OUTLINE
PREMIER APPEAL
NEW MEXICO SUPREME COURT
SEPTEMBER 8,1997

THREE ISSUES RAISED BY PREMIER:

1. BIAS OF THE COMMISSION (RAND CARROLL)

2. UNIT BOUNDARY--SHOULD ITS ACREAGE BE UNITIZED? (JIM BRUCE)

3. FAIRNESS OF THE ALLOCATION FORMULA--IS IT ENTITLED TO A GREATER SHARE OF UNIT PRODUCTION? (BILL CARR)

POINT II
THE COMMISSION FAILED TO COMPLY WITH THE STATUTORY UNITIZATION ACT

QUESTION HERE IS WAS THE DIVISION'S ACTION CONTRARY TO LAW-- TO THE STATUTORY UNITIZATION ACT

STATUTORY UNITIZATION:

INVOLVES COMBINING TRACTS OF LAND IN A POOL OR A PORTION THEREOF FOR THE PURPOSE OF CONDUCTING ENHANCED RECOVERY OPERATIONS TO MAXIMIZE THE RECOVERY OF OIL AND GAS.

STATUTORY UNITIZATION ACT:

Authorizes the Commission under specific circumstances to

> "authorize and provide for the unitized management, operation and further development of oil and gas properties"
>
> "to the end that **greater ultimate recovery** may be had therefrom"
>
> Section 70-7-3 NMSA (1978)

Contains specific requirements which Applicants and the Division that must meet before statutory unitization can occur.

Sets out the **"Matters to be found by the division precedent to issuance of a unitization order"** Section 70-7-6 NMSA (1978)

MATTERS TO BE FOUND BY THE COMMISSION PRIOR TO THE ISSUANCE OF A STATUTORY UNITIZATION ORDER ARE SET OUT IN SECTION 70-7-6 NMSA:

> "(6) that the participation formula contained in the unitization agreementallocates the produces and saved unitized hydrocarbons to the separately owned tracts in the unit area on a fair, reasonable and equitable basis."

HEARINGS:

DIVISION AND COMMISSION HEARD EVIDENCE ON THE FAIRNESS OF THE FORMULA:

THREE PHASE FORMULA--

REMAINING PRIMARY

SECONDARY/ WATERFLOOD OIL

TERTIARY/ CO2 FLOOD

THE FORMULA IS BASED ON THE RESERVES UNDER EACH TRACT AND THE RISK AND COST INVOLVED IN EACH PHASE OF PRODUCTION

PREMIER TRACTS PRODUCE NO OIL IN THE PRIMARY OR SECONDARY PHASES AND ONLY 4%+ OF THE TERTIARY RESERVES

4% PRODUCED ONLY IF A CO2 FLOOD IS IMPLEMENTED

4% PRODUCED ONLY IF ALL TERTARY PRODUCTION IS RECOVERED

FORMULA GAVE PREMIER 1% OF THE UNIT PROCEEDS FROM THE FIRST DAY OF UNIT PRODUCTION--**EVEN IF A CO2 FLOOD IS NEVER INSTITUTED**

COMMISSION APPROVAL:

Division and Commission expressly found that the participation formula proposed by Exxon and Yates was fair and equitable.

Order No. R-10460-B, Finding 20 (f) and 27 (a): Order No. R-10460, Finding 22 (a)

FINDING 20 (f):

" The **correlative rights** of all interest owners are protected by the Exxon Unit participation formula. As long as the formula is fair, it is not the Commission's responsibility to change a formula which was the product of negotiations. That is not to say that other formulas, derived as a result of negotiation would not be "fair" because there is no perfect formula. Premier will benefit by receiving income from the start even though their tract is **uneconomic today**. However, CO2 "potential" earns Premier the right according to Exxon's formula to receive income from the start of unit operation."

PREMIER CONTENTION:

Premier contends more is required--That the Commission is required to determine the relative value of each tract in the unit--

PREMIER CONTENDS that the Commission failed to "establish the appropriate **relative value** to be attributed to each tract" in the unit including its Tract 6. (Brief in Chief at 8)

Failed to assign **"relative value"** to certain tracts. (Brief in Chief at 9)

THEREBY VIOLATING THE STATUTORY UNITIZATION ACT

LOOK AT THE ACT:

Section 70-7-6 B.

> **"If the Division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbonss on a fair,reasonable and equitable basis, the division shall determine the relative value,** from the evidence introduced at the hearing..." (taking into account the separately owned in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the produc allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area."

HERE THE COMMISSION FOUND THE PARTICIPATION FORMULA WAS FAIR, REASONABLE AND EQUITABLE--ACCORDINGLY--UNDER THE ACT--IT IS NOT CHARGED WITH THE DETERMINATION OF THE RELATIVE VALUE OF EACH TRACT---

MAKES NO SENSE TO DO SO ONCE THE FORMULA HAS BEEN DETERMINED TO BE FAIR

COMMISSION'S ACTIONS WERE NOT CONTRARY TO LAW--THEY WERE CONSISTANT WITH IT.

COURT'S REVIEW DOES NOT END THERE---

LOOK TO SEE IF THE COMMISSIONS FINDING IS **SUPPORTED BY THE RECORD** -- AND NOT ARBITRARY OR UNREASONABLE.

Evidence establishes:

--Premier acquired its interest in 1990

--**DID NOT DRILL WELLS THEREON**

(contends that Exxon's unitizationt plans prevented further development efforts-- the truth is that **no new wells have been drilled since 1990 on edge tracts** because the pool is beyound its primary production phase--WELLS DRILLED ON EDGE TRACTS WOULD BE NON-ECONOMIC)

--No commercial production

--Division determined from the data presented that this **acreage is uneconomic today**

--That this tract contains 4%, more or less, of the remaining reserves

--These reserves may be produced in the CO2 Phase of development

MAY BE NO CO2 PHASE

NOT A QUESTION OF **WHEN** THESE RESERVES WILL BE PRODUCED

A QUESTION OF **IF** THEY CAN BE PRODUCED

-- YEARS FROM NOW

4.08% (4.16%) reserves v. 1.02% share

*Premier cites its **Exhibit 9 page 41** where it set out its **recommended formula:***
3.42% to Premier

PREMIER NUMBERS VALID ONLY IF CO2 FLOOD IS EFFECTIVE AND ONLY IF ALL THESE RESERVES ARE PRODUCED--BIG IF'S

Data presented to the Commission and rejected

Number of possible factors
Some overlap (Total barrel column overlaps with Cum. Production and CO2 reserves)

7.6% of unit acreage has nothing to do with how much each acre will contribute to the unit

Column "CO2 Reserves--MSTBO" 1,626.0
% of field total ***4.08%***

All in potential CO2 phase--
May never be produced
Not for many years

NEED TO INCLUDE THIS ACREAGE NOW

--THREE YEARS BEFORE RESERVOIR PERFORMANCE CAN BE EVALUATED--Beuhler Tr. II at 140

--Later joinder is difficult--delays result in the waste of oil--Boneau Tr. II at 217, 220

--WANT TO JOIN AFTER COSTS ARE BORN AND RISKS INCURRED

--CO2 Flooding not separate from Waterflood effort--It is and will be one project through the CO2 phase

MUST PRESSURE UP THE RESERVOIR BEFORE A CO2 PROJECT CAN BE IMPLEMENTED Beuhler Tr. II at 184.

ALL WHO WILL SHARE IN CO2 PRODUCTION SHOULD PAY THEIR SHARE OF THESE COSTS--INCURRED PRIOR TO CO2 PHASE

The evidence established that these reserves are uneconomic now, and may never be producible

The Commission concluded that 1%+ of the unit proceeds from the date of first unit production is **FAIR**

COMMISSION HAS COMPLIED WITH THE STATUTORY UNITIZATION ACT

ITS DETERMINATION THAT THE PARTICIPATION FORMULA IS FAIR AND THAT THESE LANDS NEED TO BE INCLUDED IN THE UNIT AT THIS TIME IS SUPPORTED BY THE EVIDENCE

THE ORDER SHOULD BE AFFIRMED

PREMIER ASKS THE COURT

TO SUBSTITUTE THE INTERPRETATION OF PREMIER'S OWN EXPERT ENGINEERING WITNESS ON TECHNICAL ENGINEERING AND GEOLOGICAL QUESTIONS FOR THE DECISION OF THE DIVISION

BEFORE THE DIVISION AND COMMISSION--THE TECHNICAL ISSUES HAVE BEEN REVIEWED

Commissioner Bailey met with Exxon's attorney and certain of its witnesses and reviewed Exxon's evidence and thereafter approved Exxon's request to include the Premier tract in the unit. Despite her previous review and approval of Exxon's request to include Premier's Tract in this unit, Commissioner Bailey decided to participate in the Commission's decision of this same issue.

On May 5, 1995, Exxon's attorney and certain Exxon and Yates' technical witnesses met with Commissioner Jami Bailey in her capacity as a Deputy Director to the Commissioner of Public Lands. The purpose of this meeting was to obtain preliminary approval from Commissioner Bailey for the inclusion of all State of New Mexico Oil & Gas Leases, including Premier's tract, into the Exxon Unit.[52] Exxon presented to Ms. Bailey a summary of its case including ten of the actual exhibits used later at the Commission hearing. One of these exhibits showed that by including Premier's Tract in the unit, it would increase the economic share of royalty paid to the Commissioner of Public Lands.[53] On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division.

On May 15, 1995, in response to Exxon's request, Commissioner Bailey concluded that the Exxon proposal "meets the general requirements of the Commissioner of Public Lands" and in his behalf approved the Exxon request including Premier's Tract 6 and the other New Mexico oil & gas leases into Exxon's Avalon-Delaware Unit.[54] By her actions, Commissioner Bailey

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[52] TR-II, Vol-I, p. 31-34, Premier's Exhibits A and B.
[53] TR-II, Vol-I, p. 31-34, Exxon's Exhibit 7
[54] TR-II, Vol-I, p. 33-34, Exxon Exhibit 7

providing me an opportunity to put this issue on the record.

I have the greatest respect for Commissioner Bailey and her expertise and professionalism. However, there is a conflict of interest that has arisen, which is of concern to my client, and I appreciate the opportunity to put this on the record.

On December 11th, I delivered a letter to Commissioner Bailey expressing our concerns about this issue.

Ken Jones and his mother are the lessees of a State of New Mexico oil and gas lease. It's Section 25, the eastern portion of which -- the east half of the east half -- is the tract that Exxon is seeking to place within their waterflood and to place within their carbon dioxide project. They're doing so over the objection of Ken Jones.

The concern is that Commissioner Bailey, in discharging her responsibilities as a Land Office employee, was involved in meetings with Exxon's expert witnesses and their attorneys back in May of 1995 to discuss the Land Commissioner's preliminary approval of this very unit and the issue of the inclusion of the State of New Mexico oil and gas lease.

Subsequently, Commissioner Bailey signed the letter on behalf of the Commissioner, granting preliminary

approval, by which the Commissioners made the decision to commit their royalty interest in Ken's lease to this unit. We think that creates a conflict of interest.

I raised that with Commissioner Bailey, and in response we received a letter from the attorney for the Commissioner of Public Lands.

To complete the record on that subject, Mr. Chairman, I would like to introduce into the record as Premier Exhibit A my letter to Commissioner Bailey and the response I received from the Land Office, which is marked as Premier Exhibit B.

CHAIRMAN LEMAY: Is there objection to that? If not, those letters will be admitted into the record as Premier's Exhibit -- A and B, is it, Mr. Kellahin?

MR. KELLAHIN: Yes, Mr. Chairman.

CHAIRMAN LEMAY: Commissioner Bailey, would you like to respond?

COMMISSIONER BAILEY: I appreciate Mr. Kellahin's concern and question on behalf of his client.

However, I think our attorney quite clearly demonstrated that there would be no question of partiality and lack of bias in this case, that any decisions reached in this case will be based on the facts as presented during this hearing.

I can assure Premier, I can assure Exxon, I can

A. 4A.

Q. Now, let's move on to your Exhibit 5 and discuss the royalty interest ownership.

A. Exhibit 5 lists all royalty interests and contains royalty owner ratifications. The royalty and overriding royalty owners who have not yet ratified in the unit are listed in Exhibit 5A. We seek to statutorily unitize those owners.

Q. And have the Bureau of Land Management and the Commissioner of Public Lands approved the unit?

A. Yes, Exhibits 6A and 6C contain copies of the BLM's and Commissioner's letters of designation for the unit.

Exhibit 6B and 6D are their final approvals.

Q. And again, because of the Division order approving the unit, the unit was put into effect October 1; is that correct?

A. That is correct.

Q. What percentage of the working interest and the royalty owners have voluntarily agreed to join in the unit?

A. Approximately 98.66 percent of cost-bearing working interest owners have ratified the unit agreement and unit operating agreement.

Twenty out of 24 of the total number of royalty and overriding royalty interest owners have ratified the

unit agreement, or over 98 percent on the basis of participation.

Q. Now we've got a big, thick pile of correspondence here marked Exhibit 7. Would you identify Exhibit 7, first, for the Commissioners, Mr. Thomas?

A. Exhibit 7 contains copies of correspondence regarding the unit. The first three pages are listed as a table of contents.

Q. Okay, and we're not going to go over all of those, Mr. Thomas, but would you outline Exxon's contacts with the interest owners?

A. Exxon began considering unitization of the Avalon-Delaware Pool in 1991 and had informal discussions with working interest owners starting shortly thereafter. Exxon also began collecting data for the preparation of the technical report.

The first contact with working interest owners formally proposing an enhanced recovery unit was by a letter dated March 9th, 1992, when Exxon sent the working interest owners a proposed pre-unitization voting procedure. The technical report was published in August of 1992.

Q. Now, has the unit boundary changed from 1991 until today?

A. No.

Q. Let's move on, then. What happened subsequently to 1992?

A. Because there appeared to be a general consensus on unitization, Exxon met with representatives of the BLM in Carlsbad and the OCD in Artesia on February 1, 1993, and with the SLO and the OCD in Santa Fe on February 2nd, 1993. The SLO and BLM are the largest royalty interest owners.

In January, 1994, Exxon requested title data from working interest owners, so they could proceed with preparation of exhibits to the unit agreement. Certain parts of the technical report were subsequently amended, and Exxon forwarded ballots to the working interest owners for their review and approval. Over 90 percent of the working interest owners approved the amendment of the technical report.

On April 8th, 1994, Exxon notified working interest owners that the technical report was approved and scheduled a working-interest-owner meeting on April 26th, 1994.

As a result of verbal and written comments, Exxon scheduled another meeting on June 17th, 1994, at which over 90 percent of working interest owners were represented.

Comments were made and concerns expressed by Premier, Yates, Hudson and ANPC, an interest that is now owned by Unit Petroleum, regarding the participatio

formula that we proposed, voting percentages and other matters.

The working interest owners, including Exxon, asked Yates to take the lead in developing and proposing a single-phase participation formula.

Yates developed several single-phase formulas, which they discussed with Exxon during the next several-month period.

As a result of these discussions, Exxon and Yates agreed to present a participation formula to the other working interest owners.

On February 22nd, 1995, Exxon sent the working interest owners a letter making certain revisions to the unit agreement and the unit operating agreement. A nonbinding ballot on unitization was approved by 97.4 percent of the working interest owners.

The unit documents were then revised, and on May 1st, 1995, the unit agreement was mailed to fee royalty owners.

Exxon met with the BLM again on May 2nd, 1995, **and with the SLO on May 5th, 1995. Both agencies expressed their support of unitization, and the Applications were filed with the OCD on May 9th, 1995.**

Final copies of pertinent unit documents together with the ratification forms were sent to all interest

Janis letter. Janis letter.

STATE LAND OFFICE

MEETING RE AUSTROL (DELAWARE) Unit

JOE B THOMAS	(915) 688-7162	EXXON
Ron Mayden	" 688-7841	Exxon
Bill Duncan	" 688-6174	"
Jeff Albers	505 827-5759	SLO
Janet Richardson	505-748-1471	Yates Petroleum
JANI BAILEY	505-827-5745	SLO
PETE MARTINEZ	505-827-5791	SLO
ELEANOR KNOTTINGHAM	505-827-5748	SLO
CHARLES D. ENGELKE	827-5880	OSC
DAVE BONEAU	505-748-1471	YATES PETROLEUM
Jim Bruce	505-982-4554	Exxon (Hobbs)
Scott Lansdown	915-688-4982	Exxon

EXHIBIT 12

State of New Mexico
Commissioner of Public Lands
310 OLD SANTA FE TRAIL P.O. BOX 1148
SANTA FE, NEW MEXICO 87504-1148

RAY POWELL, M.S., D.V.M.
COMMISSIONER

Legal Division
(505) 827-5713
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December 13, 1995

VIA FACSIMILE & U.S. MAIL

W. Thomas Kellahin, Esq.
Kellahin & Kellahin
117 North Guadalupe
P.O. Box 2265
Santa Fe, NM 87504-2265

Re: NMOCD cases 11297 and 11298, Application of Exxon Corporation for Waterflood Project, Carbon Dioxide Project and Statutory Unitization Avalon-Delaware Unit, Eddy County, New Mexico

Dear Mr. Kellahin:

Your letter of December 11, 1995 to Jami Bailey has been referred to me for reply. In your letter you raise certain questions about Ms. Bailey's participation in a State Land Office decision to approve this particular Unit. You are concerned that her participation may have created a conflict of interest precluding her from sitting on the Oil Conservation Commission as the Commissioner of Public Lands' designee. See Sec. 70-2-4 NMSA 1978.

We share your concern that procedural due process of law be accorded parties appearing before this agency and any others on which a designee of the Commissioner sits. We are mindful of our responsibilities to the public in this regard. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 NM 103 (S.Ct. 1992).

In this instance Ms. Bailey and I are satisfied that she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality. In response to the first two questions you pose in your letter, Ms. Bailey has no reservations about participating in this case. Any decision she may make as the Commissioner's designee will be based on the evidence in the record of the case. She had very little personal involvement in the Land Office process concerning this particular unitization. She attended one meeting internally and as a formality signed a letter of preliminary approval prepared by staff. The documents

BEFORE THE
OIL CONSERVATION COMMISSION
Case No. 11298 DeNovo Exhibit No. 8
Submitted By:
PREMIER OIL & GAS INC.
Hearing Date: December 14, 1995

EXHIBIT
4

concerning the unitization in question are, of course, public records and you are free to examine them if you wish. In that event please call me at 827-5715 to arrange a time for you to inspect the documents.

Your letter is the first occasion that this particular conflict of interest question has come to my attention. As you may know, I have been general counsel here for a relatively short time, and I am continually discovering new areas requiring legal attention. This is one of them.

It seems to me that the Legislature created a statutory conflict of interest, or at least a potential one, when it provided for the Commissioner to participate as a member of the Oil Conservation Commission under Sec. 70-2-4 NMSA 1978. It seems to me that the Legislature was concerned enough for the welfare and protection of public lands that, as a secondary consequence of its action, it created this form of institutional conflict. One of the purposes of having the Commissioner of Public Lands or his designee on the Oil Conservation Commission is to look after the interests of public land trust beneficiaries. There is nothing, of course, that the Land Office can do about this legislative framework.

At the same time, however, as we stated earlier, we do recognize that parties litigating before the Oil Conservation Commission are entitled to have their constitutional rights, including procedural due process, respected. As a transactional matter, this means that the Commissioner's designee should be free from bias and prejudgment. We are satisfied that such is the case with Ms. Bailey in this case. In addition, as to the future, we will try to make sure that the Commissioner's designee has not participated in the Land Office decision or transaction that is the subject of the Oil Conservation Commission hearing. The issues before the Land Office may be different from the questions before the Commission, which would mean that participating in a Land Office decision would not preclude a designee from hearing a different issue, albeit arising out of the same facts, before a different administrative body. We haven't researched this issue at this point, partly in the interest of turning around your letter request as soon as possible. We understand that you have a hearing in this matter before the Oil Conservation Commission tomorrow and we would not want to delay that by our review. In any case, we think it is the wiser choice for the Land Office to simply avoid any transactional conflict whenever it can by making sure the Commissioner's designee has not worked directly on the matter before the Commission.

If there is anything further we can do for you on this matter, please give me a call.

Sincerely,

Jan Unna
General Counsel

JU/jc

cc: Jami Bailey
Rand Carroll, Esq.

Certiorari Not Applied For

FROM THE NEW MEXICO COURT OF APPEALS

LAS CRUCES PROFESSIONAL FIRE FIGHTERS and INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 2362,
Petitioners-Appellees,

versus

CITY OF LAS CRUCES and LOUIS ROMAN, LAS CRUCES FIRE DEPARTMENT FIRE CHIEF,
Respondents-Appellants.

No. 17,415 (filed February 19, 1997)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
JERALD A. VALENTINE, District Judge

WILLIAM R. BABINGTON, JR.
SHARI LYNN ALLISON
SAGER, CURRAN, STURGES & TEPPER, P.C.
Las Cruces, New Mexico

HARRY S. (PETE) CONNELLY
Acting City Attorney
Las Cruces, New Mexico
for Appellants

CHRISTOPHER E. PLATTEN
CAROL L. KOENIG
WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN
San Jose, California
for Appellees

OPINION
HARRIS L HARTZ
Chief Judge

{1} In 1992 the New Mexico Legislature enacted the Public Employee Bargaining Act (the PEBA), NMSA 1978, §§ 10-7D-1 through -26 (Repl. Pamp. 1995) (effective until July 1, 1999). The purpose of the PEBA

> is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

Section 10-7D-2. The PEBA created the Public Employees Labor Relations Board (PELRB), Section 10-7D-8, and authorizes local governments to create their own boards, which assume the duties and responsibilities of the PELRB for their employees, Section 10-7D-10(A). The PEBA also authorizes local governments to enact ordinances governing labor relations, subject to certain restrictions contained in the PEBA. Section 10-7D-26(C).

{2} On February 16, 1993 the City of Las Cruces (the City) adopted a labor-management relations ordinance, Las Cruces, N.M., Ordinance ch. 16.5 (1993) (the Ordinance). Section 16.5-6 of the Ordinance created the Las Cruces labor-management relations board (the Local Board). One provision of the Ordinance, which has no counterpart in the PEBA, states that "[a]n employee, labor organization or its representative shall not: . . . [s]olicit membership for an employee or labor organization during the employee's duty hours[.]" Ordinance § 16.5-16(2).

{3} The dispute on appeal concerns the application of the Ordinance and the PEBA to fire fighters. Las Cruces fire fighters work on 24-hour shifts. Fire department duties and training are generally restricted to between 8 a.m. and 5 p.m. The hours from 5 p.m. to 8 a.m., called "residential hours," are interrupted only to respond to an emergency; during those hours fire fighters may engage in recreational activities or sleep. Fire fighters are also given a 15-minute morning break, a one-hour lunch break, and a 15-minute afternoon break.

{4} On June 3, 1994 Fire Chief Louis Roman issued a memorandum to his captains and lieutenants forbidding union organizational activities in any fire department facility. The Las Cruces Professional Fire Fighters and International Association of Fire Fighters, Local No. 2362 (the Union) complained that the chief's directive constituted a practice prohibited by the PEBA and the Ordinance. The Local Board ruled in favor of the Union. The City appealed to the district court, which affirmed the board. On appeal to this Court the City contends that (1) the Union's complaint to the Local Board was untimely, (2) the board's decision was incorrect, and (3) the City did not receive a fair hearing before the board because of the bias of the board's chairperson. We affirm the decision of the district court.

I. TIMELINESS OF THE APPEAL TO DISTRICT COURT

{5} We assume that the City is correct in contending that the Ordinance requires charges of prohibited labor practices to be filed within 60 days of the conduct that generated the charges. *See* Ordinance § 16.5-8(d). Chief Roman's memorandum is dated June 3, 1994. The City contends that the Union was untimely because it did not file its prohibited practice complaint until August 24, 1994—82 days after the date of the memorandum. The City's contention is frivolous.

{6} The Local Board held its initial organizational meeting on July 21, 1994. At that meeting Union President Carlos Reyes informed the board that the Union wished to file a complaint but that it was concerned that 60 days might elapse before the board established any formal procedure for filing a complaint. He tendered a letter setting forth the Union's complaint. Board chairperson Dan Gonzales, acknowledging that the board

had not yet established rules and regulations, said that the board would accept the letter as a timely filing of the complaint. The City did not object to this decision. On August 18, 1994 the board adopted interim rules and regulations. They required that prohibited-practice complaints be filed on a board-approved form. The Union then filed its complaint on that form on August 24, 1994.

{7} Submission of the Union president's letter at the July 21 meeting was a timely filing of the complaint. The complaint was not rendered untimely by the Union's decision to supplement the letter with a complaint filed in accordance with a newly enacted rule that had not been in effect at the time the letter was submitted and was not even in effect within 60 days of the alleged prohibited practice.

{8} This Court will entertain a motion pursuant to Rule 12-403(B)(4) NMRA 1996 requesting that the City pay the Union $350 for legal fees incurred to respond to the City's frivolous argument.

II. THE MERITS

{9} Both the PEBA and the Ordinance provide that actions by the Local Board shall be affirmed on appeal to the district court unless "the action is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence on the record taken as a whole; or (3) otherwise not in accordance with law." Section 10-7D-23(B); Ordinance § 16.5-19(c). Under this standard of review we view the evidence in the light most favorable to support the action of the administrative agency. *See Wolfley v. Real Estate Comm'n*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). In addition, interpretation of a statute by the administrative body charged with enforcing it may be persuasive. *See City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 99, 678 P.2d 1170, 1174 (1984); *but cf. High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 39-40, 888 P.2d 475, 485-86 (Ct. App. 1994) (noting limits on propriety of deference to agency).

