q. "And will be able to take out of the realm of rank speculation some greater

degree of certainty, some of the aspects about whether or not land is productive at all; or whether it will produce, a given tract will produce at a greater rate or a lesser rate; will have a greater reserve than another tract; and so on, is that not true?"

A. "Mr. Kerr, in general, yes, it is true, and of course you'd always like to have production data. But we're looking at a substantial area to be developed, and I certainly don't see how it can be premature. We can't wait, you know, until after all the wells that are necessary to be drilled, that really aren't necessary are already drilled.

In my opinion in this particular unit everything is voluntary. It's been joined on a voluntary basis, and I really don't see that -- I don't think it's premature at all, in my opinion."

Needless to say, in the operation of any unit systematic development is looked upon to be the primary means of achieving economic as well as physical conservation of gas reserves as well as surface resources. Where the plan of unit development must be premised upon limited data available from only partial or exploratory development, preliminary efforts are made to reach agreement upon the extent and character of the reservoir. From that point, unit participation is enjoyed by all tracts whether drilled or not, and it is customary that adjustments are made as drilling progresses under the unit plan and more field data obtained. (Tr.R.32-33). Such unitization has tremendous advantages as there is orderly, economic and intelligent development of the field from the inception of the plan. (Tr.R. 87-101). This type of unitization method has long been recognized by

industry in exploratory and development units and is commonly referred to as the "Benton Plan". [See, generally, Kirk, "Content of Royalty Owners' and Operators' Unitization Agreements," Third Annual Institute on Oil and Gas Law and Taxation, Southwest Legal Foundation, 1952; Section 12.1.3 of the A.P.I. Model Form of Unit Agreement; Texaco, Inc. v. Vermilion Parish School Board, 152 S.2d 541 (La. 1963).

It is the recognized rule and prectice, irrespective of the express or implied meaning of authority-granting-statutes, that conservation agencies possess the power to review, modify, supplement or set aside its conservation orders at any time. Continental Oil Co. v. Oil Conservation Comm'n., 70 N.M. 310, 373 P.2d 809 (1962); Aylward Production Corp. v. State Corporation Comm'n., 176 P.2d 861 (Kan. 1947); And see, Section 70-2-11 and 70-2-12 (B) (12) NMSA, 1978.

Indeed, particularly where orders approving exploration and development units have been issued, regulatory agencies of all the states are continually amending, supplementing, setting aside, or granting exceptions to their orders because of change of condition, inadequacies or errors in existing orders, improved technologies or because additional knowledge is brought to light.

The authority to apply such a fluid concept in administering its actions and orders is inherent in the conservation agencies' general powers and continuing responsibility to prevent waste and protect correlative rights. Indeed, Texas case law has stated that "... the principle is so well established as to require no citation of authority." Railroad

Comm'n. v. Humble Oil and Ref. Co., 193 S.W. 2d 824 (Tex. Civ. App. 1946). To hold otherwise that the Oil Conservation Commission is without the power to make its findings and issue its orders on the basis of the best information available to it and then later modify its orders would be to render powerless the agency and defeat its statutory purposes.

With this view toward the public policies underlying the various conservation laws, it has become the inclination of the law that regulatory agency orders should not be subject to the rigid strictures of the doctrine of res judicata and be set in concrete. See, Hartman v. Corp. Comm'n., 529 P.2d 134 (Kan. 1974), 2 K. Davis, ADMINISTRATIVE LAW TREATISE Sections 18.03, et. seq. This legal theory is premised on the nature of such regulatory orders as being prospectively legislative rather than retrospectively adjudicatory in nature. 2 K. Davis, supra, section 1803.

However, even where, as alleged here, the agency order may be thought of as adjudicating previously vested rights such as allocation and unit participation, the res judicata doctrine can be relaxed and the order modified by the agency, as opposed to the rather harsh alternative of having to set the order aside. The case of Corley v. State Oil and Gas Board is directly on point and presents strong parallels to the issue at bar. Corley v. State Oil and Gas Board, 105 So. 2d 633 (Miss. 1958).

In Corley, the Mississippi Oil and Gas Board, on the

basis of available evidence, issued an order approving a voluntary unitization with a 100% acreage participation formula. Subsequently, the conservation agency modified its order and increased the maximum efficient rate of production while it enlarged the size of individual drilling units, effectively expanding the unit area to include additional acreage. Consequently, the effect of the agency's second order was to reduce the participation of the mineral owners under the original order, thus generating an appeal by some of those owners.

Of necessity, the field expansion order in Corley was based upon reservoir information that was unavailable at the original hearing. The Mississippi Supreme Court's response in Corley, nonetheless, was to reaffirm that the original order, 'though based upon preliminary data at the time, was in fact adequately supported by substantial evidence and was subject to refinement upon additional data. The court stated:

> What the Board in fact did was to redefine the field and reservoirs according to the facts if found at the hearing. It increased the size of the field, because the undisputed evidence reflected that the increased area was underlain with oil of varying depths. Clearly, the Board had the power to define the zero isopach line of the pool. Corley v. State Oil and Gas Board, supra.

Unquestionably, the initial approval and subsequent modification of the unit was proper and reasonably necessary in order to comport with the policy behind the state's

conservation agency's authority to act in such a manner is reasonably found by implication within the general ambit of its overall statutory mandate to prevent wast and protect correlative rights.