{10} The City relies principally on Section 16.5-16(2) of the Ordinance, which prohibits employees, unions, and their representatives from "[s]olicit[ing] membership for an employee or labor organization during the employee's duty hours[.]" The City contends that the entire 24-hour shift constitutes "duty hours" for a fire fighter and therefore union solicitation is banned from fire stations at all times. The City's interpretation of this section of the Ordinance is reasonable. It is no strain on the English language to say that "duty hours" encompasses all of a fire fighter's paid 24-hour shift.

{11} But the City's interpretation is not the only reasonable one. Although the Local Board's decision in this case fails to refer to Section 16.5-16(2) of the Ordinance, the decision appears to view "duty hours" as the time during which fire fighters are required to be performing job duties. The Union contends that this is the proper meaning of the language of the Ordinance. We agree with the Union because its interpretation better fits the legislative scheme. The City's interpretation conflicts with that scheme. In particular, if the City were to enforce the no-solicitation mandate of Ordinance Section 16.5-16(2) as it interprets the language, it would be engaging in an employer practice that would ordinarily be prohibited by the PEBA and by other provisions of the Ordinance.

{12} To see this conflict, we now turn to the pertinent law regarding employer prohibited practices. An understanding of that law requires an examination of the source of the language used in the Ordinance and the PEBA.

{13} Ordinance Section 16.5-15(2), (3), and (4) is virtually identical with Section 10-7D-19(B), (C), (D) of the PEBA, which states that a public employer or its representative shall not:

> (B) interfere with, restrain or coerce any public employee in the exercise of any right guaranteed under the [PEBA][1];
>
> (C) dominate or interfere in the formation, existence or administration of any labor organization;
>
> (D) discriminate in regard to hiring, tenure or any term or condition of employment in order to encourage or discourage membership in a labor organization[.]

Although the PEBA does not require in so many words that local ordinances prohibit the identical practices, it does require that every local ordinance include "prohibited practices for the public employer . . . that promote the principles established in Section[] [10-7D-19]." Section 10-7D-26(C)(9). The Ordinance therefore cannot countenance conduct that violates the core of the prohibitions in Section 10-7D-19.

{14} The above-quoted language from the PEBA is taken from the National Labor Relations Act (NLRA). Section 8(a) of the NLRA states, in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7];
>
> (2) to dominate or interfere with the formation or administration of any labor organization . . .;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]

29 U.S.C. § 158(a) (1994). Section 10-7D-19(B) of the PEBA refers to rights guaranteed by the PEBA, whereas Section 8(a)(1) of the NLRA refers to rights guaranteed in Section 7 of the NLRA; but the rights specified in the two enactments are similar, as can be seen by comparing the provisions set forth in the footnote.[2]

{15} Our legislature's selection of language that so closely tracks the NLRA indicates general approval of the operation of that statute. Although the special circumstances of public employment may on occasion require an inter-

[1] The Ordinance refers to rights guaranteed under the *Ordinance*, rather than under the PEBA. But the rights under the two enactments are essentially the same. *See* footnote 2.

pretation of the PEBA different from the interpretation of essentially the same language in the NLRA, the general thrust is clear. Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted. Such an interpretative approach furthers the legislature's evident intent to incorporate certain federal standards into the PEBA. This approach also promotes administrative efficiency. Rather than litigating every matter from scratch, interested parties can largely rely on the body of law developed under the NLRA to expedite the resolution of disputes under the PEBA. We approve of the position of the state PELRB that interpretations of the NLRA by the National Labor Relations Board (NLRB) and reviewing courts should act as a guide in interpreting similar provisions of the PEBA. *See County of Santa Fe & Am. Fed'n of State, County & Mun. Employees*, 1 PELRB 1, 43 (1993).

[16] Thus, in determining whether an employer practice violates Section 10-7D-19(B) or Ordinance Section 16.5-15(2) because it "interfere[s] with, restrain[s] or coerce[s]" an employee in the exercise of rights guaranteed under the PEBA or the Ordinance, we seek guidance from decisions interpreting Section 8(a)(1) of the NLRA. Those decisions establish that under federal law a blanket ban on union organizational activities at the work place would ordinarily constitute an unfair labor practice. In 1945 the United States Supreme Court affirmed an NLRB decision holding that such a ban on any type of solicitation at the employer's factory or offices violated the prohibition against interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the NLRA. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Supreme Court approved the following statement by the NLRB:

> Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Id. at 803-04 n.10 (quoting *In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943)). The NLRB has continued to distinguish between bans on solicitation during working time and blanket bans on solicitation that include work breaks, holding that the latter bans are presumptively invalid. *See Our Way, Inc.*, 268 N.L.R.B. 394 (1983). The Supreme Court has also continued to approve the position of the NLRB. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (upholding determination that hospital could not prohibit employees' organizational efforts in employee cafeteria); *cf. NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (employer could prohibit union solicitation by nonemployee union organizers on company-owned parking lots).

[17] We conclude that a no-solicitation rule that encompasses rest breaks, lunch time, and residential hours would be presumptively contrary to Section 10-7D-19(B)of the PEBA. It would also violate Ordinance Section 16.5-15(2) unless the Ordinance language is interpreted differently from the virtually identical language in Section 10-7D-19(B) of the PEBA and Section 8(a)(1) of the NLRA. We reject that possibility. As a general rule, when a local ordinance uses the same language as the state statute authorizing the ordinance, we can infer that the local governing body intends its ordinance to have the same meaning as the state statute.

[18] To be sure, the City's enactment of Ordinance Section 16.5-16(2) might be construed as indicating that the City did not intend Section 16.5-15(2) to have as expansive a meaning as Section 10-7D-19(B) of the PEBA. One could say that Section 16.5-16(2) immunizes certain no-solicitation rules that would otherwise be prohibited practices. But in that event the Ordinance might well violate Section 10-7D-26(C)(9), which requires local ordinances to include "prohibited practices for the public employer . . . that promote the principles established in [Section 10-7D-19.]" Ordinance Section 16.5-16(2), as interpreted by the City, would appear to be contrary

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[2] Section 10-7D-5 (which is substantively identical to Ordinance Section 16.5-4) states:

"Public employees, other than management employees, supervisors and confidential employees, may form, join or assist any labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any or all such activities."

Section 7 of the NLRA states:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

to the core of Section 10-7D-19(B); after all, for more than 50 years (*Republic Aviation* was decided in 1945) federal law has generally prohibited blanket no-solicitation rules that apply during both working time and breaks. Therefore, the better means of resolving potential conflict between Ordinance Sections 16.5-16(2) and 16.5-15(2) is to adopt the Union's interpretation of "duty hours" as time during which job duties are being performed. Then enforcement of Ordinance Section 16.5-16(2) would ordinarily not constitute a prohibited employer practice. Under this interpretation—the interpretation apparently adopted by the Local Board—the fire department's no-solicitation rule was not authorized by Ordinance Section 16.5-16(2).

{19} That leaves for consideration only whether the fire department's no-solicitation rule constituted a prohibited practice under Ordinance Section 16.5-15(2). Applying the standard approved in *Republic Aviation*, the rule could pass muster only if "necessary in order to maintain [performance] or discipline." 324 U.S. at 804 n.10. In the present case the City made no showing that its fire fighting efforts would be hampered if employees were permitted to engage in union organizational activities during residential hours, rest breaks, or the lunch period, when fire fighters were not needed for emergency services. Also, the Union presented as evidence a September 9, 1993 memo from the previous fire chief stating that supervisors "must not try to control what workers do [during] non-working time[,] [including] authorized coffee breaks and lunch time." The memo implies that solicitation during such times would not interfere with fire fighting responsibilities. Consequently, the Local Board could properly determine that enforcement of the no-solicitation rule constituted a prohibited employer practice. We affirm the board's interpretation of the Ordinance and hold that the record supports the board's finding of a prohibited employer practice.

III. ALLEGED BIAS

{20} Section 10-7D-10(B) of the PEBA provides as follows:

> The local board shall be composed of three members appointed by the public employer. One member shall be appointed on the recommendation of individuals representing labor, one member shall be appointed on the recommendation of individuals representing management and one member shall be appointed on the recommendation of the first two appointees.

The Ordinance complies with the statute by stating:

> The board shall consist of three (3) members appointed by the mayor and the city council. The mayor and the city council shall appoint one (1) member from a list of up to three (3) recommended by individuals representing labor representatives, one (1) member from a list of up to three (3) recommended by the city manager, and one (1) member from a list of up to three (3) recommended jointly by the two (2) other appointees.

Ordinance § 16.5-6(a).

{21} The City's complaint of bias relates to the Local Board chairperson, Dan Gonzales, who was the member recommended by labor interests. The City focuses on the conduct of Gonzales during the hearing on the Union's complaint, but it also pointedly notes that Gonzales was the Union's "appointee." Before addressing the specifics of Gonzales's conduct of the hearing, we put the matter in perspective by discussing the general law regarding allegations of bias against administrative tribunals.

{22} The leading New Mexico case is *Reid v. New Mexico Board of Examiners in Optometry*, 92 N.M. 414, 589 P.2d 198 (1979). The City relies on the following language from *Reid*:

> At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.
>
> . . . The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.

Id. at 416, 589 P.2d at 200 (citations omitted). This language, however, must be read in context. In *Reid* one of the board members prior to the administrative hearing stated something like "Dr. Reid would be losing his license soon anyway[.]" *Id.* at 415, 589 P.2d at 199. The Court concluded that because the board member had "admitted making a statement indicating his bias and prejudgment of the issues . . . , the Board's failure to disqualify [the board member] clearly violated Reid's constitutional right to procedural due process."[3] *Id.* at 416, 589 P.2d at 200.

[3] Although *Reid* treated tribunal bias as a matter of constitutional due process, we need not decide whether the City is entitled to such constitutional protection. Any bias that would violate due process would also render the resulting decision "arbitrary, capricious or an abuse of discretion" within the meaning of Section 10-7D-23(B) of the PEBA and Ordinance Section 16.5-19(c). *See Board of Educ. v. Department of Health, Educ. & Welfare*, 655 F. Supp. 1504, 1545 (S.D. Ohio 1986); *State ex rel. Iowa Employment Sec. Comm'n v. Iowa Merit Employment Comm'n*, 231 N.W.2d 854, 857 (Iowa 1975); *cf. Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 826-27 (10th Cir. 1996) (arbitrary-and-capricious standard can take decisionmaker's bias into account).

[23] One should not infer from *Reid* that a member of a tribunal is necessarily disqualified whenever prior conduct of the member indicates a view that would favor one party or the other. If that were the law, no judge could sit on a case after rendering a decision in a similar case. For example, a judge who upheld the validity of a convenant against competition in one case would be barred from deciding the validity of a similar covenant in another case. Likewise, a judge who had severely sentenced a defendant convicted of child sexual abuse would be disqualified from sentencing others convicted of the same offense. As one might expect, the law imposes no such requirement. Bias can take different forms. Whether a bias is disqualifying depends upon the nature of the bias.

[24] An excellent summary of the pertinent law can be found in Professor Davis' treatise on administrative law. Professor Davis has extracted from judicial opinions a helpful framework for determining when a decisionmaker should be disqualified for bias. He has distinguished five kinds of bias and stated the law regarding each:

> (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification.
>
> (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification.
>
> (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be.
>
> (4) A personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism.
>
> (5) One who stands to gain or lose by a decision either way has an interest that may disqualify; even a legislator may be disqualified on account of a conflict of interest.

3 Kenneth Culp Davis, *Administrative Law Treatise*, § 19:1, at 371-72 (2d ed. 1980) (set out above in paragraph form for easier recognition). We will refer to the types of bias as type 1, type 2, etc. *Reid* involved type 3 bias—a disqualifying prior commitment.

[25] Gonzales's ties to labor may implicate type 1, type 2, or possibly type 3, bias. Because Professor Davis' summary of the law with respect to those types of bias appears to contradict the broad language of *Reid* quoted above, it is worth noting the strong precedential support for that summary.

[26] On the question of whether prejudgment of law or policy is disqualifying, no more striking precedents could be found than the conduct of Justices of the United States Supreme Court. Their actions are reviewed in *Laird v. Tatum*, 409 U.S. 824 (1972), a one-justice memorandum opinion in which Justice Rehnquist explains why he is not recusing himself from the case. He relies on what his predecessors had done in similar circumstances. For example, Justice Black was one of the principal authors of the Fair Labor Standards Act, sometimes cited as the "Black-Connery Fair Labor Standards Act," and presented the favorable report of the Senate Labor and Education Committee, of which he was chairman, to the Senate; yet as a member of the Supreme Court he sat in the case that upheld the Act's constitutionality and also in later cases construing the Act. When he was a professor, Justice Frankfurter had been a noted expert in labor law and played an important part in drafting the Norris-LaGuardia Act; yet he wrote the opinion in a leading case interpreting the scope of the Act. Justice Jackson participated in a case raising exactly the same issue as one he had decided as attorney general, in a way opposite to that in which the Court decided it. *Id.* at 831-32. These actions by members of the Supreme Court reflect a recognition that members of all courts (and administrative agencies) are human beings. They cannot avoid having histories or opinions; indeed, they may well have been selected for their offices in part on that basis. Recognition of this reality counsels us against requiring that every decisionmaker start with a clean slate.

[27] Davis' views on type 2 and type 3 bias also find support from the United States Supreme Court. We discuss two leading cases. First, in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), the FTC, based on its own investigation, had submitted reports to Congress and the President stating that an arrangement known as the multiple basing point system violated the Sherman Act because it was equivalent to a price-fixing restraint of trade. Then the FTC filed a complaint against, among others, the Cement Institute and its corporate members. After lengthy hearings the FTC issued a cease-and-desist order against use of the multiple basing point system in the sale of cement. The cement companies complained that the FTC had prejudged the issue and was prejudiced and biased. The Supreme Court rejected the challenge. The Court assumed that the entire membership of the FTC had formed an opinion, based on its prior ex parte investigation, that the multiple basing point system constituted unlawful price fixing. Yet it stated that one could not infer from the prior actions of the FTC that the members had made up their minds. *See id.* at 701. As Professor Davis has noted:

> The manner in which the Court in the Cement Institute opinion avoided the question whether the Commissioners' minds were "irrevocably closed" is very significant, for, as a practical matter, it makes proof of closed minds virtually impossible. The Court said that the Commission's previous expression of its views about basing points "did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices." 333 U.S. at 701. Enough to satisfy the

> Court was the opportunity of members of the cement industry to present their evidence and argument that the basing point system was legal. *Despite the plausible allegation of closed minds, the Court did not require the Commissioners to show that they had open minds, and the members of the industry had no means of proving that the minds were closed.*

Davis, *supra*, § 19:2, at 374 (emphasis in original). We read the *Cement Institute* case as stating that the FTC was not disqualified by its "legislative" fact-finding regarding use of the multiple basing point system, even though the legislative fact-finding may have involved facts relating to the parties subject to the cease-and-desist order, at least in the absence of evidence that the FTC had already committed itself with respect to the facts concerning those parties.

{28} In the second opinion, *United States v. Morgan*, 313 U.S. 409 (1941), appellants contended that the Secretary of Agriculture should not have reconsidered the case after it was remanded by a prior decision of the United States Supreme Court. At the time of that decision the Secretary had written a letter to *The New York Times* critical of the Court, stating that the money at issue "rightfully belongs to the farmers." Davis, *supra*, at 375. The Court held that it was not necessary for the Secretary of Agriculture to deny his bias:

> That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

Morgan, 313 U.S. at 421. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976); Davis, *supra*, at 375-76.

{29} From the above, it is apparent that Gonzales was not disqualified for bias simply because he was nominated by union interests. Even if he had previously expressed support for aggressive unionization of the public sector, he would not be disqualified. Members of tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before the tribunal. *Reid* does not hold to the contrary.

{30} We therefore turn to the City's allegations of specific misconduct by Gonzales that it contends was unfair and demonstrated improper bias. As we understand the City, it is alleging that Gonzales's actions evidenced bias against the City, or at least its fire department management, and favoritism toward the Union. This would be type 4 bias in Professor Davis' summary. The City points to Gonzales's questioning of the Union representative "on matters [the representative] never raised and to matters to which the fire fighters did not testify to. This is before the City even ha[d] the opportunity to cross examine [the representative]." These matters included lunch breaks, coffee breaks, residential breaks, non-working hours, the memo from the prior fire chief, etc. The City also points out that after the Union chose not to cross-examine the fire chief, Gonzales cross-examined the chief at length, including questions on topics not covered by the direct examination.

{31} We have reviewed the portions of the hearing transcript containing the questions and statements by Gonzales that allegedly reflect bias. We find no impropriety, not even a hint of impropriety, in the questioning. Although a written transcript cannot capture a speaker's tone of voice and facial expressions, the questions were intelligent, respectful, phrased in a fair manner, and pertinent to issues to be decided at the hearing. The questions did not indicate any prejudgment by Gonzales or the board itself. Even Gonzales's questioning of both the fire chief and the Union representative regarding the possibility of compromise did not indicate what he thought the compromise should be. On the contrary, Gonzales volunteered that he had not made up his mind.

{32} In a jury trial the trial judge must be careful not to ask questions in such a manner as to convey the judge's personal view of the evidence or the merits of the case, *see* Rule 11-614(B) NMRA 1996, but that would not be a concern with a hearing before the Local Board. There is no reason to forbid the board to consider evidence elicited by its own questions and limit it to evidence elicited by questioning by the parties. *See* Bernard Schwartz, *Administrative Law* § 6.16, at 338 (3d ed. 1991); *cf. State v. Sedillo*, 76 N.M. 273, 275, 414 P.2d 500, 501 (1966) (trial judge can question witness; judge is more than mere umpire).

{33} In sum, we find no merit to the City's contention that it did not receive a fair hearing from Gonzales or the board as a whole.

IV. CONCLUSION

{34} We affirm the judgment of the district court.

{35} IT IS SO ORDERED.

HARRIS L HARTZ, Chief Judge

WE CONCUR:
LYNN PICKARD, Judge
BENNY E. FLORES, Judge

589 P.2d 198

Fred M. REID, Petitioner-Appellant,

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Respondent-Appellee.

No. 11785.

Supreme Court of New Mexico.

Jan. 15, 1979.

Following an administrative hearing, the Board of Examiners in Optometry rendered a decision revoking optometrist's license to practice. The District Court, Sante Fe County, Bruce E. Kaufman, D. J., affirmed and optometrist appealed. The Supreme Court, McManus, Senior Justice, held that failure of Board to disqualify member, who stated prior to disciplinary hearing that optometrist would soon be losing his license and who testified he could still render impartial decision, denied optometrist due process of law.

Reversed and remanded.

1. Constitutional Law ⇐287.2(5)

Failure of Board of Examiners in Optometry to disqualify member, who stated prior to disciplinary hearing that optometrist would soon be losing his license and who testified he could still render impartial decision, denied optometrist due process of law. Const. art. 2, § 18; U.S.C.A.Const. Amends. 5, 14.

2. Constitutional Law ⇐251.5, 251.6

The Fourteenth Amendment guarantees every citizen a right to procedural due process in state proceedings, i. e., a state cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐251.6

At a minimum, a "fair and impartial tribunal" requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. U.S.C.A.Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

4. Physicians and Surgeons ⇐11

In determining whether optometrist's license to practice was revoked by a "fair and impartial" Board of Examiners in Optometry, the inquiry was not whether the Board members were actually biased or prejudiced, but whether, in natural course of events, there was an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

5. Administrative Law and Procedure ⇐309

When government agencies adjudicate or make binding determinations which directly affect legal rights of individuals, it is imperative that those agencies use procedures which have traditionally been associated with the judicial process; the rigidity of the requirement that trier be impartial and unconcerned in result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in interest of expedition and a supposed administrative efficiency, been relaxed. Const. art. 2, § 18; U.S.C.A.Const. Amends. 5, 14.

6. Constitutional Law ⇐287.2(5) Physicians and Surgeons ⇐11

Board of Examiners in Optometry could not rely on statute prohibiting disqualification of member when such disqualification would result in absence of quorum so as to justify its failure to disqualify member for bias in revocation of license hearing; such use of statute, which had effect of allowing an administrative hearing, punitive in nature, to be conducted by a patently prejudicial tribunal necessarily violated due process provisions of State and Federal Constitutions. Const. art. 2, § 18; U.S.C.A.Const. Amends. 5, 14; 1978 Comp. § 61–1–7.

Sommer, Lawler & Scheuer, Standley & Suzenski, Santa Fe, for petitioner-appellant.

Toney Anaya, Atty. Gen., Mary Anne McCourt, Bruce Kohl, Asst. Attys. Gen., Santa Fe, for respondent-appellee.

OPINION

McMANUS, Senior Justice.

Following an administrative hearing, the New Mexico Board of Examiners in Optometry rendered a decision revoking Dr. Fred M. Reid's license to practice. Reid appealed to the District Court of Santa Fe County. The district court affirmed the Board's decision. Reid now appeals the decision of the district court. We reverse.

Upon receipt of a complaint, the Board initiated disciplinary proceedings against Dr. Reid. The Board accused Reid of having made sexual advances to female patients in violation of § 61–2–8(B), N.M.S.A. 1978 [formerly § 67–1–7(B), N.M.S.A.1953 (Repl.1974)] and Rule No. 4 of the New Mexico Board of Examiners in Optometry. Prior to the scheduled administrative hearing, Reid disqualified two of the five board members pursuant to § 61–1–7, N.M.S.A. 1978 [formerly § 67–26–7, N.M.S.A.1953 (Repl.1974)]. After the hearing commenced, Reid moved to disqualify Dr. Carl Zimmerman on the basis of bias or pecuniary interest. Reid's motion was denied on the ground that there was no good cause for disqualification. Reid's motion to disqualify the entire Board for prejudice, bias, or pecuniary interest was also denied. Reid then moved to dismiss the proceedings because they were brought under an inapplicable statute and because they were brought under a statute and regulation which were unconstitutionally vague. The Board denied both of these motions.

In his appeal to the district court, Reid objected to the Board's refusal to disqualify its members and to the Board's failure to dismiss the charges. Reid also argued that the Board's decision was arbitrary, capricious, and not supported by substantial evidence. The district court decided in favor of the Board on all these issues. Reid raises essentially the same issues in his appeal to this Court.

Reid's first contention is that the Board's failure to disqualify Dr. Zimmerman for bias denied him due process of law. Prior to the hearing, the Board heard testimony concerning Dr. Zimmerman's ability to hear the case. Carol Pederson, a former secretary to Dr. Reid, testified as to a conversation she had with Dr. Zimmerman. Ms. Pederson testified that upon mentioning to Dr. Zimmerman that she was leaving Reid's employment, Dr. Zimmerman replied that "... it didn't matter ... because Dr. Reid would be losing his license soon anyway, or wouldn't be practicing soon anyway ..." On voir dire examination, Dr. Zimmerman admitted making the statement. However, Dr. Zimmerman also testified that he could render a fair and impartial decision.

[1] Reid argues that Dr. Zimmerman's testimony clearly constitutes prejudgment of the charges brought against him. Thus, the failure of the Board to disqualify Dr. Zimmerman plainly denied him due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and under Article II, Section 18 of the New Mexico Constitution. The Board contends its action was proper because, although Dr. Zimmerman admitted to making a prejudicial statement, he also testified that he could render a fair and impartial decision. We agree with Dr. Reid.

[2] "The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings." *Matter of Protest of Miller*, 88 N.M. 492, 497, 542 P.2d 1182, 1187 (Ct.App.1975, *cert. denied*, 89 N.M. 5, 546 P.2d 70. In *Miller*, the Court of Appeals stated:

> By "procedural due process" we mean the following:
>
> > Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking

> to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); *and the proceedings looking toward the deprivation must be essentially fair.* (Citation omitted.)
>
> (Emphasis added.)

Id. at 497–98, 542 P.2d at 1187–88. In other words, a state cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal.

[3, 4] At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In addition, our system of justice requires that the appearance of complete fairness be present. *See Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.1974), *aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974). The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. *See generally Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1974).

[5] These principles apply to administrative proceedings as well as to trials. *Matter of Protest of Miller, supra.* When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. *National Labor Relations Board, supra.*

In the case before us, Dr. Zimmerman admitted making a statement indicating his bias and prejudgment of the issues. According to the principles outlined above, the Board's failure to disqualify Dr. Zimmerman clearly violated Reid's constitutional right to procedural due process.

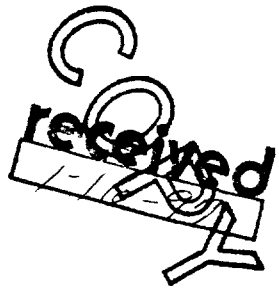
[6] The Board argues that even if the Court should find that Dr. Zimmerman was biased, § 61–1–7 does not allow for disqualification where exercise of this privilege would result in the absence of a quorum. We refuse to accept the Board's argument. Any utilization of § 61–1–7 which has the effect of allowing an administrative hearing, punitive in nature, to be conducted by a patently prejudiced tribunal must necessarily violate the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

Therefore, we reverse the decision of the district court upholding the Board's refusal to disqualify Dr. Zimmerman. We remand the case to the Board so that Dr. Reid will have the opportunity to present all his defenses before a fair and impartial tribunal.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY



PREMIER OIL & GAS, INC.,

Petitioner,

vs. No. CV 96-121-JWF

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
EXXON CORPORATION AND YATES PETROLEUM CORPORATION

Respondents.

ANSWER BRIEF
OF THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

Comes now the Oil Conservation Commission of the State of New Mexico (OCC) by and through its attorneys of record and submits this Answer Brief in the above-entitled matter.

Summary of Proceedings

Exxon Corporation (EXXON) applied to the OCC for statutory unitization pursuant to the Statutory Unitization Act, Sections 70-7-1 through 70-7-21 NMSA 1978, of approximately 2118.78 acres comprised of state, federal and fee lands to be known as the Avalon (Delaware) Unit Area (UNIT AREA) in Eddy County, New Mexico. Exxon also sought authority from the OCC, *inter alia,* to institute a waterflood project in a portion of the Unit Area. Pursuant to Section 70-2-12 NMSA 1978, the Oil Conservation Division (DIVISION) held a hearing on the application on June

29 and 30, 1995, at which Exxon, Premier Oil and Gas Corporation (PREMIER), and Yates Petroleum Corporation (YATES) appeared and were represented by counsel. The Division entered an order granting Exxon's request for statutory unitization and allowing Exxon, *inter alia,* to institute a waterflood project. The Division's order is attached hereto as Exhibit A.

Premier appealed the Division order to the OCC pursuant to Section 70-2-13 NMSA 1978. The OCC held its *de novo* hearing on December 14, 1995, at which all parties appearing at the Division hearing appeared and were represented by counsel before the OCC. The OCC entered its order on March 12, 1996, ordering the statutory unitization of the Unit Area and allowing, *inter alia,* Exxon to institute a waterflood project. (The OCC's order is attached to Premier's Petition for Review to the District Court as Exhibit 6.) Premier filed its Application for Rehearing (Premier's Exhibit 1) with the OCC on March 20, 1996. The OCC did not act on the Application, and it was therefore deemed denied pursuant to Section 70-2-25 NMSA 1978.

ARGUMENT

The OCC addresses fully only Points I and II of Premier's Petition. The OCC supports the arguments made by Exxon and Yates as to Points III through IX. As to those latter points, the findings of fact in the OCC's order are supported by substantial evidence, *i.e.,* evidence that a reasonable mind might accept as adequate to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n,** 87 N.M. 286, 532 P.2d 582 (1975); **Fugere v. State,** 120 N.M. 29, 897 P.2d 216 (Ct. App. 1995). Additionally, the OCC's order is in accordance with applicable law. The case law in New Mexico illustrates that the courts of the state give great deference to the OCC's decisions on the issues of fact which necessarily involve a great deal of expertise in the areas of petroleum engineering and geology. As the Supreme Court stated in **Fasken v. Oil Conservation**

Comm'n, 87 N.M. 292, 293, 532 P.2d 588, 589 (1975), in reference to counsels' arguments in that case: "The difficulty with them [the arguments to the court] is that they emanate from the lips and pens of counsel and are not bolstered by the expertise of the [Oil Conservation] Commission to which we give special weight and credence."

Point I
COMMISSIONER BAILEY WAS NOT DISQUALIFIED FROM PARTICIPATING IN THE CASE BEFORE THE OCC

A. Conflict of Interest

Commissioner Bailey is the designee of the Commissioner of Public Lands (STATE LAND OFFICE) on the OCC; such designee is required by statute to have expertise in the area of oil and gas production. Section 70-2-4 NMSA 1978 states, in part: "The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue of education or training." The duties and responsibilities of the State Land Office and those of the OCC are distinct. The State Land Office is the trustee of state lands. N.M. Const., art. XIII. The OCC has as its principal duties the prevention of waste and the protection of correlative rights in the production of oil and gas. **Simms v. Mechem,** 72 N.M. 186, 382 P.2d 183 (1963). Even so, there is a specific statute, Section 19-10-48 NMSA 1978, that addresses the interplay between the powers of the OCC and the powers of the State Land Office stating: "Nothing herein [19-10-45 to 19-10-48 NMSA 1978] contained shall be held to modify in any manner the power of the oil conservation commission under laws now existing or hereafter enacted with respect to the proration, and conservation of oil or gas and the prevention of waste, nor as limiting in any manner the power and the authority of the commissioner of public

lands now existing or hereafter vested in him."

The State Land Office leases certain state lands to private entities for oil and gas production in accord with the state statutory scheme. *See* Sections 19-10-1 through 19-10-70 NMSA 1978. Sections 19-10-45 through 19-10-47 NMSA 1978 address cooperative agreements for the development or operation of oil and gas pools between state lessees and others; additionally, the State Land Office has adopted rules as to how a state lands lessee can obtain the approval of the State Land Office as to these cooperative agreements as well as the effect on state lands leases when forced pooling is ordered by the Oil Conservation Division. *See* Commissioner of Public Lands Rules 1.044 through 1.052, attached hereto as Exhibit B. Section 19-1-2.1 NMSA 1978 and Rule 1.046 require the State Land Office to keep the geological and engineering data supplied by the applicant confidential for a certain period of time. There is no provision for an adversarial hearing in this process. The issue before the State Land Office, referred to in Premier's Application for Rehearing, was limited to Exxon's desire to obtain the approval of the State Land Office to include certain state lands leased to Exxon in a cooperative agreement for the development and operation of oil and gas pools with others. [1]

The issues before the OCC, however, were Exxon's request for a statutory unitization order

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[1]There is a difference between the terms "pooling" and "unitization" even though they are at times used interchangeably. "Pooling" is the bringing together of small tracts for the granting of a drilling permit under applicable spacing rules; it is important for the prevention of drilling unnecessary and uneconomical wells. "Unitization" is the joint operation of all or some portion of a producing reservoir. Unitization is important where there is separate ownership in a common producing pool which requires the operator to engage in cycling pressure maintenance, or secondary recovery operations and to explore for minerals at considerable depths. T. Brown and S. Miller, *Layman's Guide to Oil & Gas* 132 (1985).

as to approximately 2118.78 acres that included state trust land, federal land and land owned by private entities. Also, Exxon sought approval from the OCC to: 1) institute a waterflood project in part of the proposed unit; 2) qualify the waterflood project for the recovered oil tax rate; and 3) drill 18 new producing wells at unorthodox locations. These issues differ greatly from that issue before the State Land Office, even though some of the proposed unit included state trust lands.

In the third paragraph on page 9 of its Application for Rehearing, Premier states: "By her [Commissioner Bailey's] actions, the SLO [the State Land Office] agreed to include the State Oil & Gas lease which it has leased to Premier and which Premier objects to being included in the unit." This statement is incorrect so far as the State Land Office's power granted by Sections 19-10-45 through 19-10-47 NMSA 1978 *vis a vis* Premier's state oil and gas leases. Commissioner Bailey, as an employee of the State Land Office, did not have the power to include the Premier lease without its permission as to any cooperative agreement on unit production; this can only be done by the OCC pursuant to the Statutory Unitization Act. (The SLO, as a royalty owner pursuant to Section 70-7-8 NMSA 1978, did approve Exxon's proposed unitization as to state trust lands in the Unit Area, including Premier's state oil and gas leases in the Unit Area.)

It is not unusual in state administrative matters for a decision maker in an administrative hearing to have prior involvement in some or all aspects of an issue. For instance, the Secretary of the Environment Department or his designee is a member of the state mining commission. *See* Section 69-36-6 NMSA 1978. Applicants for new mine permits must obtain from the Secretary of the Environment Department a written determination that the permitted activities will be expected to achieve environmental standards. The Secretary's written determination must be obtained by the applicant prior to the issuance of a new mine permit by the Mining and Minerals Division. *See*

Section 69-36-7(P)(2) NMSA 1978. However, if there is an appeal of the Mining and Minerals Division Director's order either to issue or not issue a new mine permit, then the appeal is heard by the Mining Commission of which the Environment Department Secretary is a member. *See* Section 69-36-15 NMSA 1978.

The officials and employees of the state are making decisions in the interest of the state, not for any pecuniary individual gain. In her capacity as an employee of the State Land Office, Commissioner Bailey has to comply with the statutes and rules that circumscribe her duties in that employment. In her capacity as the designee of the State Land Office on the OCC, Commissioner Bailey is subject to a different set of statutes and rules. In acting in an adjudicatory capacity on the OCC, Commissioner Bailey addresses different issues and considers different evidence from that of an employee of the State Land Office. The fact that one individual holds both of these positions does not create a conflict that in any manner prejudiced Premier's interests. The hearing before OCC conformed with the principles of due process set forth in **Santa Fe Exploration Co. v. Oil Conservation Comm'n,** 114 N.M. 103, 835 P.2d 819 (1992).

B. Bias and Prejudgment

In its Application for Rehearing, Premier cites correctly **Santa Fe Exploration Co. v. Oil Conservation Comm'n.,** 114 N.M. 103, 835 P.2d 819 (1992) as the setting forth the minimum due process requirements that must be afforded parties before administrative adjudicatory bodies such as the OCC. In turn, **Santa Fe Exploration Co.** at page 109 cites **Reid v. New Mexico Bd. of Examiners in Optometry,** 92 N.M. 414, 589 P.2d 198 (1979) as an example in which the Supreme Court found that the statements of the trier of fact were biased and indicated a predisposition regarding the outcome of the case.

The facts in **Reid** involved a licensing hearing before the Board of Examiners of Optometry (Board) in which one of the Board's licensees was accused of wrongdoing. The Board, after conducting an administrative adjudicatory hearing, had the authority to revoke the licensee's license. The licensee sought to disqualify one of the Board members based on prior statements the Board member had made to the effect that the licensee would lose his license after the hearing. The license was, in fact, revoked, and the licensee appealed to the Court. The Supreme Court found that the Board member's statement indicated prejudgment, and the Board's failure to disqualify the member from participating in that hearing violated the licensee's right to due process.

As with the **Santa Fe Exploration Co.** case, the facts in this case are distinguishable . Premier has not alleged any kind of statement or other action by Commissioner Bailey that remotely approaches the prejudice and bias exhibited by the **Reid** Board member. As in **Santa Fe Exploration Co.**, no member of the OCC, including Commissioner Bailey, expressed any opinion regarding the outcome of the case prior to the hearing.

Point II
THE STATUTORY UNITIZATION ACT IS CONSTITUTIONAL

Point II of Premier's Petition was not presented to the OCC in Premier's Application for Rehearing; consequently, this question cannot be reviewed on appeal. Section 70-2-25 NMSA 1978 states, in part, "...provided, however, that the questions reviewed on appeal [to the district court] shall be only questions presented to the commission [OCC] by the application for rehearing." Point II of the Petition maintains that the Statutory Unitization Act, Sections 70-7-1 through 70-7-21 NMSA 1978, is unconstitutional. However, Premier's Application for Rehearing to the OCC

contains no such claim. In fact, Point VIII on page 12 of the Application for Rehearing complains that the OCC violated correlative rights by failing to comply with the Statutory Unitization Act.

But even had Premier raised the issue of the constitutionality of the Statutory Unitization Act (Act) to the OCC, there is no question as to the constitutionality of this Act adopted more than 20 years ago. Laws 1975, ch. 293. Except for Texas[1], every major oil and gas producing state has a compulsory unitization statute,[2] including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia and Wyoming.

In 1945 Oklahoma passed the first comprehensive statutory provision for compulsory unitization act. This act faced a variety of constitutional challenges including substantive due process taking and equal protection arguments in **Palmer Oil Corp. v. Phillips Petroleum Co.**, 231 P.2d 997 (Okla. 1951), *appeal dismissed,* 343 U.S. 390 (1952). In a more recent case the Arkansas state supreme court summarily rejected a takings clause challenge to a compulsory unitization order issued by the state conservation commission. **Williams v. Arkansas Oil & Gas Comm'n.**, 817 S.W.2d 863, (Ark. 1991)The Statutory Unitization Act is an important tool in conservation of the state's natural resources, and the courts have recognized the significant state interest outweighs the

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[1]Apparently Texas law provides that the parties can voluntarily agree to unitization, or the Texas Railroad Commission can determine to order the wells shut-in. Vernon's Tex. Nat. Res. Code Sections 85.046, 933-933.7.

[2]B. Kramer & P. Martin, The Law of Pooling and Unitization, Vol 1. Section 18.01 (Third Edition 1996).

individual's private property interest.

CONCLUSION

There is no evidence in the record that Commissioner Bailey should have been disqualified from participating in the OCC hearing. Premier was afforded its due process rights in the administrative adjudicatory hearing. The Statutory Unitization Act is constitutional. There is sufficient evidence in the record to support the findings of the OCC, and the OCC's order is not arbitrary, capricious or contrary to law.

The OCC's order should be affirmed by this court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Answer Brief was mailed to opposing counsel of record this 15th day of January 1997.

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

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

APPLICATION OF EXXON CORPORATION FOR A WATERFLOOD PROJECT, QUALIFICATION FOR THE RECOVERED OIL TAX RATE PURSUANT TO THE "NEW MEXICO ENHANCED OIL RECOVERY ACT" FOR SAID PROJECT, AND FOR 18 NON-STANDARD OIL WELL LOCATIONS, EDDY COUNTY, NEW MEXICO.

CASE No. 11297

APPLICATION OF EXXON CORPORATION FOR STATUTORY UNITIZATION, EDDY COUNTY, NEW MEXICO.

CASE No. 11298

Order No. R-10460

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on June 29, 1995, in Hobbs, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 18th day of September, 1995 the Division Director, having considered the testimony, the record and the recommendations of the Examiner, and being fully advised in the premises,

FINDS THAT:

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

(2) The applicant in Case No. 11298, Exxon Corporation ("Exxon"), seeks the statutory unitization, pursuant to the "Statutory Unitization Act", Sections 70-7-1 through 70-7-21, NMSA (1978), for the purpose of establishing both a secondary recovery and tertiary recovery project, of all mineral interests in the designated and Undesignated Avalon-Delaware Pool comprising 2140.14 acres, more or less, of State, Federal, and fee

lands in Eddy County, New Mexico, said unit to henceforth be known as the Avalon (Delaware) Unit Area; the applicant further seeks approval of the "*Unit Agreement*" and "*Unit Operating Agreement*", which were submitted at the time of the hearing in evidence as applicant's Exhibit Nos. 2 and 3.

(3) In Case No. 11297, Exxon seeks authority:

(a) to institute a waterflood project in its proposed Avalon (Delaware) Unit Area by the injection of water into the designated and Undesignated Avalon-Delaware Pool by the injection of water through 18 new wells to be drilled as injection wells and one well to be converted from a producing oil well to an injection well;

(b) to qualify this project for the recovered oil tax rate pursuant to the "New Mexico Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Sections 1 through 5); and

(c) to drill 18 new producing wells throughout the project area at locations considered to be unorthodox.

(4) The applicant proposes that said unit comprise the following described area in Eddy County, New Mexico:

TOWNSHIP 20 SOUTH, RANGE 27 EAST, NMPM
Section 25: E/2 E/2
Section 36: E/2 E/2

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM
Section 29: SW/4 SW/4
Section 30: Lots 1 through 4, SW/4 NE/4, E/2 W/2, and SE/4
Section 31: All
Section 32: SW/4 NE/4, W/2, and W/2 SE/4

TOWNSHIP 21 SOUTH, RANGE 27 EAST, NMPM
Section 4: Lot 4
Section 5: Lots 1 and 2
Section 6: Lots 1 and 2

(5) The horizontal confines of said unit are within the governing limits, as specified by Division General Rule 104.A(2), of the Avalon-Delaware Pool with a large part of the proposed area having been reasonably defined by development.

(6) The vertical limits or "unitized formation" of said unitized area is that interval described as the Delaware Mountain Group, extending from 100 feet above the base of the Goat Seep Reef to the top of the Bone Spring formation and including, but not limited to, the Cherry Canyon and Brushy Canyon formations, as identified by the *Compensated Neutron/Lithodensity/Gamma Ray Log* dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines (Unit A) of Section 31, Township 20 South, Range 28 East, NMPM, Eddy County, New Mexico, with the top of the unitized interval being found in said well at a depth of 2,378 feet below the surface (869 feet above sea level) and the base of the unitized interval being found at a depth of 4,880 feet below the surface (1,633 feet below sea level), or stratigraphic equivalents thereof.

(7) The proposed Unit Area contains twelve separate tracts of land, the working interests in which are owned by forty-eight different interest owners. Exxon operates five of the twelve tracts, five tracts are operated by Yates Petroleum Corporation ("Yates"), one tract is operated by Premier Oil & Gas, Inc. ("Premier"), and one tract is operated by MWJ Producing Company. There are twenty-four royalty and overriding royalty interest owners in the proposed Unit Area.

(8) At the time of the hearing, the owners of approximately 97.5% of the working interest, and the owners of over 95% of the royalty and overriding royalty interest, had voluntarily joined in the proposed unitization. The 95% royalty owner approval includes federal lands owned by the United States. The U.S. Bureau of Land Management has indicated its preliminary approval by designating the unit as logical for conducting secondary recovery operations, and the New Mexico Commissioner of Public Lands, acting on behalf of the state's trust lands, has preliminarily approved the proposed unitization.

(9) The applicant has conducted negotiations with interest owners within the proposed unit area for over four years. Therefore, the applicant has made a good faith effort to secure voluntary unitization within the above-described Unit Area.

(10) All interested parties who have not agreed to unitization were notified of the hearing by applicant. At the hearing in this matter, Yates entered its appearance and presented evidence in support of the application. Unit Petroleum Company and MWJ Producing Company, working interest owners, made statements in support of the application.

(11) Premier, the operator and sole working interest owner of Tract No. 6, which comprises the E/2 E/2 of Section 25, Township 20 South, Range 27 East, NMPM, Eddy County, New Mexico, and represents 7.6% of the proposed unit acreage, appeared at the hearing and presented evidence in opposition to the inclusion of Tract 6 within the Unit Area.

(12) Exxon, the largest working interest owner in the proposed Unit Area with 80 percent of the current production, prepared a "*Report of the Technical Committee for the Working Interest Owners*", which was submitted at the time of the hearing in evidence as applicant's Exhibit No. 10, Volumes I and II.

(13) The applicant proposes to institute a waterflood project at an expected cost of $14,400,000.00 for the secondary recovery of oil and associated gas, condensate, and all associated liquefiable hydrocarbons within and to be produced from the proposed Unit Area (being the subject of Division Case No. 11,297). The estimated reserves recoverable from the waterflood project are 8.2 million barrels of oil.

(14) Said Unit Area also has potential as a tertiary (CO_2 injection) project. Evidence presented at the hearing by the applicant and proponents of this case shows that:

(a) the estimated recoverable tertiary reserves are 39.9 million barrels of oil;

(b) if such a CO_2 flood is instituted in the proposed Unit Area, it will likely be the first CO_2 project in the area and could facilitate other CO_2 floods;

(c) the waterflood project will provide additional data which may justify additional secondary recovery waterflood projects in other Delaware pools in the general area;

(d) institution of the CO_2 flood depends upon waterflood performance, results of future CO_2 injectivity tests, and perception of future oil prices. A minimum of 3 years of water injection would be required to repressure the reservoir prior to commencing a CO_2 injection program; and

(e) the participation formula presented is single phase whereby remaining primary oil is weighted by 25%, secondary oil and workover potential is weighted by 50% and tertiary oil is weighted by 25%, which results in Exxon receiving 73.920333% of Unit

production, Yates receiving 4.149893% of Unit production and Premier receiving 1.019231% of Unit production.

(15) Additional testimony was presented by Exxon for approval of said Unit Area because:

(a) the waterflood project area includes approximately 1100 acres in the center of the Unit Area. The outer or "fringe" tracts were included in the Unit Area based upon their CO_2 flood potential. The "fringe" tracts having little or no primary or secondary production potential will however participate in production from inception of the Unit;

(b) the "Technical Report" and the Unit Agreement attribute no remaining primary or waterflood reserves to Tract 6, operated by Premier;

(c) Premier will own 1% of the Avalon (Delaware) Unit despite the fact that Premier's Tract 6 has produced only 0.1% of the cumulative oil to date;

(d) in addition, Premier is likely to receive positive cash flow from the first day of unit operations because of investment adjustments;

(e) it would be difficult, if Tract 6 were deleted from the Unit, to waterflood or CO_2 flood Tract 6 separately from the Unit. Furthermore, if Tract 6 is not part of the Unit, production of CO_2-laden gas from Tract 6 would present operational difficulties; and

(f) deleting Tract 6 from the Unit Area would require additional negotiations among working interest owners, revision of Unit documents, and other delays. It was further indicated that if Tract 6 is deleted, unitization may never occur.

(16) Premier presented evidence in opposition to the formation of said Unit and contends that Tract 6 should be excluded because:

(a) the proposed waterflooding portion of this project is the reason for the Unit, while the tertiary recovery portion, or CO_2 injection, has only some probability of happening or not happening;

(b) under the Exxon analysis the inclusion of the Premier's Tract 6 is not necessary in order to effectively carry on the waterflood portion of this project and that it is premature to include Tract 6 for tertiary recovery;

(c) under the Exxon analysis there is no increase in ultimate recovery of secondary oil from the Unit by including Tract 6;

(d) the Exxon analysis of the CO_2 potential is speculative and has not been the subject of any scientific study to determine its feasibility and therefore any forecasted increase in ultimate recovery of tertiary oil from the unit by including Tract 6 is speculative;

(e) Exxon proposes to include Tract 6 only as a "protection buffer" and assigns no "contributing value" for secondary oil recovery; and

(f) Premier, as owner of all of said Section 25, is not receiving any "contributing value" for primary or secondary oil and does not desire to divide its property for the formation of said Unit.

(17) Based upon the foregoing, the inclusion of Tract 6 in the proposed unitization is in the best interest of conservation in that it is deemed necessary, as well as fair and reasonable, to effectively carry out tertiary recovery operations. The exclusion of Tract 6 would result in waste and could serve to inhibit CO_2 development not only of this project but others in the area. Further, such unitization as requested and the adoption of Exxon's proposed secondary and tertiary plans for this Unit Area will serve to benefit the working interest and royalty interest owners of the oil and gas rights in the Delaware formation.

(18) The proposed unitized method of operation as applied to the Avalon (Delaware) Unit is feasible and will result with reasonable probability in the increased recovery of substantially more oil and gas from the unitized portion of the Avalon-Delaware Pool than would otherwise be recovered without unitization.

(19) The estimated additional costs of such operations will not exceed the estimated value of the additional oil so recovered plus a reasonable profit.

(20) The applicant's Exhibit Nos. 2 and 3 in this case, being the Unit Agreement and the Unit Operating Agreement, should be incorporated by reference into this order.

(21) The unitized management, operation and further development of the Avalon (Delaware) Unit Area, as proposed, is reasonably necessary to effectively increase the ultimate recovery of oil and gas from the unitized portion of the Avalon-Delaware Pool.

(22) The Avalon (Delaware) Unit Agreement and the Avalon (Delaware) Unit Operating Agreement provide for unitization and unit operation of the Avalon (Delaware) Unit Area upon terms and conditions that are fair, reasonable and equitable, and include:

(a) a participation formula which will result in fair, reasonable and equitable allocation to the separately owned tracts of the Unit Area of all oil and gas that is produced from the Unit Area and which is saved, being the production that is (i) not used in the conduct of unit operations, or (ii) unavoidably lost;

(b) a provision for the credits and charges to be made in the adjustment among the owners in the Unit Area for their respective investments in wells, tanks, pumps, machinery, materials and equipment contributed to the unit operators;

(c) a provision governing how the costs of unit operations including capital investments shall be determined and charged to the separately-owned tracts and how said costs shall be paid, including a provision providing when, how and by whom such costs shall be charged to each owner, or the interest of such owner, and how his interest may be sold and the proceeds applied to the payment of his costs;

(d) a provision for carrying any working interest owner on a limited or carried basis payable out of production, upon terms and conditions which are just and reasonable, and which allow an appropriate charge for interest for such service payable out of production, upon such terms and conditions determined by the Division to be just and reasonable;

(e) a provision designating the Unit Operator and providing for supervision and conduct of the unit operations, including the selection, removal and substitution of an operator from among the working interest owners to conduct the unit operations;

(f) a provision for a voting procedure for decisions on matters to be decided by the working interest owners in respect to which each working interest owner shall have a voting interest equal to his unit participation; and

(g) a provision specifying the time when the unit operation shall commence and the manner in which, and the circumstances under which, the operations shall terminate and for the settlement of accounts upon such termination.

(23) The statutory unitization of the Avalon (Delaware) Unit Area is in conformity with the above findings, and will prevent waste and protect correlative rights of all interest owners within the proposed Unit Area, and should therefore be approved as requested by Exxon.

(24) The proposed Avalon (Delaware) Unit Area contains undeveloped acreage and acreage that will not be part of the initial waterflood project. Therefore, in compliance with Division General Rule 701.G(3), the initial waterflood project area, for allowable and tax credit purposes, should be reduced to include the following described 1088.50 acres in Eddy County, New Mexico:

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM
Section 30: Lots 1 through 4, SE/4 NW/4, E/2 SW/4, and S/2 SE/4
Section 31: Lots 1 through 3, NE/4, E/2 NW/4, NE/4 SW/4, N/2 SE/4, and SE/4 SE/4
Section 32: W/2 NW/4, N/2 SW/4, and SW/4 SW/4.

(25) Exhibit "A", attached hereto and made a part hereof, lists the 19 proposed injection wells (18 of which are to be new drills and one is to be a conversion) for the initial waterflood project. It is the applicant's intent to drill the 18 new wells and initially complete them first as oil producing wells and eventually convert them to water injectors. Approval of the unorthodox locations is necessary for "start-up" of said waterflood project.