This view is shared by the New Mexico Supreme Court:

> Nothing we have said to now is contrary to Continental Oil, supra. When the Commission exercises its duty to allow each interest owner in a pool "his just and equitable share" of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by Section 65-3-29 (11), N.M.S.A. 1953, is subject to the qualification "as far as it is practicable to do so." See Grace v. Oil Conservation Comm'n. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet obtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not constitute "substantial evidence" or that the orders were improperly entered or that they did not protect the correlative rights of the parties "so far as [could] be practicable determined" or that they were arbitrary or capricious. (Emphasis supplied). Rutter and Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286 at 292, 532 P.2d 582 (1975).

See, also, Continental Oil Co. v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962); Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939 (1975).

Moreover, in aid of an administrative agency's jurisdiction and authority to accomplish its statutory duties, the New Mexico Supreme Court has held: "...the authority of an agency is not limited to those powers expressly granted by

statute, but includes all powers that may be fairly implied therefrom." Wimberly v. New Mexico State Police Bd., 82 N.M. 757 at 758, 497 P.2d 968. The Supreme Court has further stated in Public Service Co. of New Mexico v. New Mexico Environmental Imp. Bd., 98 N.M. 223, 549 P.2d 638, that "... the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." 89 N.M. at 223. Surely, then, it is within the authority of the Oil Conservation Commission to consider its orders on the basis of even preliminary data where it deems appropriate. Because of the very nature of the technical subject matter it regulates, it cannot be said that the manner in which the OCC has deliberated and made its decision in approving the Bravo Dome Carbon Dioxide Unit was "premature".

OCC FINDINGS ON THE PROTECTION OF CORRELATIVE RIGHTS:

The concept of correlative rights in oil and gas law evolved from that particular body of case law that sought to prevent conduct in the oil field which could cause damage to others having ownership interests in the same producing reservoir. (See, 1 Williams and Meyers, Oil and Gas Law, Section 204.6.) In essence, correlative rights has come to mean the opportunity for an owner to produce his fair share of oil or gas. Indeed, that is the meaning of correlative rights embodied by Section 70-2-33 (H), supra.

The findings in Order R-6446-B directed at correlative rights were:

> (14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:
>
> (a) a formula which provides that each owner in the unit shall share in production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and
>
> (b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage eithin designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.
>
> (17) That the method of sharing the income from

production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

At hearing before the OCC, it was explained at length that unit is exploratory in nature (Tr. R. 34) with geologic information being less that complete. Consequently, witness testimony corroborated the finding (17) that when unitization is attempted with limited knowledge of the actual producing characteristics of the field, a participation formula based upon surface acreage is a "reasonable and appropriate" means of assuring an equitable distribution of production or proceeds.

Again, Amoco's witness Bruce Landis addressed means of protecting correlative rights here:

> Q. (Mr. Padilla) . . . "My concern with this line and type of questioning involves correlative rights where someone, say in the -- committed to the unit in the north-west section of the unit participates equally with someone, say, in the south-east, irrespective of geology or -- or engineering. Would you elaborate or do you have any comment on that?"
>
> A. "Yes. Many, many such type units, that we are talking about here today, have been formed on the same basis of participation that we're using here, which is the acreage, because there is not at the outset sufficient information upon which to base -- make any other judgment.
>
> Here we have the one positive thing that we can measure directly and put everybody in on the same basis.
>
> Now, this agreement, as I testified previously, does have a provision to correct this if there is such inequity in the beginning, after the period of time that I mentioned, because then you are

> going to have the information available that will tell you where the productive acres are. There is nobody in the world that can tell you where the productive acres today.
>
> Now, there's more testimony that relates to that particular feature of this coming up, but certainly this -- the correlative rights are protected. Everybody has had his opportunity to join. We are not forcing anybody. If he doesn't like it, he simply stays out and we have another set of obligations with him to protect his correlative rights. But certainly all those committed have protection of their correlative rights." (Tr. H. 36-37)

As well, Amoco's Petroleum Engineer, Neil Williams, characterized the 100% acreage partcipation formula as "...probably the most ideal situation to have in exploratory units." (Tr. R. 16).

Additional evidence was presented to show that even for those lease tracts where the lessors did not consent to unit ratification, their correlative rights would continue to be protected by their lessees on an individual lease contract basis, as well as by the conservation laws of this state.

The OCC's findings were further corroborated by the findings of the Commissioner of Public Lands on the matter of correlative rights. Pursuant to Section 19-10-46 NMSA, 1978, the Commissioner, upon the recommendation of his expert staff, made the following finding in his approval of the unit agreement:

> (b) that under the proposed agreement, the State of New Mexico will receive its fair share of the recoverable Unitized Substance

in place under its land in the area. (Tr. R. 183, Ex.8).

This finding of the Commissioner, along with the extensive testimony of the many expert witnesses, sufficiently establishes that the OCC's findings relative to protection of correlative rights were meritorious.

CONCLUSION

Following lengthy hearings amassing extensive evidence and expert testimony, the Oil Conservation Commission applied its specialized expertise in deliberating whether the Bravo Dome Carbon Dioxide Unit Agreement would prevent waste of CO_2 gas and protect the correlative rights of the interest owners in the area. An examination of the record shows, without doubt, that the OCC's findings that the unit agreement will indeed serve to prevent waste and protect all interests, is well supported by a substantial body of technical and practical evidence. In fact, the OCC's findings were corroborated by a similar evaluation conducted by the Commissioner of Public Lands before the commitment of state lands to the unit was approved.

As well, the record dispells any notion that approved of this exploratory carbon dioxide unit was premature.

For the foregoing reasons, it is respectfully

requested that the Orders of the Oil Conservation Commission approving the Bravo Dome Carbon Dioxide Unit Agreement be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Intervenor-Appellee Commissioner of Public Lands was mailed to all the following counsel of record this 22nd day of December, 1982:

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