(26) The waterflood pattern to be utilized initially is to be a 40-acre inverted fivespot comprising the 19 aforementioned water injection wells and 27 producing wells.

(27) The present Delaware oil producing wells within the subject project area and interval are in an advanced state of depletion and should therefore be properly classified as "stripper wells".

(28) The operator of the proposed Avalon (Delaware) Unit Waterflood Project should take all steps necessary to ensure that the injected water enters and remains confined to only the proposed injection interval and is not permitted to escape from that interval and migrate into other formations, producing intervals, pools, or onto the surface from injection, production, or plugged and abandoned wells.

(29) The injection of water into the proposed injection wells should be accomplished through 2-3/8 inch plastic-coated tubing installed in a seal bore assembly set within 100 feet of the uppermost injection perforation. The casing-tubing annulus should be filled with an inert fluid and a gauge or approved leak-detection device should be attached to the annulus in order to determine leakage in the casing, tubing or seal bore assembly.

(30) Prior to commencing injection operations into the proposed injection wells, the casing in each well should be pressure tested throughout the interval from the surface down to the proposed seal bore assembly setting depth to assure the integrity of such casing.

(31) The injection wells or pressurization system for each well should be so equipped as to limit injection pressure at the wellhead to no more than 490 psi; however, the Division Director should have the authority to administratively authorize a pressure increase upon a showing by the operator that such higher pressure will not result in the fracturing of the injection formation or confining strata.

(32) The operator should give advance notification to the supervisor of the Artesia District Office of the Division of the date and time of the installation of injection equipment and of the mechanical integrity pressure-tests in order that the same may be witnessed.

(33) The proposed waterflood project should be approved and the project should be governed by the provisions of Rule Nos. 701 through 708 of the Oil Conservation Division Rules and Regulations.

(34) The applicant further requests that the subject waterflood project be approved by the Division as a qualified Enhanced Oil Recovery Project ("EOR") pursuant to the "Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Sections 1 through 5).

(35) The evidence presented indicates that the subject waterflood project meets all the criteria for approval.

(36) The approved "project area" should initially comprise that area described in Finding Paragraph No. (24) above.

(37) To be eligible for the EOR credit, prior to commencing injection operations the operator must request from the Division a Certificate of Qualification, which Certificate will specify the proposed project area as described above.

(38) At such time as a positive production response occurs and within five years from the date of the Certificate of Qualification, the operator must apply to the Division for certification of a positive production response, which application shall identify the area actually benefitting from enhanced recovery operations, and identifying the specific wells which the operator believes are eligible for the credit. The Division may review the application administratively or set it for hearing. Based upon evidence presented, the Division will certify to the Department of Taxation and Revenue those lands and wells which are eligible for the credit.

(39) The injection authority granted herein for the proposed injection wells should terminate one year after the effective date of this order if the operator has not commenced injection operations into the subject wells, provided however, the Division, upon written request by the operator, may grant an extension thereof for good cause shown.

IT IS THEREFORE ORDERED THAT:

(1) The application of Exxon Corporation ("Exxon") in Case No, 11,298 for the Avalon (Delaware) Unit, covering 2,118.78 acres, more or less, of State, Federal, and fee lands in the designated and Undesignated Avalon-Delaware Pool, Eddy County, New Mexico is hereby approved for statutory unitization, for the purpose of establishing both a secondary recovery and tertiary recovery project, pursuant to the "Statutory Unitization Act", Sections 70-7-1 through 70-7-21, NMSA (1978).

(2) The Avalon (Delaware) Unit Agreement, and the Avalon (Delaware) Unit Operating Agreement, which were submitted to the Division at the time of the hearing as Exhibits 2 and 3, respectively, are hereby incorporated by reference into this order.

(3) The lands herein designated the Avalon (Delaware) Unit Area shall comprise the following described acreage in Eddy County, New Mexico:

TOWNSHIP 20 SOUTH, RANGE 27 EAST, NMPM
Section 25: E/2 E/2
Section 36: E/2 E/2

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM
Section 29: SW/4 SW/4
Section 30: SW/4 NE/4, NW/4, and S/2
Section 31: All
Section 32: SW/4 NE/4, W/2, and W/2 SE/4

TOWNSHIP 21 SOUTH, RANGE 27 EAST, NMPM
Section 4: Lot 4
Section 5: Lots 1 and 2
Section 6: Lots 1 and 2

(4) The vertical limits or "unitized formation" of said unitized area shall include that interval described as the Delaware Mountain Group, extending from 100 feet above the base of the Goat Seep Reef to the top of the Bone Spring formation and including, but not limited to, the Cherry Canyon and Brushy Canyon formations, as identified by the *Compensated Neutron/Lithodensity/Gamma Ray Log* dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines (Unit A) of Section 31, Township 20 South, Range 28 East, NMPM, Eddy County, New Mexico, with the top of the unitized interval being found in said well at a depth of 2,378 feet below the surface (869 feet above sea level) and the base of the unitized interval being found at a depth of 4,880 feet below the surface (1,633 feet below sea level), or stratigraphic equivalents thereof.

(5) Since the persons owning the required statutory minimum percentage of interest in the Unit Area have approved, ratified, or indicated their preliminary approval of the Unit Agreement and the Unit Operating Agreement, the interests of all persons within the Unit Area are hereby unitized whether or not such persons have approved the Unit Agreement or the Unit Operating Agreement in writing.

(6) The applicant as Unit operator shall notify in writing the Division Director of any removal or substitution of said Unit operator by any other working interest owner within the Unit Area.

IT IS FURTHER ORDERED THAT:

(7) Exxon is hereby authorized to institute a waterflood project in its Avalon (Delaware) Unit Area by the injection of water into the designated and Undesignated Avalon-Delaware Pool, as found in that stratigraphic interval between 2378 feet to 4880 feet as identified by the *Compensated Neutron/Lithodensity/Gamma Ray Log* dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines (Unit A) of Section 31, Township 20 South,

Range 28 East, NMPM, Eddy County, New Mexico, through nineteen certain wells as further described in Exhibit "A" attached hereto and made a part hereof.

(8) In compliance with Division General Rule 701.G(3), the initial waterflood project area, for allowable and tax credit purposes, shall comprise only the following described 1088.50 acres in Eddy County, New Mexico:

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM
Section 30: Lots 1 through 4, SE/4 NW/4, E/2 SW/4, and S/2 SE/4
Section 31: Lots 1 through 3, NE/4, E/2 NW/4, NE/4 SW/4, N/2 SE/4, and SE/4 SE/4
Section 32: W/2 NW/4, N/2 SW/4, and SW/4 SW/4.

(9) The applicant must take all steps necessary to ensure that the injected water only enters and remains confined to the proposed injection interval and is not permitted to escape to other formations or onto the surface from injection, production, or plugged and abandoned wells.

IT IS FURTHER ORDERED THAT:

(10) Injection shall be accomplished through 2-3/8 inch plastic-coated tubing installed in a seal bore assembly set approximately within 100 feet of the uppermost injection perforation; the casing-tubing annulus in each well shall be filled with an inert fluid and equipped with an approved pressure gauge or attention-attracting leak detection device.

(11) The 19 water injection wells or pressurization system shall be initially equipped with a pressure control device or acceptable substitute which will limit the surface injection pressure to no more than 490 psi.

(12) The Division Director shall have the authority to administratively authorize a pressure limitation in excess of the 490 psi herein authorized upon a showing by the operator that such higher pressure will not result in the fracturing of the injection formation or confining strata.

(13) Prior to commencing injection operations, the casing in each injection well shall be pressure-tested throughout the interval from the surface down to the proposed seal bore assembly setting depth, to assure the integrity of such casing.

(14) The operator shall give advance notification to the supervisor of the Artesia District Office of the Division of the date and time of the installation of injection equipment and of the mechanical integrity pressure-test in order that the same may be witnessed.

(15) The applicant shall immediately notify the supervisor of the Artesia District Office of the Division of the failure of the tubing, casing or seal bore assembly in any of the injection wells, the leakage of water or oil from or around any producing well, or the leakage of water or oil from any plugged and abandoned well within the project area, and shall take such steps as may be timely and necessary to correct such failure or leakage.

(16) The applicant shall conduct injection operations in accordance with Division Rule Nos. 701 through 708 and shall submit monthly progress reports in accordance with Division Rule Nos. 706 and 1115.

FURTHERMORE:

(17) The subject waterflood project is hereby approved as an Enhanced Oil Recovery Project ("EOR") pursuant to the "Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Sections 1 through 5).

(18) The approved "project area" shall initially comprise that area described in Decretory Paragraph No. (8) above.

(19) To be eligible for the EOR credit, prior to commencing injection operations the operator must request from the Division a Certificate of Qualification, which certificate will specify the proposed project area as described above.

(20) At such time as a positive production response occurs and within five years from the date of the Certificate of Qualification, the operator must apply to the Division for certification of a positive production response, which application shall identify the area actually benefitting from enhanced recovery operations, and identifying the specific wells which the operator believes are eligible for the credit. The Division may review the application administratively or set it for hearing. Based upon evidence presented, the Division will certify to the Department of Taxation and Revenue those lands and wells which are eligible for the credit.

(21) The injection authority granted herein for the proposed injection wells shall terminate one year after the effective date of this order if the operator has not commenced

injection operations into the subject wells, provided however, the Division, upon written request by the operator, may grant an extension thereof for good cause shown.

FURTHERMORE:

(22) The applicant is authorized to drill the first eighteen wells listed on Exhibit "A" attached hereto. The applicant may complete the wells as producers and later convert them to injection.

(23) Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

WILLIAM J. LEMAY
Director

S E A L

EXHIBIT "A"

CASE NO. 11297
ORDER NO R-10460

EXXON CORPORATION
PROPOSED WATER INJECTION WELLS/UNORTHODOX OIL WELL LOCATIONS
AVALON (DELAWARE) UNIT WATERFLOOD PROJECT AREA

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM,
EDDY COUNTY, NEW MEXICO

WELL NO.	ORIGINALLY PROPOSED LOCATION	SECTION	ACTUAL STAKED LOCATION	PROPOSED PERFORATED INTERVAL FEET
1212	1668' FNL & 1455' FWL	30	1665' FNL & 1452' FWL	2486 - 4817
1412	2310' FSL & 1485' FWL	30	2301' FSL & 1485' FWL	2509 - 4832
1612	992' FSL & 1489' FWL	30	1152' FSL & 1489' FWL	2492 - 4798
1614	1046' FSL & 2677' FWL	30	NO CHANGE	2498 - 4853
1812	183' FNL & 1397' FWL	31	101' FNL & 1355' FWL	2467 - 4774
1814	123' FNL & 2673' FEL	31	NO CHANGE	2496 - 4844
1816	46' FNL & 1402' FEL	31	43' FNL & 1458' FEL	2520 - 4902
2012	1386' FNL & 1314' FWL	31	NO CHANGE	2481 - 4800
2014	1335' FNL & 2681' FWL	31	1388' FNL & 2750' FWL	2495 - 4843
2018	1317' FNL & 97' FEL	31	1310' FNL & 97' FEL	2501- 4924
2212	2600' FSL & 1322' FWL	31	NO CHANGE	2496 - 4817

EXHIBIT "A"
PAGE TWO

WELL NO.	ORIGINALLY PROPOSED LOCATION	SECTION	ACTUAL STAKED LOCATION	PROPOSED PERFORATED INTERVAL FEET
2214	2699' FSL & 2549' FWL	31	2610' FSL & 2549' FWL	2509 - 4841
2216	2566' FNL & 1377' FEL	31	2564' FNL & 1377' FEL	2505 - 4885
2218	2423' FSL & 78' FEL	31	2517' FSL & 78' FEL	2477 - 4918
2220	2648' FSL & 1127' FWL	32	2658' FSL & 1127' FWL	2489 - 4945
2412	1337' FSL & 1324' FWL	31	NO CHANGE	2535 - 4826
2418	1356' FSL & 99' FEL	31	NO CHANGE	2478 - 4911
2420	1323' FSL & 1107' FWL	32	1333' FSL & 1107' FWL	2479 - 4935
2016*	1305' FNL & 1305' FEL	31	NO CHANGE	2478 - 4880

*Already drilled under prior Division Order (previously designated the Exxon Corporation Yates "C" Federal No. 36).

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

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

APPLICATION OF EXXON CORPORATION FOR A WATERFLOOD PROJECT, QUALIFICATION FOR THE RECOVERED OIL TAX RATE PURSUANT TO THE "NEW MEXICO ENHANCED OIL RECOVERY ACT" FOR SAID PROJECT, AND FOR 18 NON-STANDARD OIL WELL LOCATIONS, EDDY COUNTY, NEW MEXICO.

CASE No. 11297

APPLICATION OF EXXON CORPORATION FOR STATUTORY UNITIZATION, EDDY COUNTY, NEW MEXICO.

CASE No. 11298

Order No. R-10460-A

NUNC PRO TUNC ORDER

BY THE DIVISION:

It appearing to the New Mexico Oil Conservation Division ("Division") that Order No. R-10460, dated September 18, 1995, does not correctly state the intended order of the Division.

IT IS THEREFORE ORDERED THAT:

(1) Finding Paragraph No. (29) on page 9 of said Order No. R-10460, be and the same, is hereby amended to read in its entirety as follows:

> " (29) Injection should be accomplished through lined or otherwise corrosion-resistant tubing installed in a packer set within 300 feet of the upper most injection perforation; the casing-tubing annulus in each well should be filled with an inert fluid and equipped with an approved gauge or leak-detection device. The supervisor of the Artesia District Office of the Division may authorize the setting of the casing-tubing isolation device at a shallower

depth if appropriate."

(2) Finding Paragraph No. (30), also on page 9 of said Order No. R-10460, be and the same, is hereby amended to read in its entirety as follows:

> " (30) Prior to commencing injection operations, each injection well should be pressure tested throughout the interval from the surface down to the proposed upper most perforation to assure mechanical integrity of each well."

(3) Decretory Paragraph No. (10) on page 12 of said Order No. R-10460, be and the same, is hereby amended to read in its entirety as follows:

> " (10) Injection shall be accomplished through lined or otherwise corrosion-resistant tubing installed in a packer set within 300 feet of the upper most injection perforation; the casing-tubing annulus in each well shall be filled with an inert fluid and equipped with an approved gauge or leak-detection device. The supervisor of the Artesia District Office of the Division can authorize the setting of the casing-tubing isolation device at a shallower depth if appropriate."

(4) Decretory Paragraph No. (13), also on page 12 of said Order No. R-10460, be and the same, is hereby amended to read in its entirety as follows:

> " (13) Prior to commencing injection operations, each injection well shall be pressure tested throughout the interval from the surface down to the proposed upper most perforation to assure mechanical integrity of each well."

(5) The corrections set forth in this order be entered nunc pro tunc as of September 18, 1995.

DONE at Santa Fe, New Mexico, on this 25th day of October, 1995.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

WILLIAM J. LEMAY
Director

S E A L

filing of such notice and payment of the required fees the land affected by such suit will not be subject to assignment or other disposition until such suit shall be finally determined and disposed of.

1.043 Cancellation for Default. The Commissioner may cancel any lease or assignment thereof for default upon giving the lessee or assignee notice by registered mail (certified mail if the lease so provides) of his intention to cancel, specifying the default and unless the lessee or assignee remedies the default within thirty (30) days of the mailing date, the Commissioner may cancel the lease or assignment. Proof of receipt of notice is not necessary or required before a valid cancellation may be entered.

COOPERATIVE AND UNIT AGREEMENTS

1.044 Purpose--Consent. The Commissioner may consent to and approve agreements made by lessees of State Lands for any of the purposes enumerated in Section 19-10-45 NMSA 1978.

1.045 Application--Requisites of Agreements. Formal application shall be filed with the Commissioner for approval of a cooperative or unit agreement at least twenty (20) days in advance of the New Mexico Oil Conservation Division's hearing date. The filing fee therefor shall be thirty dollars ($30.00) for each section or fractional part thereof, whether the acreage is federal, state, or privately owned. A unit agreement presented must have a unique unit name that will identify the agreement for so long as the agreement remains in effect and only under extraordinary circumstances will a unit name change be allowed after initial approval is granted. Applications for approval shall contain a statement of facts showing:

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

B. That under the proposed unit operation, the State of New Mexico will receive its fair share of the recoverable oil and gas in place under its lands in the proposed unit area.

C. That each beneficiary institution of the State of New Mexico will receive its fair and equitable share of the recoverable oil and gas under its lands within the unit area.

D. That such unit agreement is in other respects for the best interest of the trust.

1.046 Information to be Furnished. Complete geological and engineering data shall be presented with the application and the information offered for the Commissioner's action must be in clear and understandable form. Such data shall be kept confidential by the Commissioner pursuant to Section 19-1-2.1 NMSA 1978 for a period of six (6) months or until the unit agreement is approved, whichever first occurs. Then such data will be made a permanent part of the records and open for public inspection. If for any reason such proposed agreement is not approved, then at the request of the applicant, the data shall be returned to the applicant.

1.046.1 Use of Fresh Water. The use of fresh water in waterflood units is discouraged in the cases where salt water is practical. If an operator plans to use fresh water in a proposed unit, the following specific information should also be provided:

A. Laboratory analyses of water compatibility tests (fresh vs. salt water).

B. Reservoir analyses for swelling clays and soluble salts.

C. Estimate of monthly make-up water required for operations.

D. Location and depth of area salt water wells or quantities of produced water available for injection.

1.047 Decision Postponed. In any matter respecting cooperative and unit agreements, the Commissioner may postpone his decision pending action by the Oil Conservation Division and may use any information obtained by his own investigators, or obtained by the Oil Conservation Division to enable him to act properly on the matter. The applicant shall deposit with the Commissioner a sum of money estimated to be sufficient to meet the actual and necessary expenses of any investigation or inspection by representatives of the State Land Office.

1.048 Leases Conformed. When any cooperative or unit agreement has been approved by the Commissioner and executed by the lessee, the terms and provisions of the lease, so far as they apply to lands within the unit area, are automatically amended to conform to the terms and provisions of the cooperative agreement; otherwise, said terms and provisions shall remain in full force and effect.

1.049 Posting to Tract Books. In every case where a cooperative unit agreement is finally approved by the Commissioner such agreement and the application therefor shall be entered upon the tract books of the State Land Office, filed and recorded, together with any order respecting the same issued by

the New Mexico Oil Conservation Division; any modification or dissolution of such cooperative or unit agreement shall be likewise entered and filed. The fees therefor shall be those regularly charged by the State Land Office for similar services.

1.050 Assignments. No assignment of acreage under lease within any unitized or cooperative area will be approved by the Commissioner unless the assignment is subject to the provisions of the cooperative or unit agreement covering the area within which the acreage sought to be assigned lies, or unless the Commissioner and all parties to the cooperative agreement agree, in writing, that such acreage is not needed for proper cooperative operations.

1.051 Form of Agreement. No specific forms for the various types of cooperative or unit operating agreements are required; however, sample forms of agreements now in operation will be furnished for guidance upon request, if available. Agreements submitted for approval must be submitted in duplicate. At least one copy must contain original signatures, which copy, after approval of the agreement, will be retained by the Commissioner as the approved copy.

1.052 Forced Pooling--Oil Conservation Division Order:

The record owner or operator of all oil and gas leases covering the state owned lands forced pooled by order of the New Mexico Oil Conservation Division, either under 70-2-17 (gas proration unit) or under 70-7-1, NMSA (statutory unitization act for secondary recovery), shall file with the Commissioner the following information:

A. One (1) copy of application for hearing for forced pooling at least ten (10) days prior to date set for hearing.

B. State lease number, record owner and legal description of all state lands forced pooled.

C. Oil Conservation Division Order number and date.

D. Legal description and type (Federal, fee, or Indian) of all lands included in forced pooling order.

E. Location, formation, and depth of well.

F. Oil Conservation Division approved copies of forms numbered C-101, C-102, C-103, C-104, and C-105. These are to be filed at same time as filed with Oil Conservation Division.

G. Date production commenced.

H. A copy of the agreement for unit operations involving state lands approved in writing by the Oil Conservation Division, and signed by parties required by the agreement to initially pay at least seventy-five percent of unit operating costs, and by owners of at least seventy-five percent of the non-cost bearing interests such as royalties, overriding royalties and production payments.

This Rule has no application to a situation wherein all parties have voluntarily executed a communitization agreement covering all lands in a proration unit or a secondary recovery unit and such agreement has been approved by the Commissioner.

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W. THOMAS KELLAHIN*
*NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

JASON KELLAHIN (RETIRED 1991)

TELEPHONE (505) 982-4285
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January 17, 1997

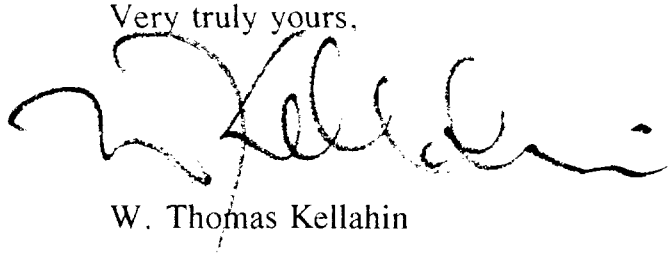
Honorable Jay W. Forbes
District Court Judge
P. O. Box 1838
Carlsbad, NM 88220

Re: CIV 96-CV-121-JWF
Premier v. Oil Conservation Commission

Dear Judge Forbes:

On behalf of Premier Oil & Gas Company, please find enclosed your copy of our Memorandum of Arguments and Legal Authority for this case. The original was filed today with the District Court Clerk.

Very truly yours,



W. Thomas Kellahin

cc w/ enclosures:

Lyn Herbert, Esq.
James Bruce, Esq.
William F. Carr, Esq.
Ken Jones
Terry Payne

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY

PREMIER OIL & GAS, INC.,

Petitioner,

vs. CIV 96-CV-121-JWF

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents.

MEMORANDUM BRIEF
OF
PREMIER OIL & GAS INC.

This matter is before the Court on Petitioner's Petition for Review of an administrative order issued by the New Mexico Oil Conservation Commission ("Commission"). Petitioner, Premier Oil & Gas, Inc. ("Premier"), seeks to have Commission Order R-10460-B entered in Cases 11297 and 11298 declared void. This order was issued by the Commission approving an application by Exxon Corporation ("Exxon") to confiscate Premier's real property rights in a State of New Mexico oil & gas lease for Tracts 1109, 1309, 1509 and 1709 (collectively "Unit Tract 6") so that it could be included in Exxon's Avalon-Delaware Unit Waterflood Project in Eddy County, New Mexico. Yates Petroleum Corporation ("Yates"), who voluntarily included its tracts in this unit, appears in support of the Commission's order.

SCOPE OF JUDICIAL REVIEW

The substantial evidence requirement has changed from a review of the evidence most favorable to the agency decision to a review of the evidence in the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). **Trujillo v. Employment Sec. Dept.**, 734 P.2d 245 (N.M. App. 1987).

In reviewing the decision of the Commission, the New Mexico Supreme Court has determined that the District Court is acting as an appellate court and the presentation of new or supplemental evidence in such appellate proceedings is not proper. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962).

In addition, the Court cannot substitute its judgment for the Commission. Instead the District Court must decide whether the Commission's findings are logical and consistent and whether its decision is reasonable, lawful and based upon the substantial evidence in the record as a whole. **Continental Oil, supra**.

Recently, the New Mexico Supreme Court in **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 835 P.2d 819 (1992) provided the following summary:

> "Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Commission**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**

> In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members.
>
> Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. **Groendyke Transport v. N.M. State Corporation Commission**, 101 N.M. 470, 684 P.2d 1135 (1984);
>
> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.
>
> An abuse of discretion will also be found when the decision is contrary to logic and reason."

The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the laws creating it. **Continental Oil, supra** at 814. The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights (Sec. 70-2-2 NMSA (1978), as amended, and also charges it with responsibility for administering the Statutory Unitization Act. (Section 70-7-1 through 21 NMSA (1978).

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588 (1975). Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962). Likewise, in Viking Petroleum v. Oil Conservation

Commission, 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in Continental Oil and Fasken, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions.

The task before this Court is to determine if the Commission's decision is reasonable, lawful and based upon substantial evidence in the record as a whole. In particular, the Court must conclude that the numbered findings of fact set forth in the Commission's order are logical and consistent with the Commission's ultimate ordering paragraphs ("conclusions") which must be reasonable and supported by substantial evidence.

ISSUES FOR REVIEW

Premier asks this Court to vacate Commission Order R-10460-B because the order was entered in violation of Premier's constitutionally guaranteed due process rights. Additionally, Premier asserts that this order is contrary to law, not supported by substantial evidence and is arbitrary, capricious and an abuse of the Commission's discretion and should be vacated because:

> *(1)* ***Commissioner Bailey should not have participated in this case:*** *Premier was entitled to present its case to a Commission composed of fact finders who had not already decided to approve the inclusion of Premier's Tract into Exxon's unit. Unfortunately, Commissioner Bailey chose to participate in this Commission case over the objection of Premier. Commissioner Bailey is also the Deputy Director of the Oil & Gas Mineral Division for the Commissioner of Public Lands. Seven months earlier she reviewed Exxon's evidence and approved Exxon's request to include the Premier tract in the unit. Despite her previous review and approval of Exxon's request to include Premier's Tract in this unit, Commissioner Bailey decided to participate in the Commission's decision of this same issue. See Rehearing Application Point V.*

*(2) **Commission failed to understand that the October 1995 test of FV3 Well was not conducted within the disputed 82 feet interval in Upper Cherry Canyon ("UCC") reservoir:** The Commission's ultimate decision is based upon erroneous findings of fact set forth in Findings (20)(a) and (20)(c). See Rehearing Application Point I.*

*(3) **The Statutory Unitization Act is Unconstitutional:** because its provides for the use of the State's police powers to allow the private confiscation and impairment of property rights.*

*(4) **Commission violated the Statutory Unitization Act:** Even if valid, the Commission failed to comply with the Statutory Unitization Act. See Rehearing Application Point VIII.*

*(5) **Commission prematurely approved a CO2 project which is speculative:** The Commission's approval of the C02 project is premature. Rehearing Application Point VI.*

*(6) **Premier tract not necessary for waterflood:** There is no substantial evidence to support including Premier's Tract 6 in the Waterflood Project. See Rehearing Application Point VII.*

*(7) **Commission mistakenly thought Premier's claim was based only upon oil in place:** The Commission's ultimate decision is based upon Findings (17) (h) and (19) (a) which are wrong and are contrary to undisputed testimony. See Rehearing Application Point II. The Commission's ultimate decision is based upon Findings (17) (h) and (20)(b) which are wrong and are contrary to undisputed testimony. See Rehearing Application Point II. and Point IV.*

*(8) **Participation formula:** Finding (20) (f) is not supported by Substantial Evidence and does not protect correlative rights. See Rehearing Application Point III.*

STATEMENT OF FACTS[1]

In July, 1990, Premier purchased a State of New Mexico oil and gas lease covering 480 acres in Section 25, T20S, R27E, which already contained three wells, including two wells which Exxon proposed to include within its proposed Avalon-Delaware Unit boundary: the FV-1 Well in the SE/4NE/4, the FV-3 Well in the SE/4SE/4.[2] On May 21, 1991, Exxon commenced plans in part of this pool to consolidate more than 2,000 acres consisting of five tracts operated by Exxon, five tracts operated by Yates and one tract operated by Premier for its proposed Avalon-Delaware Unit and announced its schedule to commence waterflood operations by June, 1992.[3] Once Exxon commenced its unitization study in 1991, no operator including Exxon, Yates or Premier, drilled any further wells pending the outcome of this unitization plan.[4]

In November, 1991, Exxon issued its first Technical Report,[5] but then chose to delay progress towards unitization until September, 1992, when Exxon circulated its second Technical Report (Exxon Exhibit 10) to the working interest owners.[6] The Exxon Technical Report was undertaken exclusively by Exxon without requesting participation or involvement by Premier.[7]

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[1] TR-I refers to the transcript of the Examiner hearing held on June 29, 1995. TR-II refers to the transcript of the Commission hearing held December 14, 1995.

[2] TR-I, Vol II, p. 244.

[3] See TR-II, Exxon Exhibit 7, Exxon Exhibit 20 (copy attached as Memorandum Exhibit A)

[4] See TR-II, Vol. I, p. 238.

[5] TR-II, Vol. II, p. 272.

[6] TR-II, Vol. II, p. 272.

[7] TR-II, Vol. I, p. 38.

Exxon's plan was to attempt to recover more oil from the Exxon and Yates's wells in part of this pool by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells all of which would be surrounded by an outer ring of 40-acre tracts "***buffer zone***" (including Premier's Tract 6 on the western unit boundary) which would not contain producing wells nor contain or be offset by water injection wells.[8]

In addition, if and when the waterflood project would be converted to CO2 injection, then part of Premier's Tract 6 would be used for CO2 injection wells to improve recovery of oil from the adjoining Yates' tracts.[9]

On November 25, 1992, David Boneau,[10] on behalf of Yates, advised Exxon that:

> (a) Yates considered the engineering work in Exxon's second Technical Report to have "cut a few corners" and expressed concern that the modeling work required that permeability be increased by a factor of two or more and "cast doubt on the shaly-sand analysis of the logs which reduced log porosity and indirectly log permeability." (TR-II: Yates Exhibit 6 (2-A).
>
> (b) Yates expressed concern that the areas outside the area where primary production has been established in the Upper Cherry Canyon ("UCC") and the Lower Brushy Canyon ("LBC") reservoirs may not be developed economically by CO2 injection. (TR-II: Yates Exhibit 6 (2-A).
>
> (c) Yates questioned Exxon's workover reserve credited to Yates' Tracts 1111, 1311, 1313, 1511 and 1513 **but** stated, "Since the assumed workover reserves benefit Yates, we are willing to believe the Exxon explanation and leave the workover reserves in the Engineering Report." (ie, Exxon Exhibit 10 part 2).

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[8] TR-II, Exxon Exhibit 27a (copy attached as Memorandum Exhibit B).

[9] TR-II, Vol I, Exxon Exhibit 28 (copy attached as Memorandum Exhibit C).

[10] See TR-II, Yates Exhibit 6, Tab 2B

On December 22, 1992, Exxon advised Yates that Exxon had increased the primary oil reserves credited to Yates Wells EP-5 (Unit E-Sec 30), Well EP-8 (Unit F-Sec 30) and C-36 (Unit A-Sec 31).[11] Then on January 7, 1993, Yates withdrew its objections about the Exxon Technical Report,[12] but continued to express concern over Exxon's estimated costs of operation, Exxon's participation formula and stated, "Exxon's voting procedures stinks." [13]

On April 8, 1994, Exxon as operator of 58.17% of the unit acreage, proposed to the potential working interest owners in this unit, including Yates with 30.50% of the unit acreage operations and Premier with 7.6% of the unit acreage operations, that this unit be formed utilizing a Participation Formula. This formula consisted of a Phase I where each tract received a credit for 62.34% of its remaining primary oil, 37.56% for its waterflood reserves including workover potential and 0% for its CO2 potential; and then a Phase II were the credits were 23.45%, 20.6375% and 55.9073% respectively.[14]

As a result of this proposed Exxon participation formula, Exxon would receive 79.71% of Phase I oil and 72.529% of Phase II oil, Yates would receive 9.837% of Phase I oil and 11.55% of Phase II oil, and Premier would receive -0- % of Phase I oil and 2.279% of Phase II oil.[15]

Exxon proposed to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary of the Avalon-

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[11] TR-II, Yates Exhibit 6, Tab 2D

[12] TR-II, Yates Exhibit 6, Tab 2D

[13] TR-I, Vol I, P. 153.

[14] TR-II, Exxon Exhibit 7 and Premier's Exhibit 9, p 41.

[15] TR-II, Exxon Exhibit 7.

Delaware Unit. Exxon did not intend to attempt to recover from those tracts any remaining primary oil or any secondary oil by waterflooding.[16]

On May 18, 1994, Premier withdrew its tracts from unit consideration and did not enter into further negotiations because it disagreed with the geology and the proposed unit boundary in the Exxon Technical Report which Exxon refused to change.[17]

On June 17, 1994, in Premier's absence, all other working interest owners agreed to consider excluding Premier's Tract 6 from the unit.[18] Yates then took the lead in developing a single phase formula which now included original oil in place.[19] On October 1, 1994, Yates and Exxon continued to consider excluding Premier's Tract 6.[20]

Dr. Boneau testifying for Yates stated, "It was only late in the negotiation process that I realized that if Premier was removed that Exxon would reduce our CO2 reserves and it would hurt us in the unit." [21] Thus, by January 18, 1995, Yates had convinced Exxon to put Premier's Tract 6 into the unit.[22] On January 18, 1995, Exxon and Yates finally agreed to a single phase Participation Formula where each tract's primary oil is credited with 25%, secondary oil and workover potential is credited with 50% and tertiary oil is credited with 25%. This revised participation formula resulted in Exxon receiving 64.79% of unit production, Yates

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[16] TR-II, Exxon Exhibit 27a.

[17] TR-II, Exxon Exhibit 7

[18] TR-II, Yates Exhibit 7, Tab 3G.

[19] TR-II, Yates Exhibit 7, Tab 3(f) p 1.

[20] TR-II, Yates Exhibit 7, Tab 3J

[21] TR-II, Vol I, p. 239.

[22] TR-II, Yates Exhibit 7, Tab 3H. attachments 1 and 2.

receiving 34.07% of unit production and Premier receiving 1.02% of unit production.[23]

On May 5, 1995, Exxon's attorney and technical witnesses met with Commissioner Jami Bailey in her capacity as the Deputy Director of the oil and gas mineral division of the office of the Commissioner of Public Lands.[24] Exxon presented a summary of its case to Ms. Bailey and requested her approval for including Premier's Tract 6 in the unit along with other State of New Mexico oil & gas leases. [25]

On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division seeking to confiscate Premier's property (Tract 6) for both the waterflood project and the CO2 project by resorting to statutory unitization, pursuant to the "Statutory Unitization Act". (Sections 70-7-1 through 70-7-21, N.M.S.A. (1978).

On May 15, 1995, Commissioner Bailey approved the inclusion of Premier's Tract 6 and the other State of New Mexico oil & gas leases into Exxon's Avalon-Delaware Unit. [26]

On June 29 and 30, 1995, the Division held a hearing on Exxon's application and on September 18, 1995, entered its order approving Exxon's request to include Premier's Tract 6 in both projects. On October 13, 1995, Premier filed an application for a DeNovo hearing before the New Mexico Oil Conservation Commission ("Commission").

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[23] TR-II, Vol. II, Premier Exhibit 9 page 32.

[24] TR-II, Exxon Exhibit 7, See copies of letters, exhibits and meeting sign-in sheet, all attached as Memorandum Exhibit D.

[25] TR-II, Exxon Exhibit 7.

[26] TR-II, Exxon Exhibit 7. (approval letter attached as Memorandum Exhibit D.

In late September, 1995, ("the October 1995 test") Premier attempted to test for oil production in its FV-3 Well in zones **other than** the UCC reservoir and produced approximately 10 BOPD until the test was terminated when Exxon disputed Premier's right to operate.[27]

On December 11, 1995, Premier wrote to Commissioner Bailey to express its concern that her past involvement prevented her from being an unbiased member of the Commission.[28] On December 13, 1995, counsel for the Commissioner of Public Lands wrote Premier and admitted that there was a conflict of interest for Commissioner Bailey to participate on the Commission at the hearing of this case but "excused" it as a legislative problem over which they had no control.[29] Counsel promised that the Commissioner of Public Lands would avoid such conflicts in the future by not having Commissioner Bailey review and decide this type of case prior to hearing. On December 14, 1995, and over the objection of Premier, Commissioner Bailey participated as a member of the Commission and decided this case against Premier.[30]

On March 12, 1996, the Commission entered Order R-10460-B which accepted Premier's geologic interpretation but then "affirmed" the Division's decision to include Premier's Tract 6 in the unit and denied all of Premier's arguments. On March 20, 1996, Premier filed its Application for Rehearing before the Commission which failed to act within the ten (10) day period and was therefore deemed denied. On April 12, 1996, Premier timely filed its appeal with the District Court.

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[27] TR-II, Vol. II, p. 291, 297.

[28] TR-II, Premier Exhibit A (copy attached as Memorandum Exhibit D).

[29] TR-II, Premier Exhibit B. (copy enclosed as Memorandum Exhibit D).

[30] TR-II, Vol. I, p 8-14.

THE EXXON-PREMIER DISPUTE

BACKGROUND:

Exxon's project is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and workover reserves by adding additional perforations in existing wells and by injecting water into the reservoir to recover more oil; and CO2 oil reserves by injecting a combination of carbon dioxide and water into the reservoir. Exxon's final formula is intended to allow each unit tract to receive 25% of its share of primary oil, 50% of its share of secondary/workover oil and 25% of its share of CO2 oil.

Exxon's plan was to determine each tract's share of the Upper Cherry Canyon ("UCC") and Upper Brushy Canyon ("UBC") reservoir in the Avalon-Delaware Oil Pool. Almost all oil reservoirs, including the UCC and UBC reservoirs, naturally contain a certain percentage of salt water (meaning "water saturation" which is expressed as "Sw"). When the concentration of salt water in the UCC reservoir is **greater than** 65% up to 90%, then the oil remaining at that point in the reservoir can only be recovered by a CO2 injection process.[31] When the concentration of salt water in the UCC reservoir is **less than 65%** then the oil can be recovered by injection of water, known as "waterflooding". (See Exxon Exhibit 10 G-20)

EXXON'S CONTENTIONS:

Exxon believed that only a portion of the Delaware formation within the Avalon-Delaware Oil Pool was suitable to waterflooding operations. That portion was confined to the Upper Cherry Canyon ("UCC") and the Upper Brushy Canyon ("UBC") reservoirs. Exxon's reason for forming the Avalon-Delaware Unit was for

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[31] TR-II, Vol I, Exxon's Exhibit 10 G-20.

a Secondary Recovery Project ("waterflooding"), while the Tertiary Recovery Project ("CO2") had only some probability of happening.

Exxon chose the central portion of the pool for waterflooding where Exxon and Yates had some 27 existing producing Delaware oil wells and disregarded waterflooding the western portion of the pool where Premier's lease is located. Arbitrarily, Exxon chose this waterflood pattern despite the undisputed fact that the western edge of the proposed unit was not the western boundary of the pool.[32]

Exxon proposed to include Premier's Tract 6 within the western boundary of the Avalon-Delaware Unit but did not intend to attempt to recover from those tracts any remaining primary oil, any workover oil or any secondary oil by waterflooding. Instead, Exxon and Yates wanted Premier's Tract 6 as a "buffer zone" so that if CO2 flooding was ever determined to be feasible, then they would use part of Premier's tract for CO2 injection wells to improve recovery from the Yates' tracts.

Exxon argued that Premier, with a 10 year oil and gas lease issued by the State of New Mexico, had forfeited its correlative rights by failing to commence production in the first five years of its 10 year lease term even though Premier still had 5 years remaining of its lease term in which to commence production from its lease. Exxon argued that the Commission, pursuant to the Statutory Unitization Act, could authorize Exxon to take Tract 6 away from Premier and to allow Exxon exclusive control over Tract 6 without further development pending the possibility of a CO2 recovery project in the future.

The first issue in dispute between Premier and Exxon was the geological pick of the base of the UCC reservoir in Premier's FV3 Well. By mis-locating the base of the UCC reservoir and deleting some 82 feet of net UCC reservoir from Premier's FV3 Well, Exxon reduced the net UCC reservoir thickness credited to Premier's FV3 Well. This allowed Exxon to contended that Premier's Tract 6 had:

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[32] TR II, Vol I, p. 227 line 23-25.

Original Oil in place:	*13,730,000 BO*	*5.53% of unit*
acres	*160 acres*	*7.55% of unit*
Remaining Primary Recovery	*-0-*	
Waterflood target oil in place:	*2,950,000 BO*	*8.29% of unit*
waterflood recovery:	*-0-*	
workover recovery:	*-0-*	
CO2 target oil in place:	*10,070,000 BO*	*5.88% of unit*
CO2 recovery:	*1,626,000 BO*	*4.08% of unit*

(See Exxon Exhibit 10 (G-19) Premier Exhibit 9 page 41).

The second issue in dispute between Premier and Exxon is the proposed unit boundary which stems from the "mispick" of the reservoir thickness in Premier's FV3 Well. Exxon believed that the UCC reservoir was ending on Premier's Tract 6 while Premier's geologic model showed the reservoir continuing farther westward beyond Premier's Tract 6. Exxon contended that the western boundary of the unit should be at the Premier Tract 6 despite the undisputed fact that the western edge of the proposed unit was not the western boundary of the pool because no apparent updip closure of structural contours existed in the north and west portions of the proposed unit. Premier's geologist contended that the UCC reservoir extended to the north and northwest of Premier's Tract 6 and therefore was significantly larger than shown by Exxon.

The third issue in dispute between Premier and Exxon was the amount of water contained in the reservoir ("water saturation") underlying Premier Tract 6. By exaggerating the amount of water contained in the reservoir at the FV3 Well so that it was greater than 60%, Exxon was able to discriminate in its Report against Premier by not giving the same primary, workover waterflood or CO2 flood reserve credits to the Premier acreage as it did to the Yates' tracts.

Exxon was able to argue that the productive limits of the UCC reservoir "ended" at Premier's Tract 6 and that Premier's Tract 6 had no waterflood target oil instead of having the 2,950,000 barrels of waterflood target oil originally calculated by Exxon. See Exxon Exhibit 10, G-24).

Exxon still had to concede that Premier's Tract 6 had 13,730,000 barrels of oil under its tract of which 10,070,000, barrels of oil could be targeted for recovery by CO2 flooding. However, in order to minimize the unit's compensation to Premier, Exxon chose to construct a pattern for its waterflood injection wells so that none of Premier's waterflood oil would be recovered and if CO2 flooding ever occurred then only 1,626,00 barrels of Premier's oil would be recovered. (See Premier Exhibit 9 page 41). Exxon's manipulations finally resulted in **crediting Premier with only 1.0192% of unit equity despite the fact that Premier's Tract 6 had 7.6% of the unit acreage and 4.16% of the total remaining reserves**. (by Exxon's calculations--See Exxon Exhibit 10 (G-19).

Premier sought to be credited with 4.52% of all unit production, because its Tract 6 had 7.6% of the unit acreage, 6.14% of the original oil in place, 6.19% of the CO2 reserves and 5.17% of the total remaining reserves (by Premier's calculation--See Premier Exhibit 9 page 49).

Even with the deletion of Premier's Tract 6, Exxon showed that its proposed unit would still recover an additional 8,269,400 barrels of oil from the pool. By Exxon's calculations, Exxon and Yates would have a total of 96.37% of the future oil to be produced with Premier only having 3.30%.[33] Still, they argued that it was essential to have Premier's Tract 6 or the "entire project would fail or be delayed for years".[34] Premier argued that excluding the Premier tract would not cause waste--the only waste issue was whether "statutory unitization" is the **proper** means by which the drilling of certain lease line CO2 injection wells could take place or whether those wells can be drilled by adoption of a cooperative lease line agreement.

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[33] TR-II, Vol II, Premier's Exhibit 9 p. 41.

[34] TR-II, Vol. I, p 207.

PREMIER'S CONTENTIONS:

Premier advised the Commission that in November, 1991, after receiving notice from Exxon of possible unitization, Premier had postponed its development plans for its lease pending the outcome of unitization commenced by Exxon. Premier urged the Commission to not deny Premier its opportunity to further develop its lease just because Exxon wanted to hold this tract without further development pending the possibility of a tertiary ("CO2") recovery project in the future. Premier asked the Commission to delete Tract 6 from the unit because as owner of all of Section 25, T20S, R27E, Premier was not going to receive any "contributing value" for primary or secondary oil, and it did not want to divide its property for Exxon's satisfaction.

Exclusion of Premier's Tract

Premier contended that Exxon's own analysis demonstrated that Premier's Tract 6 **must be excluded** from the unit because under Exxon's analysis:

(a) there is **no increase** in ultimate recovery of primary oil from the unit by including the Premier Tract 6.

(b) there is **no increase** in ultimate recovery of waterflood oil from the unit by including the Premier Tract 6.

(c) Premier's Tract 6 is included only as a "protection buffer".

(d) since recovery of oil from under Tract 6 is deferred to a CO2 recovery phase for which no commitment had been made, Exxon's implication that correlative rights would be impaired and that waste would occur if the Premier acreage were deleted from the proposed unit is groundless.

(e) since Exxon's proposed CO2 project was not supported by substantial scientific evidence and had not yet been adequately studied, it was **premature** to approve that project.

(f) at such time as firm plans are formulated for a CO2 recovery project, then the Commission could approve either (a) a lease line injection agreement with Premier and/or (b) include the Premier acreage in that CO2 project.

Premier contended that Exxon's proposed unit shape, determination of the distribution of hydrocarbon pore volume and the primary and secondary production estimates failed to provide "relative value" to Tracts 1109. 1309, 1509 and 1709 as required by Section 70-7-4(J) NMSA (1978), as amended and, unless corrected by the Commission, Premier's correlative rights would be violated.

Premier argued that Yates wanted Premier's Tract 6 included in order to shift the risk of being an edge CO2 flood tract from Yates to Premier. Contrary to the testimony of Mr. David Boneau on behalf of Yates that reserves under certain portions of Yates' acreage would remain unrecovered if the Premier acreage were deleted from the unit, Premier contended that the waterflood plan as proposed by Exxon provided no means for the recovery of any oil west of the existing Yates' wells.

Inclusion of Premier's Tract

If the Commission was to confiscate Premier's Tract 6 for the Exxon unit, then in order to comply with the Statutory Unitization Act and in order to protect Premier's correlative rights, Premier contended it was essential for the Commission to correct the following flaws in the Exxon proposal which:

(a) failed to establish a reasonable unit boundary because the horizontal and vertical limits of the unit should be farther west and should include more of Premier's lease;

(b) failed to appropriately distribute hydrocarbon pore volume with accurate corresponding reservoir parameters and did not establish the appropriate relative value to be attributed to each tract including Tract 6;

(c) Exxon's Technical Report is flawed because it incorrectly correlates the top and base of the Upper Cherry Canyon Reservoir in Premier's FV #3 Well located as (Unit Well 1709) within Premier's Tract 6 which resulted in Exxon assigning only 55 feet of net thickness to this well (instead of 137 feet) which it used to contour the various geologic maps and estimates of the ultimate hydrocarbon pore volume map to argue that Premier Tract 6 had no remaining primary oil potential;

(d) Exxon's Technical Report is flawed because it determined that based upon logged derived water saturations there are 2,320,000 barrels of waterflood target oil to be recovered from Premier's Tract 6 **but** then arbitrarily eliminated all of that incremental oil in Premier's FV3 Well by increasing the water saturation to 60% based upon water production volumes reported by Gulf which come from a source **other than the UCC reservoir;**

(e) failed to directly correlate the FV-3 Well with its direct east offset well, the WM-4 Well, and thereby made mistakes in correlation which reduced the net UCC reservoir for the FV-3 Well. (See Exxon Technical Report Exhibit C-6)

(f) failed to assign "relative value" to certain tracts because decline curve analysis concluded that an excessive amount of remaining primary oil was credited by Exxon to Yates' numbered tracts 1511, 1915, 1919, 2111, 2113 and 1917; (See Premier Exhibit 9 page 14-25)

(g) failed to submit an appropriate participation formula to allow the owners of Tract 6 to recover their proportionate share of the total remaining recoverable hydrocarbons underlying the unit;

Premier contended an additional 82 feet of net UCC reservoir must be credited to the FV3 Well, that the reservoir extended farther to the west, and that the average water saturation for Premier's FV3 Well should be 39.1% instead of the 59.9% used by Exxon.

By using the correct net thickness value and the correct value for the amount of water contained in the reservoir at the FV3 Well and by integrating that data into its hydrocarbon pore volume map (Premier Exhibit 8) and its volumetric calculations, Premier has:

Original Oil in place:	*15,350,000 BO*	*6.14% of unit*
acres	*160 acres*	*7.55% of unit*
Remaining Future Barrels:[35]	*2,712,000 BO*	*5.17% of unit*

Premier's expert geologic consultant concluded that Exxon had incorrectly correlated the log of the Premier FV #3 Well and as a result had failed to properly credit the Premier FV #3 Well with an additional 82 feet of net thickness of UCC reservoir and thereby failed to properly value the reservoir quality and quantity for Premier's Tract 6. (See Premier Exhibits 4, 4A,6, and 6A)

In addition, he prepared and submitted Premier's hydrocarbon pore volume map which established there are substantial additional recoverable oil remaining under all of Premier's oil & gas lease including Tract 6 and also showed that the UCC reservoir did not end on Premier's Tract 6.

Finally, he determined that Gulf improperly drilled and completed the FV-3 Well as a Delaware Well and created damage around the wellbore so that the fact that this well had been a poor producer did not indicate a lack of recoverable oil under tract 1709. He concluded that Premier had accurately determined that SW should be derived from log analysis and not actual water production because the actual water production from the FV-3 Well is attributed to water encroachment above the UCC reservoir.

Then by using the proper water saturation factor, Mr. Terry Payne, Premier's petroleum engineer, concluded that Premier's FV #3 Well has 2,655,000

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[35] TR-II, Vol II, p. 462 (consisting of workover reserves and CO2 reserves and without consideration of any waterflood reserves).

barrels of oil in place instead of the 1,580,000 barrels of oil in place used by Exxon. (See Premier Exhibit 9 p. 49 and Exxon's Exhibit 10 E-6.)

Based upon the Exxon Technical Report, Mr. Payne also concluded Premier's Tract 6 has 2,320,000 barrels of UCC waterflood target oil, that Yates operated tracts bordering Premier's tracts had 2,680,000 barrels of UCC waterflood target oil and **therefore** the Exxon Report is biased when it attributed "-0-" UCC workover reserves to the Premier Tract 6[36] and 646,600 UCC workover reserves to the Yates' tracts. (See Premier's Exhibit 9 page 41 and Exxon's Exhibit 10 G-19). He demonstrated that the Exxon-Yates formula caused the waterflood reserves to improperly favor both Yates and Exxon who are the working interest owners in Section 30 to the disadvantage of Premier. He testified that there were significant recoverable oil reserves underlying Premier's Tract 6 which could be recovered both by waterflooding and by carbon dioxide flooding.

Mr. Payne demonstrated that Exxon had failed to properly calculate "relative value" for waterflood target oil by including excessive workover reserve credit for Yates EP #7 Well (1111) which had an estimated workover potential of 266,600 barrels (Exxon Exhibit 10 G-19) but which had only produced 2,000 barrels to date. He concluded, therefore, these excessive reserves credited to the Yates operated tracts further biased the Exxon report in favor of Exxon and Yates who are both interest owners in the Yates operated wells in Section 30. (See Premier Exhibit 9 page 29 and Exhibits 1, 2, 3, showing the logs for the FV-3, EP-7 and EP-6).

Mr. Payne demonstrated that Premier's Tract 6 could be excluded from the unit without any reduction in ultimate recovery if the four lease line CO2 flood injection wells are drilled between Premier Tract 6 and the Yates' Tracts #3, 3b, 5a,and 5b (See Premier Exhibit 9 pages 9-12)

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[36] Mr. Payne determined that Premier's Tract 6 should have been credited with _____ barrels of workover reserves.

He further concluded that Exxon's proposed 25% and 50% flood factors for Tract 6 (Exxon Technical Report Exhibit E-7) are arbitrary because Exxon assumed that the outer ring tract's producing wells will be located in the center of each 40-acre tract when in fact those wells could be located 330 feet from the outer boundary and be assigned a 50% or 75% flood factor. He stated that Exxon should have extended the "outer ring-buffer" to include an additional column of 40-acre tracts in Section 25 in order to be consistent with Exxon's inclusion of the Exxon operated tracts in the Southeastern corner of the Unit which contain little or no waterflood target oil.

Premier's petroleum engineer concluded that because Exxon's plan projected **no increase** in recovery of oil for the unit by including the Premier Tract 6, then that tract was **not necessary** for the waterflood project. Finally, he reminded the Commission that is was **premature** to include Tract 6 for a CO2 project because the CO2 potential had not been the subject of proper scientific study to determine its feasibility and the project had not been tested by any pilot project in this pool and therefore any forecasted increase in ultimate recovery of CO2 oil from the unit by including the Premier Tract 6 was speculative.

ARGUMENT

POINT I:

COMMISSIONER BAILEY WAS DISQUALIFIED TO PARTICIPATE IN THIS CASE BY PRIOR EXPARTE DISCUSSION, BIAS AND PREJUDGMENT

At a bare minimum, in order to protect Premier's constitutionally-protected property rights and to afford Premier due process of law, the members of the Commission must be unbiased and may not have a predisposition regarding the outcome of the case. In *Santa Fe Exploration Company v. Oil Conservation*

Commission, 114 N.M. 103 (1992) the New Mexico Supreme Court applied this standard for administrative adjudications to the New Mexico Oil Conservation Commission and quoting ***Reid v. New Mexico Bd of Examiners of Optometry,*** 92 N.M. 414 (1979) stated:

> "The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him."

Unfortunately for Premier, there was bias in this case. On May 5, 1995, Exxon's attorney and certain of its technical witnesses met with Commissioner Jami Bailey in her capacity as the Deputy Director of the oil and gas mineral division of the office of the Commissioner of Public Lands at which time Exxon presented a summary of its case and requested that Ms. Bailey approve the inclusion of Tract 6 which was part of Premier's State of New Mexico oil and gas lease.[37] The purpose of this meeting was to obtain preliminary approval from Commissioner Bailey for the inclusion of all State of New Mexico Oil & Gas Leases, including Premier's tract, into the Exxon Unit. On May 15, 1995, in response to Exxon's request, Commissioner Bailey concluded that the Exxon proposal "meets the general requirements of the Commissioner of Public Lands" and in his behalf approved the Exxon request. By her actions, Commissioner Bailey engaged in precisely the activity prohibited by the New Mexico Supreme Court when she made the conscious decision to approve including Premier's Tract 6 in this unit.

Any doubt about the impropriety of her actions was removed when counsel for the Commissioner of Public Lands confirmed that, "we do recognize that parties litigating before the Oil Conservation Commission are entitled to have their constitutional rights including procedural due process, respected. As a transactional

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[37] copies attached as Memorandum Exhibit D

matter, this means that the Commissioner's designee should be free from bias and prejudgment." Further, "we will try to make sure that the Commissioner's designee has not participated in the Land Office decision or transaction that is the subject of the Oil Conservation Commission hearing."

It is of no comfort to Premier that the State Land Office plans to change its practices after this case. Premier was entitled to present its objections to the Exxon application to a fact finder who had not already decided to approve Exxon's application. ***Santa Fe,*** 114 N.M. 109. Because Commissioner Bailey' participation on this panel "taints" the ability of the remaining two Commissioners to again act in this case, Premier requests the Court to set aside the Commission order and to designate a special master to rehear this case.

POINT II:

THE COMMISSION'S ULTIMATE DECISION IS BASED UPON ERRONEOUS FINDINGS OF FACT SET FORTH IN FINDINGS (20)(a) AND (20)(c) OF ORDER R-10460-B WHICH ARE INCONSISTENT WITH UNDISPUTED TESTIMONY

The Commission failed to understand that Premier's October 1995 test of the FV3 Well was not conducted within the disputed 82 feet interval in UCC reservoir. The Commission's ultimate decision is based upon erroneous findings of fact set forth in Findings (20)(a) and (20)(c). See Rehearing Application Point I.

The first issue in dispute between Premier and Exxon is the geological pick of the base of the Upper Cherry Canyon ("UCC") reservoir in the Premier FV3 Well.

In Finding (20)(c) of Order R-10460-B, the Commission concluded that "the geological interpretation of Premier's was a more believable and scientifically sound interpretation." Mr. Stuart Hanson, Premier's expert geologic consultant, concluded that Exxon's geological interpretation **mistakenly excluded** some 82 feet of net

UCC pay from Premier's FV Well by picking the base of the UCC reservoir (at 2768 feet instead of at 2852 feet) some 82 feet too high. As a result of this mistake, Exxon had failed to properly credit the Premier Well with sufficient reservoir thickness[38]. In addition, Mr. Hanson demonstrated the geologic similarity and common depositional environment between Premier's FV3 Well and Yates' EP7 Well so that the FV3 Well should be compared to Yates' EP7 Well **and not** with Yates' ZG1 Well.[39]

Then, the Commission rejected Mr. Hanson's geology and explained that "Unfortunately, for Premier, the production results shows the additional potential pay to be uneconomic;" but in Finding (20)(a) of Order R-10460-B, the Commission inconsistently finds that a workover attempt in October, 1995 "overlies the disputed 82 feet" and that it "correlatives with uneconomic production" from the Yates ZG1 Well.

Despite this inconsistency, the Commission ultimately discounted the Premier geologic interpretation because the Commission mistakenly believed that the October 1995 test was a "workover" test of the disputed 82 feet of additional pay in the UCC reservoir.

The Commission compounds its mistakes of fact by concluding that the Premier FV3 Well is going to be uneconomic because the disputed 82 feet of pay correlates to the Yates ZG1 Well to the south which is "uneconomic". The Commission forgot that the Yates ZG1 Well is only perforated in the top 3 feet of the "disputed 82 feet interval" and therefore is not relevant to how the FV3 Well might have performed had it been properly drilled and cemented by Gulf.

The Commission has an **incorrect** understanding of the FV3 Well's history.

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[38] TR-II, Vol II, p 315, lines 14-19.

[39] TR-II, Vol II, pages 311-346, Premier Exhibits 2, 6, and 7.

The work conducted in October 1995 does not overlay the dispute 82 feet.[40] In October, 1995, Premier attempted to test its FV3 Well for oil production in Delaware intervals **other than in the disputed 82 feet in the lower UCC reservoir** in order to support its contention that it had other Delaware pay below Exxon's base of the Upper Brushy Canyon which was not accounted for in the Unit participation formula proposed by Exxon.[41]

Gulf originally completed the FV3 Well in only three zones:

Zone #1:
Location: some 900 feet below the disputed 82 feet interval
Zone #2:
Location: some 58 feet above the disputed 82 feet interval
Zone #3:
Location: some 269 feet above the disputed 82 feet interval

In October, 1995, Premier did not add additional perforations nor did it stimulate any zone. Premier removed both bridge plugs uncovering both Zones #1 and #2. Zone #2 had no pressure while Zone #1 had fluid flow up the casing due to the incomplete testing by Gulf. This Zone #1 is the "pay not accounted for in the unit production formula" because it is **below** Exxon's Upper **Brushy Canyon** base located some 900 feet below the disputed 82 feet interval in the UCC reservoir.[42] Mr. Terry Payne, a petroleum engineer, testified for Premier that the acid treatment log of Zone #2 of the Premier FV-3 Well shows that some of the water produced from the well was channeling down from an upper zone and should not be attributed to the UCC reservoir.[43] When evaluating the treatment of Zone

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[40] TR-II, Vol II, p. 302, lines 13-18.

[41] TR-II, Vol II, p. 291, lines 14-23.

[42] See Rehearing Application, Exhibits 1-A, 1-B and 1-C,

[43] TR-II, Premier Exhibit 10.

#2, the Cement Bond Log for the Premier FV3 Well confirms that the disputed 82 feet interval is protected with cement and along with the acid treatment log demonstrates that the disputed 82 feet interval remains "virgin reservoir" before and after the October 1995 test.

In terms of reservoir thickness, porosity, water saturations and therefore original oil in place, waterflood target oil and CO2 target oil, Premier's numbered tracts compare favorably to the Yates tracts (EP 5,7,8, & WM 5& 6) which Exxon credits with substantial waterflood reserves. Yet when Exxon imputes this data into its reservoir simulation program (computer model), it chose to increase the water saturation for the Premier FV3 Well from 38% to 60% and in doing so made the Premier tracts appear to have less value than comparable Yates' tracts. Exxon did this prior to receiving information from Premier concerning the water saturation data for Premier's FV3 Well and then when Exxon received the data, it refused to "redo" its report.

Three of these Yates' wells border the Premier Tract 6 (EP7,5 & WM6). Exxon's report shows UCC waterflood target oil for Premier's Tract 6 is 2,320,000 barrels while Yates adjoining tracts are credited with 2,680,00 barrels of oil.

By Exxon mislocating the UCC base, by incorrectly concluding the reservoir is ending on Premier's Tract 6, and by exaggerating the water saturation in the Premier FV3 Well, Exxon discriminates in its Report against Premier by not giving the same waterflood reserve credits to the Premier acreage as it does for the Yates' tracts.

Because the Commission agreed with but then discounted the net 82 feet disputed interval and failed to draw comparisons of the Premier acreage with the Yates acreage, the Commission made substantial errors of fact in Findings (20)(a) and (20)(c) which affected its ultimate decision in this case. Thus, the Court needs to vacate Order R-10460-B and require the Commission to correct its mistakes.

POINT III:

THE STATUTORY UNITIZATION ACT IS UNCONSTITUTIONAL BECAUSE IT PROVIDE FOR THE USE OF THE STATE'S POLICE POWERS TO ALLOW THE PRIVATE CONFISCATION AND IMPAIRMENT OF PROPERTY RIGHTS.

While Premier objects to having its property rights confiscated by the Commission pursuant to the Statutory Unitization Act, an analysis of currently available case law from other jurisdictions, indicates that this is an area in which property rights of individuals have been judicially decided to be subject to legislative determination of overriding public interest.[44]

Premier believes that its dispute is not with the Act itself but with the Commission's failure to abide by and comply with that act. Accordingly, Premier withdraws this point from its appeal.

POINT IV:

THE COMMISSION VIOLATED PREMIER'S CORRELATIVE RIGHTS BY FAILING TO COMPLY WITH THE STATUTORY UNITIZATION ACT

The Commission's use of the Statutory Unitization act violated Premier's correlative rights because the Commission approved Exxon proposal to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary the Avalon-Delaware Unit despite the fact that Exxon

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[44] See Romanov, "Statutory Unitization", Paper No. 12, (Rocky Mt. Min. L. Fdn. 1985). This subject has not been decided by the New Mexico Supreme Court.

did not intend to attempt to recovery from those tracts any remaining primary oil or any secondary oil by waterflooding. Exxon sought to combine two separate projects into one statutory unitization effort rather than initially establishing a waterflood unit and later, if appropriate, expanding that project to include Tract 6 when CO2 flooding was demonstrated to be practicable.

Exxon's geologic interpretation along with Exxon's volumetric calculations of original oil in place established the "relative value" of Premier's Tract 6 on the western boundary of the reservoir as follows:

Original oil in place:	13,730,000 BO
Remaining Primary Oil in place:	-0-
Waterflood Target Oil in place:	2,950,000 BO
Workover Target Oil in place:	-0-
CO2 Target Oil in place:	10,070,000 BO

See Exxon Exhibit 10 Vol 1 Exhibit E-6 (G-19).

Based upon its analysis of Premier's FV #3 Well, Exxon further argued that Premier's Tract 6 had no potential for waterflood target oil and only 1.626 million barrels of CO2 target oil by applying a weighted factor of 50% and 25% to Tract 6.[45]

The Commission adopted Exxon's unit participation formula predicated upon the intention to allow each tract to recover its percentage of remaining primary oil, its percentage of secondary oil and workover oil potential and its percentage of tertiary oil potential by a weighted formula of 25% primary, 50% secondary/ workover and 25% tertiary. The result, however, is to give 1.0192% of all unit production to Tract 6 operated by Premier despite the fact that Exxon said Tract 6 has 7.6% of the unit acreage and 4.16% of the total remaining reserves[46]. Such a

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[45] TR-II, Vol 1, Exxon's Exhibit 10, E-6 and E-7

[46] TR-II, Vol I, Exxon Exhibit 10, G-19.

participation formula does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis. Such a result violates the Statutory Unitization Act.

The Commission in Finding (20)(f) refused Premier's request that the Commission determine "relative value" from the evidence introduced at the hearing and instead has approved the Exxon participation formula as "fair" despite the following evidence:

> (a) Reserves are established for the unit by utilizing Exhibit G-19 of the Exxon's August 1992 Technical Report (as amended by G-24) in which Premier's Tract 6 is assigned "0" remaining primary recovery, "0" workover reserves, "0" waterflood reserves and 1,626.0 MSTBO CO2 reserves; and
>
> (b) Exxon proposes to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary of the Avalon Unit but does not intend to attempt to recover from those tracts any remaining primary oil, any workover oil or any secondary oil by waterflooding.

As much as the Commission may have wanted to avoid the difficult task of determining relative value, it is no excuse to accept the Exxon participation formula when it is based upon an albeit expensive and time consuming but still fatally flawed technical report. Mr. Terry Payne, Premier's expert petroleum engineering witness, based upon Exxon's Technical Report dated August 1992, concluded that:

> 1. Exxon failed to use traditional participation parameters including original oil in place which were adopted by the Division for use in the Parkway Delaware Unit (NMOCD Case 10619).
>
> 2. The Exxon-Yates participation formula was flawed because it assigns waterflood percentages based upon numbers assigned to tracts which are not adjusted for geological changes.
>
> 3. The Exxon-Yates participation formula was flawed because it failed to allocate the total unit waterflood reserves equitably among the tracts:

Operator	Waterflood percent	assigned percentage
Premier	8.29%	-0-%
Exxon	41.09%	59.71%
Yates	49.63%	40.29%
MWJ	1.07%	-0-%

(See Premier Exhibit 9 page 4)

4. The Exxon-Yates participation formula was flawed because it failed to allocate the total unit CO2 flood reserves equitably among the tracts:

Operator	CO2 flood percent	assigned percentage
Premier	5.88%	4.08%
Exxon	56.49%	60.26%
Yates	36.01%	35.25%
MWJ	1.62%	0.42%

(See Premier Exhibit 9 page 6)

The Commission attempted to excuse this inequity by arguing that the Exxon participation formula is "fair" because Premier will receive income from the start of the unit even though Premier's acreage will provide no benefit to the unit until the CO2 project. The Commission ignored the statutory definition of "fairness":

Section 70-2-33(H) NMSA of the Oil and Gas Act defines Correlative Rights as "...the opportunity afforded, as far as it is practicable to do so, to the owners 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, 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 or gas or both under the property bears to the total recoverable oil or gas or both in the pool and for such purpose, to use his just and equitable share of the reservoir energy;"

The Commission has allowed Exxon to confiscate Premier's property rights in this oil & gas lease and has failed to, "determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts

in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area." (emphasis added--See Section 70-7-6(B) NMSA 1978). Section 70-7-6(B) NMSA of the Statutory Unitization Act states:

> "If the Division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis, the Division shall determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.Section 70-7-4 (J) NMSA of the Statutory Unitization Act says "relative value" means the value of each separately owned tract for oil and gas 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 likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating or pricing facts, as may be reasonably susceptible of determination.

Section 70-7-7 NMSA of the Statutory Unitization Act provides that the Division has the authority and obligation to approve or prescribe a plan or unit agreement for unit operation which **shall include**:

> "A. ....area of the pool or part of the pool to be operated as a unit and the vertical limits to be included,...."
>
> "C. an allocation to the separately owned tracts in the unit area of all the oil and gas that is produced from the unit area..."

The failure of the Commission to comply with the Statutory Unitization Act is illustrated by Mr. Terry Payne's comparison of the following three options:

USING THE EXXON GEOLOGIC AND EXXON FORMULA the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage
Premier	3.30%	1.02%
Exxon	60.63%	64.79%
Yates	35.74%	34.07%
MWJ	0.34%	0.12%

(See Premier Exhibit 9 pages 32-35)

USING THE EXXON GEOLOGY but SUBSTITUTING PREMIER'S PROPOSED FORMULA, the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage of future production
Premier	3.03%	3.42%
Exxon	60.63%	59.28%
Yates	35.74%	36.20%
MWJ	0.34%	1.09%

(See Premier Exhibit 9 page 41)

USING PREMIER'S GEOLOGY and SUBSTITUTING PREMIER'S PROPOSED FORMULA, the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage of future production
Premier	5.17%	4.52%
Exxon	57.80%	58.29%
Yates	36.70%	36.10%
MWJ	0.32%	1.08%

(See Premier Exhibit 9 page 49)

Mr. Terry Payne concluded that of the above three options, the Premier geology and participation formula is fair because:

(i) it uses more traditional parameters like those adopted for Parkway Delaware Unit while the Exxon proposal does not;

(ii) it allocates the total unit future oil production equitable among the tracts while the Exxon participation formula is flawed because it fails to do so.

The Commission should have approved the waterflood unit **but excluded** the Premier Tract from the waterflood project because under Exxon's proposal the Premier Tract will make no contributing value to the waterflood and should not receive any compensating value.

POINT V:

THE COMMISSION PREMATURELY APPROVED EXXON'S CO2 PROJECT WHICH IS SPECULATIVE AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commission has prematurely approved a Tertiary CO2 Project. Exxon testified that "waterflooding" is the reason for the Unit, while the Tertiary Recovery Project ("CO2") had only some probability of happening/not happening.

It is undisputed that Exxon intended to institute a Secondary Recovery Project for recovery of oil by waterflooding only an interior portion of the unit which would be surrounded by an outer ring of 40-acre tracts which will not contain producing wells nor contain or be offset by injection wells.

Exxon proposed possibly at an undetermined time in the future to convert the Secondary Recovery Project to a Tertiary Recovery Project by expanding the original waterflood project area by drilling 18 CO2 injection wells, 18 new producing wells, and commencing the injection of carbon dioxide ("CO2") at which point the outer ring tracts (including Tract 6) will contain producing and adjacent

injection wells. But Exxon proposed to extend the CO2 injection in such a pattern so as to flood only 25% of Tract 1109 and 50% of the balance of Premier's tracts thereby reducing Premier's share of tertiary ("CO2 target") oil recovery by a factor of 25% to 50%.

It is of particular concern to Premier that Exxon's uses the same reservoir simulation model for both the waterflood project and the CO2 project which results in "equal value" for both projects, yet chose in its participation formula to credit 50% to waterflood target oil and only 25% to CO2 target oil. The Commission criticized Premier for giving equal value to the waterflood and the CO2 projects yet overlooked the fact that Exxon's own technical report did exactly the same thing.

The Commission's approval of the CO2 project is **premature**. Exxon's analysis of the CO2 potential is based solely on a waterflood model and therefore is speculative and has not been the subject of any scientific study to determine its feasibility and therefore any forecasted increase in ultimate recovery of tertiary oil from the unit by including the Premier Tract 6 is speculative.

At such time as firm plans are formulated for a tertiary recovery project, then Exxon should return to the Commission for either (a) a lease line injection agreement with Premier and/or (b) including the Premier acreage in the CO2 project.

POINT VI:

PREMIER'S TRACT IS NOT NECESSARY FOR THE WATERFLOOD-THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT INCLUDING PREMIER'S TRACT

Exxon argues that there is **no increase** in ultimate recovery of secondary oil from the unit by including the Premier Tract 6. Exxon argues that Premier "failed to prove additional recoverable reserves, leaving only the risky potential of CO2 flooding." (TR-II, p 522). Contrary to its arguments, Exxon's own engineer analysis shows that numbered tract 1309 of Premier's Tract 6 should have been credited with 176,511 barrels of recoverable waterflood reserves. Yet, Exxon chose to mislead the Commission by placing all of those waterflood reserves for that tract into the CO2 reserves. If Premier's acreage had properly been credited with waterflood reserves, then Premier had over 7.25% of the remaining recoverable oil.[47]

Under the Exxon analysis the inclusion of the Premier Tract 6 is **not necessary** in order to effectively carry on the Secondary Recovery Project. Exxon's Secondary Recovery Plan provides no means for the recovery of any oil west of the existing Yates' wells.

Exxon, who operates or owns working interests in all tracts (except Tracts 6, 7, and 8), seeks to include the Premier Tract 6 only as a "protection buffer" and contrary to the Statutory Unitization Act, assigned no "contributing value" for secondary oil recovery. (See Section 70-7-4(J) NMSA 1978).

Since recovery of any such oil is thereby deferred to a tertiary recovery phase for which no commitment has been made, the implication that correlative rights would be impaired and that waste would occur if the Premier acreage were deleted from the proposed unit is groundless.

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[47] TR-II, Vol I, Exxon Exhibit 7, see table attached to Exxon letter dated October 28, 1992

POINT VII:

THE COMMISSION'S ULTIMATE DECISION IS BASED UPON FINDINGS (17)(h) AND (19)(a), AND 20(b) WHICH ARE WRONG AND ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ADOPTS ARBITRARY AND CAPRICIOUS REASONS TO SUPPORT ITS REJECTION OF PRIMER'S ENGINEERING EVIDENCE

The Commission mistakenly thought Premier's claim was based only upon oil in place. The Commission's ultimate decision is based upon Findings (17)(h), (19)(a) and (20)(b) which are wrong and are contrary to undisputed testimony. See Rehearing Application Point II and Point IV. At the Commission hearing, Mr. Terry Payne, a consulting petroleum engineer, who correctly analyzed the Exxon Technical Report, DID NOT equate waterflood target oil-in-place with incremental recoverable waterflood oil reserves. Both Mr. Payne testifying for Premier and Mr. Gilbert Beuhler testifying for Exxon agreed on the engineering method by which to calculate recoverable reserves based upon volumetric calculations of original oil in place and by incorporating recovery factors and sweep efficiencies.

However, in Findings (17)(h) and (19)(a), the Commission erroneously mis-characterized Premier's petroleum engineering testimony when it described his testimony as equating waterflood target reserves with waterflood target oil in place and then unfairly dismissed Premier's claim because it "excluded recovery efficiency."

In Finding (19)(g), the Commission finds that Premier's proposed participation formula was based upon 50% on original oil in place with the remaining 50% attributed to actual recoveries. Then in Finding (20)(b), the Commission finds that Premier's arguments and proposed participation formula is limited to oil-in-place calculations. These two findings are inconsistence and

mutually exclusive. Finding (20)(b) is factually wrong. Premier's arguments and proposed participation formula is not "limited to oil-in-place calculations." **BOTH Exxon and Premier arguments** are founded in original oil in place calculations.

The mistakes in Findings (17)(h) and (19)(a) formed the basis for the Commission to reach the wrong conclusion in Finding (20)(b) when it incorrectly finds that "Premier's arguments and proposed participation formula is limited to oil-in-place calculations. In fact **both** Exxon and Premier's proposed formula are based **in part** on oil-in place calculation **while neither** is limited only to oil in place calculation. The Commission has made mistakes of fact which have affected its ultimate decision in this case.

POINT VIII:

FINDINGS (20)(f) IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND EXXON'S PARTICIPATION FORMULA WILL NOT PROTECT CORRELATIVE RIGHTS

Exxon's participation formula adopted Finding (20) (f) is not supported by substantial evidence and does not protect correlative rights. See Rehearing Application Point III. Contrary to Finding (20)(f) of Order R-10460-B, Exxon's Unit participation formula does not protect correlative rights. The Commission should have remembered that Mr. Payne used Exxon's own Technical Report and demonstrated that the Exxon-Yates participation formula is flawed because it failed to allocate the total unit waterflood reserves equitably among the tracts:

Operator	Waterflood target	Assigned percentage
Premier	8.29%	-0-%
Exxon	41.09%	59.71%
Yates	49.63%	40.29%
MWJ	1.07%	-0-%

(See Premier Exhibit 9 page 4)

Exxon's proposed 50% flood factors for Tract 6 (Exxon Technical Report Exhibit E-7) are arbitrary because they assume that the outer ring tract's producing wells will be located in the center of each 40-acre tract when in fact those wells could be located 330 feet from the outer boundary and be assigned a 75% flood factor without adversely affecting flood efficiency.

Premier's Tract 6 can be excluded from the unit without any reduction in ultimate recovery if the four lease line CO2 flood injection wells are drilled between Premier Tract 6 and the Yates' Tracts #3, 3b, 5a,and 5b (See Premier Exhibit 9 pages 9-12). Furthermore, Premier will have the ability to flood part of its lease that is being excluded from the Exxon Avalon (Delaware) Unit.

CONCLUSIONS

The confiscation of Premier's property by the State of New Mexico is permitted in very limited circumstances and upon very specific terms and conditions set forth in New Mexico's Statutory Unitization Act. Premier's property cannot be confiscate simply because Exxon spent a lot of time and money on that effort. It cannot be confiscated by Exxon simply because Premier is not yet currently producing oil from the UCC reservoir. The flaws in Exxon's technical report where brought to Exxon's attention by both Yates and Premier. Exxon changed its formula to accommodate Yates but chose to reject Premier's evidence and argued that it was now too late and too expensive to change either the technical report or the formula.

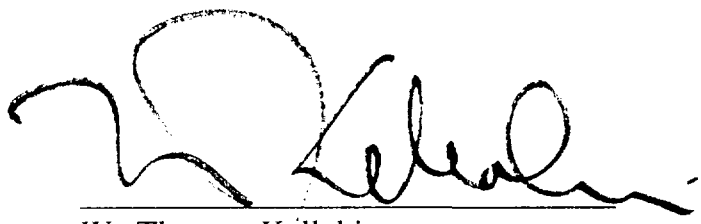
Exxon has admitted that it does not need Premier's tract for the waterflood project. Yet, the Commission has authorized Exxon to take Premier's Tract 6 for the waterflood project.

The Commission's excuse for taking Premier's tract is that the tract is necessary in order to maximize the recovery from the Yates' tracts **if and when** the waterflood project is expanded and converted to a CO2 recovery project. In doing so Premier has not been adequately compensated but has had a portion of its property taken for the benefit of Exxon and Yates. The Commission has failed to comply with the Statutory Unitization Act.

The Commission's order is tainted by the participation of a Commissioner who was biased. By that participation, Premier was denied its opportunity to have this matter heard by an impartial Commission.

Premier request's that the Court set aside this Commission decision.

Respectfully submitted,



W. Thomas Kellahin
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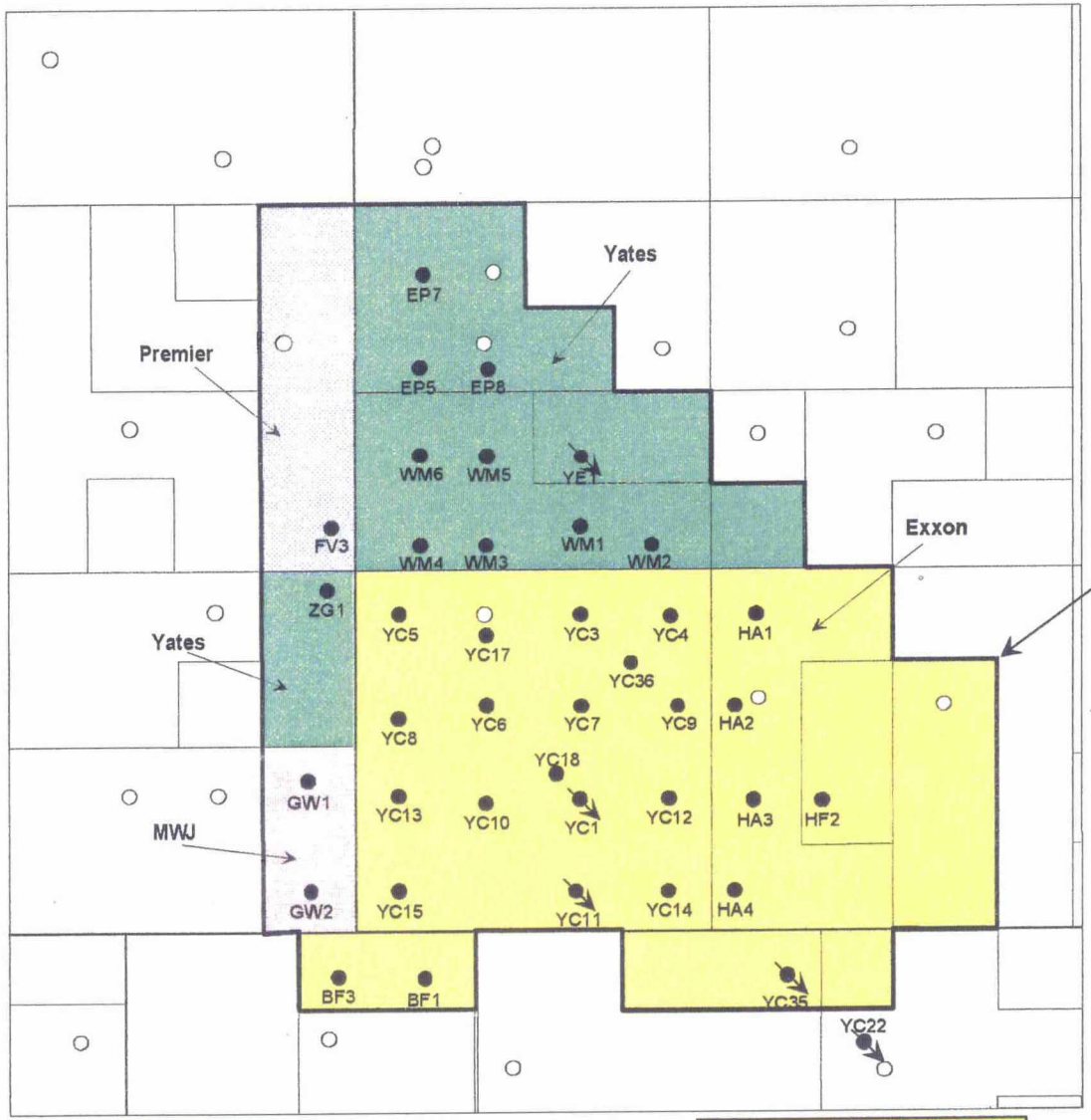
AVALON (DELAWARE) UNIT

BASE MAP



Note: See Map 1, Technical Report for lease/well designations

EXHIBIT
A

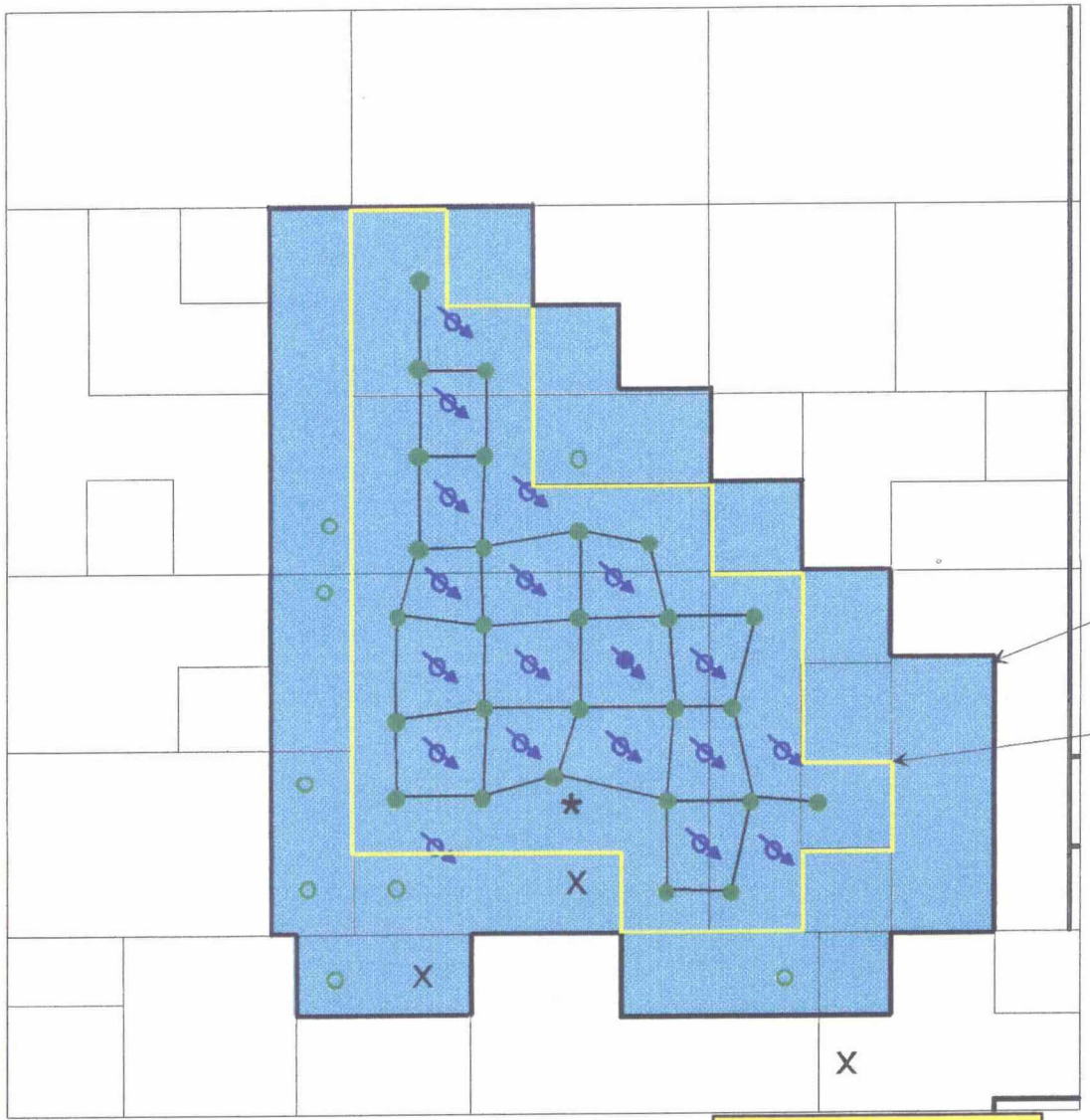
Exhibit No. 20
Exxon Corporation
NMOCD Cases 11297 & 11298
Hearing Date December 14, 1995

NMOCD Hearing

Order No. R-10460

AVALON (DELAWARE) UNIT

WATERFLOOD PROJECT AREA



WELL SYMBOL LEGEND

- Oil Well
- Injector (Conversion)
- Injector (Proposed)
- X Water Source Well
- Well for Future Use
- * Disposal Well

Proposed Unit Area Outline

Waterflood Project Area Outline

N

EXHIBIT B

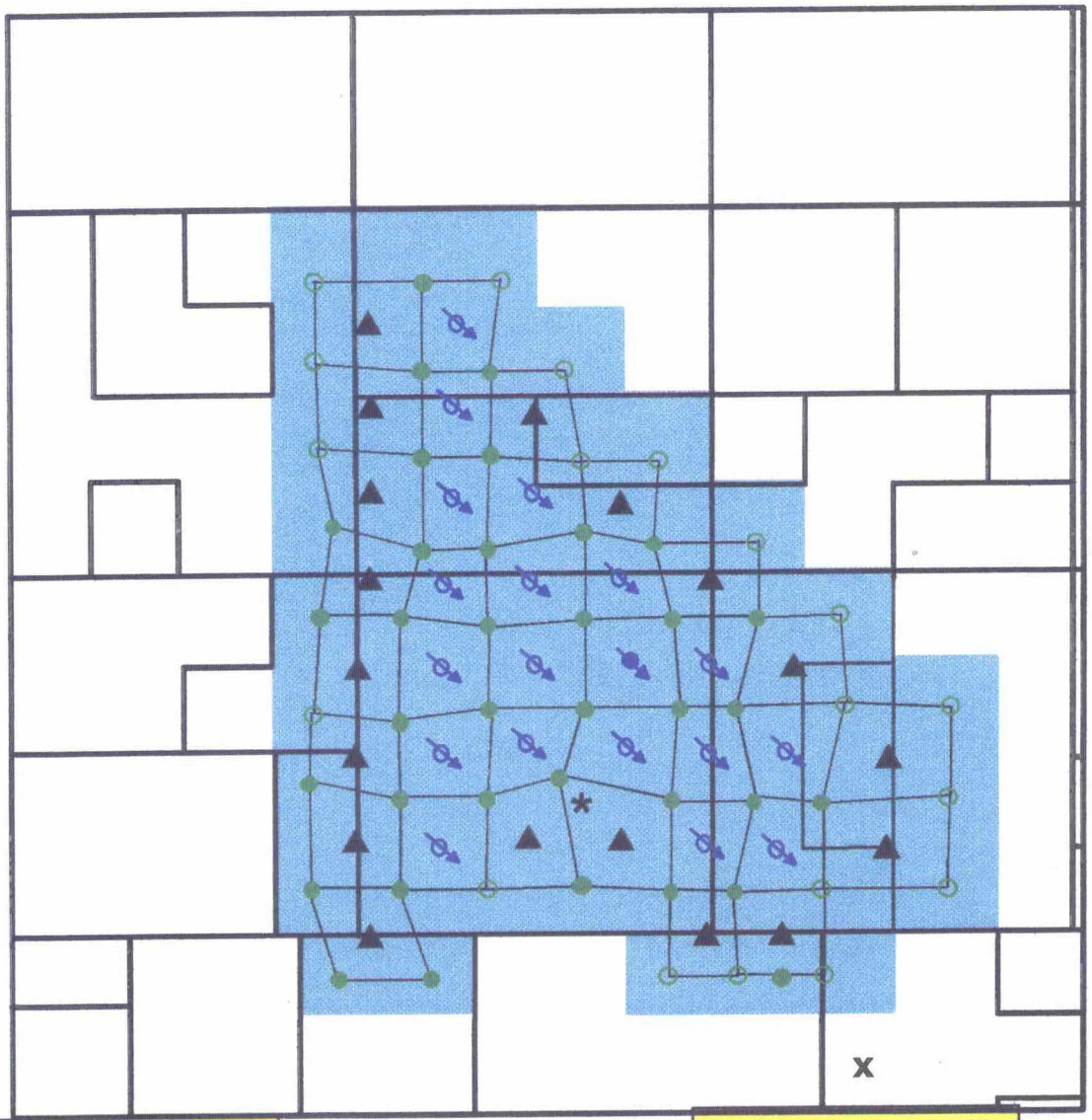
NMOCD Hearing

Order No. R-10460

Exhibit No. 27a
Exxon Corporation
NMOCD Cases 11297 & 11298
Hearing Date December 14, 1995

AVALON (DELAWARE) UNIT

POTENTIAL DEVELOPMENT PLAN: CO_2 FLOOD



- **Scope**
  - 37 patterns, 2100 acres expanding into outer ring
  - Earliest start 1999
- **Issues**
  - Attain miscibility pressure and reduce gas saturation: 3+ years
  - CO_2 injectivity test
  - Oil price

WELL SYMBOL LEGEND

- Oil Well
- Oil Well (Proposed for CO2 Flood)
- Water Phase Injector (Conversion)
- Water Phase Injector (Proposed)
- CO2 Phase Injector (Proposed for CO2 Flood)
- Water Source Well
- Disposal Well

EXHIBIT C

Exhibit No. 28
Exxon Corporation
NMOCD Cases 11297 & 11298
Hearing Date December 14, 1995

NMOCD Hearing

Order No. R-10460

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ATTORNEYS AT LAW
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JASON KELLAHIN (RETIRED 1991)

TELEPHONE (505) 982-4285
TELEFAX (505) 982-2047

December 11, 1995

HAND DELIVERED

Mrs. Jamie Bailey
Office of the Commissioner of Public Lands
State Land Office Building
310 Old Santa Fe Trail
Santa Fe, New Mexico 87501

Re: NMOCD Cases 11297 and 11298
Application of Exxon Corporation for Waterflood Project,
Carbon Dioxide Project and Statutory Unitization
Avalon-Delaware Unit, Eddy County, New Mexico

Dear Mrs. Bailey:

On December 14, 1995, the New Mexico Oil Conservation Commission is scheduled to hearing the subject case which involves Exxon's desire to include State of New Mexico Oil & Gas Lease No. K-6527-1 (E/2E/2 of Section 25, T20S, R27E) in both its proposed waterflood project and its carbon dioxide flood project.

My client is Premier Oil & Gas Inc. who is the current lessee of this lease and who is opposed to its inclusion in the unit.

I am aware that your responsibilities as an employee of the Commissioner of Public Lands ("Land Office") have involved gathering information and making recommendations concerning whether it is in the best interests of the Land Office to include certain State of New Mexico oil & gas leases in units such as this.

While I have the greatest respect for your expertise and your professionalism, I am concerned that your responsibilities to the Land Office this particular case have created a conflict of interest which would preclude you from participating as a member of the Oil Conservation Commission.

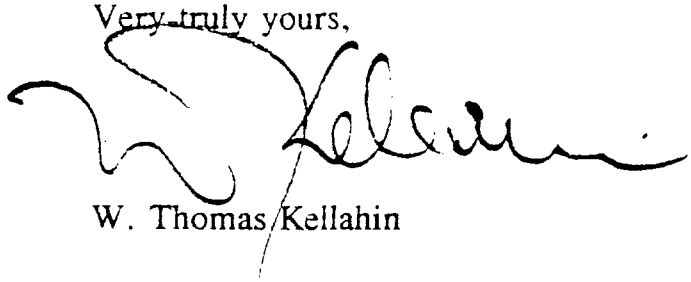
EXHIBIT
D

BEFORE THE
OIL CONSERVATION COMMISSION
Case No. 11298 DeNovo Exhibit No. A
Submitted By:
PREMIER OIL & GAS INC.
Hearing Date: December 14, 1995

The Land Office has already granted preliminary approval of this unit which includes the disputed tract. Should you ultimately decide in favor of my client, then your actions would be contrary to the decision made by the Land Office.

I would appreciate knowing (a) if you have any reservations about participating in this case, and (b) if you have had any personal involvement on behalf of the Land Office with this unitization effort by Exxon. If so, can you ignore that past involvement and decide this case regardless of the affect that decision might have upon the Land Office and its prior approval to include this tract in this unit.

Very truly yours,



W. Thomas Kellahin

cc: Ken Jones (Premier)
cc: William J. LeMay (Chairman-OCC)
cc: Jim Bruce, Esq. (Exxon)
cc: William F. Carr, Esq. (Yates)

State of New Mexico
Commissioner of Public Lands

RAY POWELL, M.S., D.V.M.
COMMISSIONER

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

Legal Division
(505) 827-5713
Fax (505) 827-5853

December 13, 1995

VIA FACSIMILE & U.S. MAIL

W. Thomas Kellahin, Esq.
Kellahin & Kellahin
117 North Guadalupe
P.O. Box 2265
Santa Fe, NM 87504-2265

Re: NMOCD cases 11297 and 11298, Application of Exxon Corporation for Waterflood Project, Carbon Dioxide Project and Statutory Unitization Avalon-Delaware Unit, Eddy County, New Mexico

Dear Mr. Kellahin:

Your letter of December 11, 1995 to Jami Bailey has been referred to me for reply. In your letter you raise certain questions about Ms. Bailey's participation in a State Land Office decision to approve this particular Unit. You are concerned that her participation may have created a conflict of interest precluding her from sitting on the Oil Conservation Commission as the Commissioner of Public Lands' designee. See Sec. 70-2-4 NMSA 1978.

We share your concern that procedural due process of law be accorded parties appearing before this agency and any others on which a designee of the Commissioner sits. We are mindful of our responsibilities to the public in this regard. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 NM 103 (S.Ct. 1992).

In this instance Ms. Bailey and I are satisfied that she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality. In response to the first two questions you pose in your letter, Ms. Bailey has no reservations about participating in this case. Any decision she may make as the Commissioner's designee will be based on the evidence in the record of the case. She had very little personal involvement in the Land Office process concerning this particular unitization. She attended one meeting internally and as a formality signed a letter of preliminary approval prepared by staff. The documents

BEFORE THE
OIL CONSERVATION COMMISSION
Case No.11298 DeNovo Exhibit No. B
Submitted By:
PREMIER OIL & GAS INC.
Hearing Date: December 14, 1995

concerning the unitization in question are, of course, public records and you are free to examine them if you wish. In that event please call me at 827-5715 to arrange a time for you to inspect the documents.

Your letter is the first occasion that this particular conflict of interest question has come to my attention. As you may know, I have been general counsel here for a relatively short time, and I am continually discovering new areas requiring legal attention. This is one of them.

It seems to me that the Legislature created a statutory conflict of interest, or at least a potential one, when it provided for the Commissioner to participate as a member of the Oil Conservation Commission under Sec. 70-2-4 NMSA 1978. It seems to me that the Legislature was concerned enough for the welfare and protection of public lands that, as a secondary consequence of its action, it created this form of institutional conflict. One of the purposes of having the Commissioner of Public Lands or his designee on the Oil Conservation Commission is to look after the interests of public land trust beneficiaries. There is nothing, of course, that the Land Office can do about this legislative framework.

At the same time, however, as we stated earlier, we do recognize that parties litigating before the Oil Conservation Commission are entitled to have their constitutional rights, including procedural due process, respected. As a transactional matter, this means that the Commissioner's designee should be free from bias and prejudgment. We are satisfied that such is the case with Ms. Bailey in this case. In addition, as to the future, we will try to make sure that the Commissioner's designee has not participated in the Land Office decision or transaction that is the subject of the Oil Conservation Commission hearing. The issues before the Land Office may be different from the questions before the Commission, which would mean that participating in a Land Office decision would not preclude a designee from hearing a different issue, albeit arising out of the same facts, before a different administrative body. We haven't researched this issue at this point, partly in the interest of turning around your letter request as soon as possible. We understand that you have a hearing in this matter before the Oil Conservation Commission tomorrow and we would not want to delay that by our review. In any case, we think it is the wiser choice for the Land Office to simply avoid any transactional conflict whenever it can by making sure the Commissioner's designee has not worked directly on the matter before the Commission.

If there is anything further we can do for you on this matter, please give me a call.

Sincerely,

Jan Unna
General Counsel

JU/jc

cc: Jami Bailey
Rand Carroll, Esq.

STATE LAND OFFICE

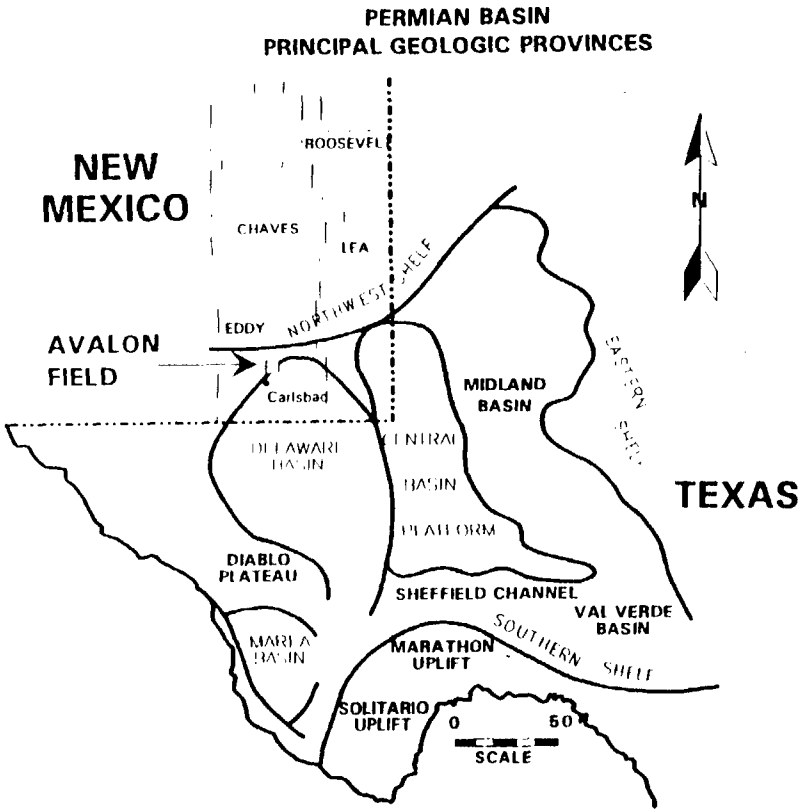
MEETING RE AUSTLOX (DELAWARE) UNIT

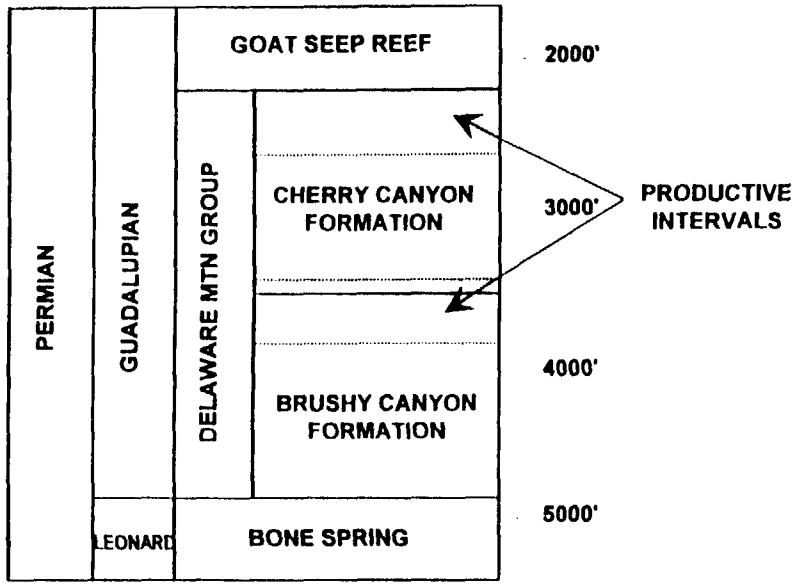
JOE B THOMAS	(915) 688-7162	EXXON
Ron Mayden	" 688-7841	Exxon
Bill Duncan	" 688-6174	"
Jeff Albers	505 827-5759	SLO
Janet Richardson	505-748-1471	Yates Petroleum
JAMI BAILEY	505-827-5745	SLO
PETE MARTINEZ	505-827-5791	SLO
ELAINE [illegible]	[illegible]	SLO
CHARLES D. ENGELKE	827-5880	OSC
DAVE BONEAU	505-748-1471	YATES PETROLEUM
Jim Bruce	505-982-4554	Exxon (Hinkle Firm)
Scott Lansdown	915-688-4982	Exxon

AGENDA

Topic	Presenter	Time, Min
Geology	Ron Mayhew	5
Reserves and Development Plan	Ron Mayhew	5
Investments	Ron Mayhew	5
Equity	Ron Mayhew	10
Unit Agreement	Joe Thomas - Land & UA Committee Lead Bill Duncan - UA Committee Scott Lansdown - UA Committee	30
Closing	Ron Mayhew	5
		60

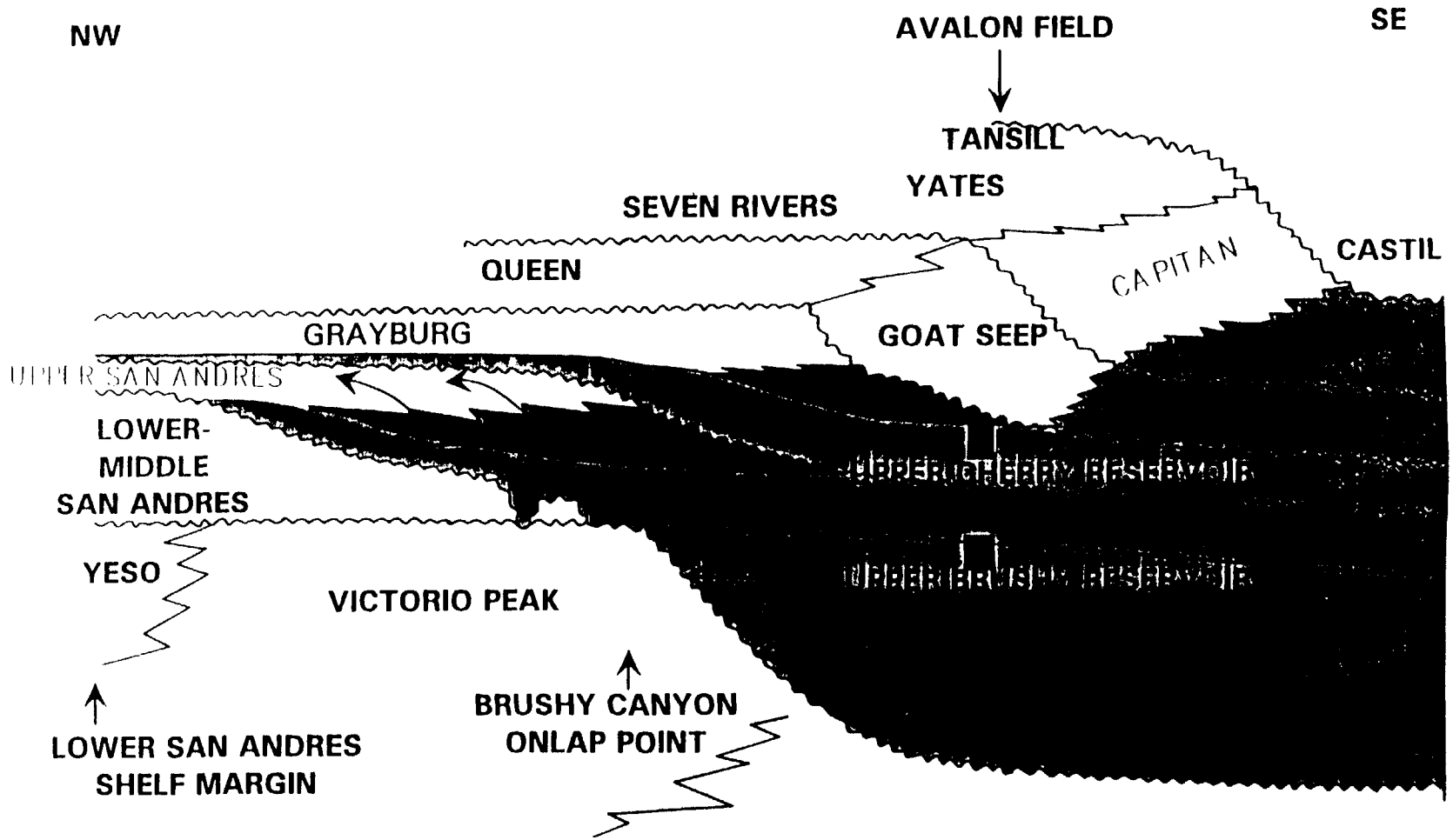
GEOLOGIC OVERVIEW





RESERVOIR DESCRIPTION		
PRODUCING FORMATION	UPPER CHERRY CANYON	LOWER CHERRY CANYON/ UPPER BRUSHY CANYON
DEPTH	2600 FT	3400 FT
RESERVOIR LITHOLOGIES	SAND	SAND & SILTSTONE
NET THICKNESS (PAY)	132 FT	272 FT
AVERAGE Φ	14.4%	14.9%
AVERAGE K	2.3 md	1.1 md

STRATIGRAPHY



GEOLOGIC MODEL DATABASE AND RESULTS

- **Database**
  - Extensive outcrop studies conducted by Exxon and academia in Guadalupe and Delaware Mountains 60 miles south
  - Published seismic line 6 miles north
  - Avalon geologic model
    - 4 cored wells
    - 71 wells with modern-vintage digital log data
      - + GR, CNL/LDT and DLL/MSFL logs
      - + study area approx 16 sections, Unit 3 sections
    - 35 wells with mudlog data
    - 13 wells with dipmeter information
    - Production data from 32 wells

- **Results & Validation**
  - Developed integrated sequence-keyed stratigraphic framework describing reservoir architecture and geometry
  - Developed reservoir models describing reservoir quality and fluid distribution
  - Validated these models with:
    - core
    - mudlog data
    - production data
      - + 33 well tests
      - + saturations derived from fractonal flow were within 2% of log derived saturations

- **Technical Reviews**
  - Depositional model reviewed by Deep Water Reservoir Study experts
  - Geologic and reservoir models reviewed with Exxon Production Research

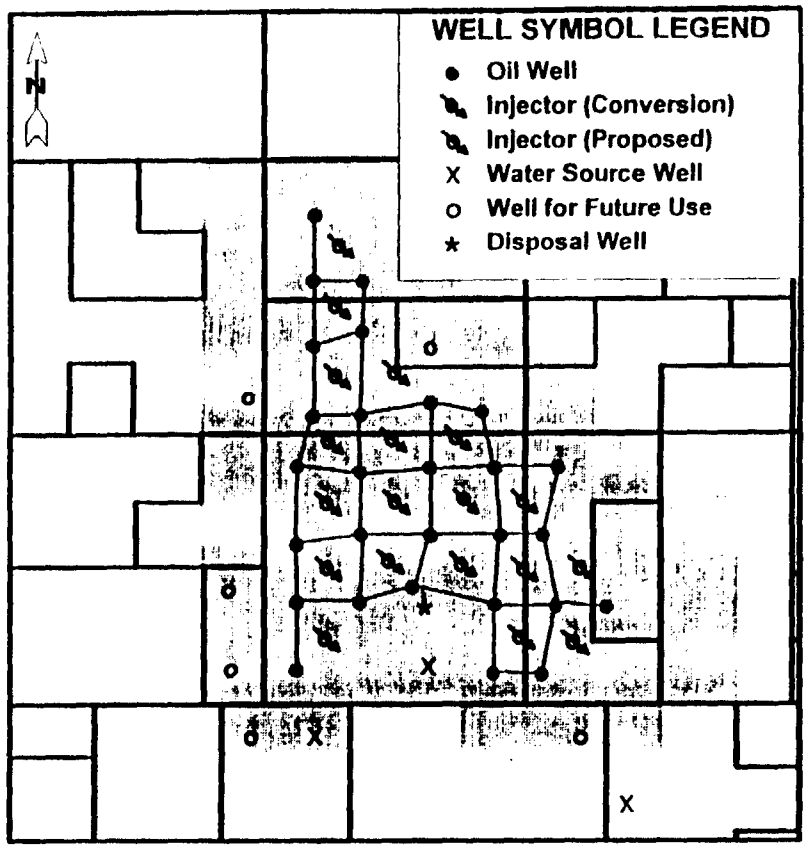
DEVELOPMENT PLAN: WATERFLOOD

- **Reserves**

	Primary	Secondary	CO_2
Incremental Estimated Ultimate Recovery, MMBO	4.2*	8.3	39.9
Cumulative EUR (% OOIP)	4.9	15.5	30.6

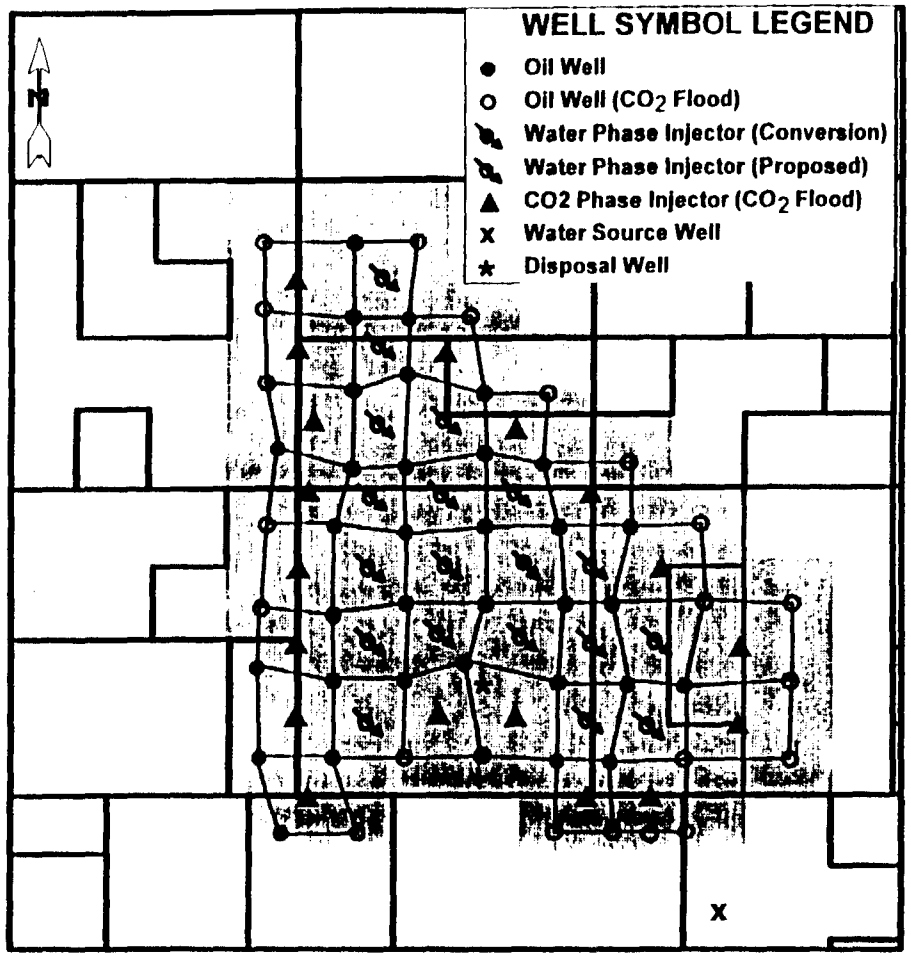
*Note: About 3.5 MMBO have been produced

- **Scope**
  - 40-year life
  - 19 water injection patterns, 1100 acres in developed area
  - 18 injector drillwells/1 conversion
  - Water treating and injection facility



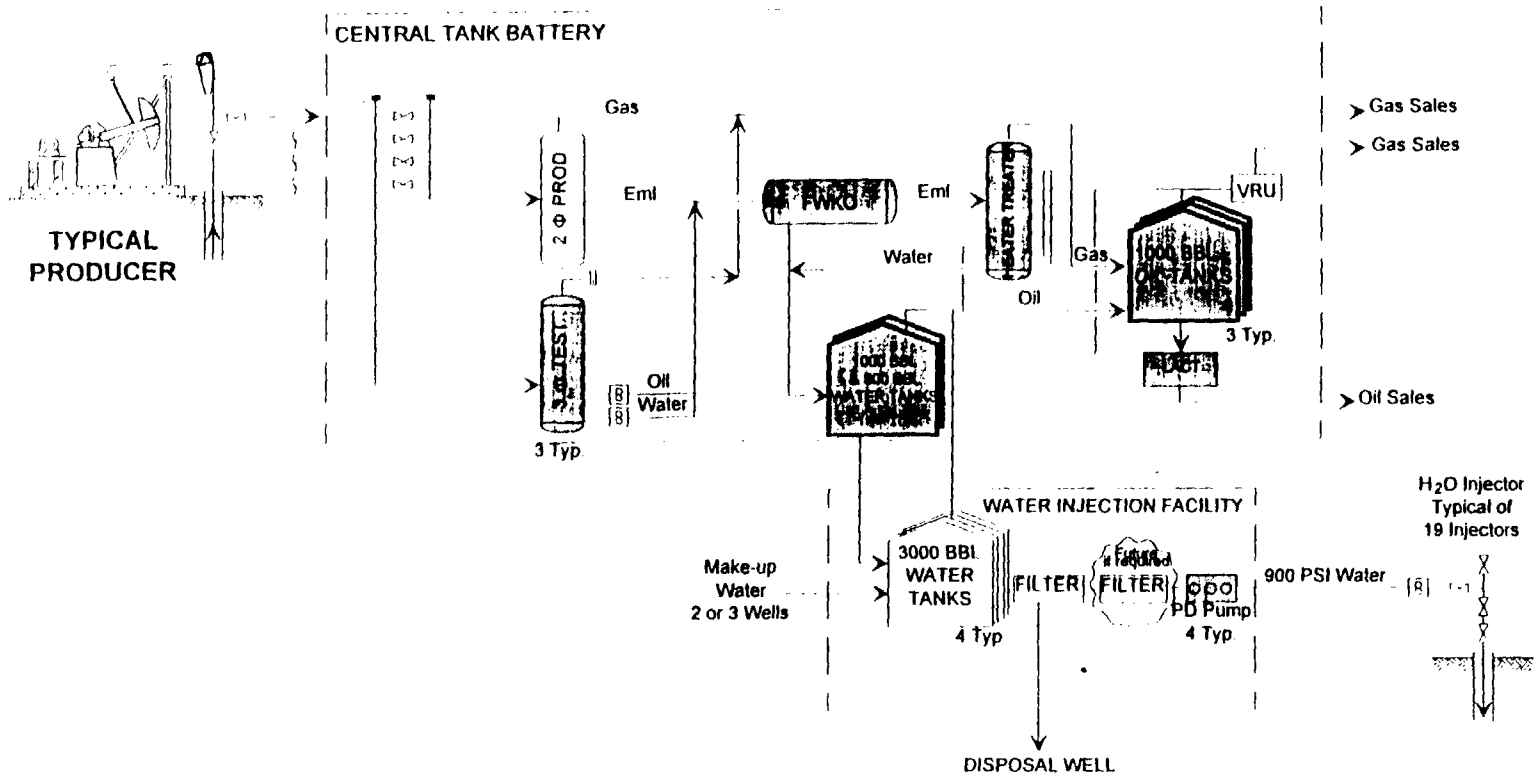
POTENTIAL DEVELOPMENT PLAN: CO_2 FLOOD

- **Scope**
  - 37 patterns, 2100 acres expanding into outer ring
  - Dual CO_2 injection (Cherry/Brushy)
  - Pipeline from Vacuum
  - CO_2 recycle compression
- **Issues**
  - Attain miscibility pressure: 3+ years
  - Waterflood performance
  - Injectivity test/pilot
  - Oil price



WATERFLOOD INVESTMENTS

Category	Investments $MM Gross
1. Drilling & Completion	7.34
2. Facilities	
• Production & Source Water	0.58
• Water Treating	2.44
• Water Injection System	0.77
3. Workover	0.83
4. Formation Evaluation	0.1
5. Allowances	2.29
Total	**14.35**



State of New Mexico
Commissioner of Public Lands

RAY POWELL, M.S., D.V.M.
COMMISSIONER

310 OLD SANTA FE TRAIL P.O. BOX 1148

SANTA FE, NEW MEXICO 87504-1148

(505) 827-5760
FAX (505) 827-5766

May 15, 1995

Exxon Company USA
P.O. Box 1600
Midland, Texas 79702-1600

MDA	RECEIVED LAND SERVICES	MPC
RLA		RGG
RKF		RTL
SHJ		TAL
PLK	MAY 17 1995	JBE
DCR		SHK
JBT		LLM
		SES
	MPO - MIDLAND	JHT
HANDLE	REVIEW SEE ME CIRC	FILE

Attention: Mr. Joe Thomas

Re: Request for Preliminary Approval
Avalon Delaware Unit
Eddy County, New Mexico

Dear Mr. Thomas:

This office has reviewed the unexecuted copy of the unit agreement for the proposed Avalon Delaware Unit, Eddy County, New Mexico. This agreement meets the general requirements of the Commissioner of Public Lands who has this date granted you preliminary approval as to form and content.

Preliminary approval shall not be construed to mean final approval of this agreement in any way and will not extend any short term leases until final approval and an effective date are given.

When submitting your agreement for final approval, please submit the following:

1. Application for final approval by the Commissioner setting forth the tracts that have been committed and the tracts that have not been committed.

2. Two copies of the Unit Agreement.

3. All ratifications from the Lessees of Record and Working Interest Owners. All signatures should be acknowledged before a notary. One set of ratifications must contain original signatures.

4. Initial Plan of Operation.

5. Order of the New Mexico Oil Conservation Division. Our approval will be conditioned upon subsequent favorable approval by the New Mexico Oil Conservation Division.

6. A copy of the Unit Operating Agreement.

Exhibit No. 6-A
Exxon Corporation
NMOCD Cases 11297 & 11298
Hearing Date: June 29, 1995

7. Per your telephone conversation with Pete Martinez of this office, please revise Exhibit "A" & "B" to coincide with the BLM's survey plats. The following unit acreage should be changed: Federal Acreage, State Acreage, Fee Acreage and Total Acreage.

8. In Unit Agreement Page 3, Section 2(a), the acreage should be changed to 2,118.78.

9. Please date the unit agreement on Page 1.

10. A redesignation of all well names and numbers. The list should include the OCD property name, property number, pool name , pool code and API number.

If you have any questions, or if we may be of further help, please contact Pete Martinez at (505) 827-5791.

Very truly yours,

RAY POWELL, M.S., D.V.M.
COMMISSIONER OF PUBLIC LANDS

BY:
JAMI BAILEY, Deputy Director
Oil/Gas and Minerals Division
(505) 827-5745

RP/JB/cpm
Enclosure
cc: Reader File
BLM-Roswell--Attention: Mr. Armando Lopez
OCD-Santa Fe--Attention: Mr. Roy Johnson

COPIES REQUIRED BY SUPREME COURT

DOCKET FEE FOR ALL APPEALS IS $125.00
State Agencies do not pay a docket fee

Endorsed copy of Notice of Appeal

Docketing Statement - Original + 2 copies
Motion for extension to file Docketing Statement - Original

Transcript of Record Proper - 1 copy
Transcript of Proceedings - Original + 2 copies
Cassette Tapes - Original + 2 copies w/logs

Brief-in-Chief - Original + 6 copies
Answer Brief - Original + 6 copies
Reply Brief - Original + 6 copies

Brief-in-Chief on Cross-Appeal - Original + 6 copies
Answer Brief on Cross-Appeal - Original + 6 copies
Reply Brief on Cross-Appeal - Original + 6 copies

Supplemental Briefs - Original + 6 copies

Amicus Curiae Briefs - Original + 6 copies

Additional Authorities - Original + 5 copies

Motion for Rehearing - Original + 5 copies
Brief in support of Motion for Rehearing - Original + 5 copies

Petition for Writ of Certiorari - Original + 6 copies
Response to Petition for Writ of Certiorari - Original + 6 copies
Motion for extension to file Petition - Original
(attach Court of Appeals Opinion/Memo Opinion to motion)

Petition for Writ of Prohibition - Original + 6 copies
Petition for Writ of Mandamus - Original + 6 copies
Petition for Writ of Superintending Control - Original + 6 copies
Petition for Writ of Error - Original + 6 copies
Response to Petitions - Original + 6 copies

Application for Interlocutory Appeal - Original + 3 copies
Response to Interlocutory Appeal - Original + 3 copies

Motion to Dismiss Appeal - Original + 3 copies
Response to Motion to Dismiss - Original + 3 copies

Stipulation of Dismissal - Original + 3 copies
Agreement for Dismissal - Original + 3 copies
Voluntary Dismissal - Original + 3 copies
Notice of Dismissal - Original + 3 copies
Joint Motion to Dismiss - Original + 3 copies

Motion to Transfer to Court of Appeals - Original + 3 copies
Motion to Consolidate - Original + 3 copies
Motion to Strike - Original + 3 copies
Motion to Remand - Original + 3 copies
Motion to Reinstate Appeal & Response - Original + 3 copies
Motion for approval of Supersedeas Bond - Original + 3 copies
Motion for Leave to Proceed Forma Pauperis-Original + 3 copies
Motion for Extension to file Briefs - Original
Request for Oral Argument - Original
Entry of Appearance - Original

Rule Extensions - Original
Rule 5-604; 10-308(c); 20-226(D); 7-703(K); 8-703(K) & 6-703(J)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number_____
Filing Date: _____

Docket No. 24,311

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION, and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

Jay W. Forbes, District Judge

Kellahin & Kellahin
W. Thomas Kellahin
Santa Fe, NM
for Appellant

Hon. Patricia A. Madrid, Attorney General
Marilyn S. Hebert,
Rand Carroll, Special Assistant Attorneys General
Santa Fe, NM
for Appellee Oil Conservation Comm.

James Bruce
Santa Fe, NM
for Appellee Exxon Corp.

Campbell, Carr, Berge & Sheridan, P.A.
William F. Carr
Santa Fe, NM
for Appellee Yates Petroleum Corp.

DECISION

MAES, Justice.

{1} This is an appeal of a district court order affirming the decision of the New Mexico Oil Conservation Commission ("OCC" or "Commission") to allow Exxon Corporation's ("Exxon's")

application for unitization under the Statutory Unitization Act, NMSA 1978, §§ 70-7-1 to -21 (1975, as amended through 1987), of the Avalon-Delaware oil field in Eddy County. We have jurisdiction pursuant to NMSA 1978, § 70-2-25(B) (1981, prior to 1998 amendment).[1]

{2} Premier Oil & Gas, Inc. ("Premier") brings three issues before us on this appeal. First, it argues that Commissioner Jami Bailey improperly functioned both as the representative approving unitization for the Commissioner of Public Lands ("CPL") and as a member of the OCC. Second, Premier argues that Exxon's proposed participation formula is not a fair one and that the OCC therefore violated the Statutory Unitization Act. Third, Premier argues that the order is arbitrary and capricious, fails to protect correlative rights, and is not supported by substantial evidence in view of (a) the failure of the OCC to appreciate the existence of disputed "pay" at well FV3, (b) the alleged premature approval of a CO_2 flood, and (c) the alleged wrongful inclusion of Premier in a waterflood. For the reasons hereinafter stated we affirm the order of the district court.

I. Facts and Issues

{3} In May 1995 Exxon Corporation applied to the Oil Conservation Division ("Division") for statutory unitization of approximately 2118.78 acres, including an outer ring of 40 acres of edge tracts or "buffer zone," of state, federal, and fee lands to be known as the Avalon-Delaware Unit Area ("Unit Area"). Exxon also applied for authority from the Division to institute the waterflood project in a portion of the Unit Area.

{4} Twelve separate tracts of land are contained in the Unit Area. Appellant Premier owns a state oil and gas lease of a tract of land known as Unit Tract 6, which Exxon's application sought to include in the Unit Area. Yates Petroleum Corporation ("Yates"), which voluntarily included its tracts in the unit, appears in support of Exxon. Before the date of unitization, October 1, 1995, Exxon operated five of the tracts, Yates operated five, and Premier and MWJ Producing Company operated one each.

{5} Exxon's project is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and work-over reserves by adding

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[1]We do not consider the bearing, if any, the 1998 amendment to NMSA 1978, § 70-2-25(B) (1981) would have on our jurisdiction in this case, because this appeal was taken well before the effective date of that amendment.

additional perforation in existing wells and by injecting water into the reservoir to recover more oil; and CO_2 oil reserves by injecting a combination of carbon dioxide and water into the reservoir. The waterflood plan is an attempt to recover more oil from Exxon's and Yates' wells by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells of all which would be surrounded by the outer ring of 40-acre tracts. Premier owns the working interest in one of these buffer zone tracts, Unit Tract 6. While Premier's Tract 6 was to be included within the western boundary of the Unit Area, Exxon did not intend to attempt to recover from Tract 6 any remaining primary oil, any work-over oil, or any secondary oil by waterflooding. Only one of Premier's two wells in Unit Tract 6 was to be included in the Unit Area. Exxon contemplated that Unit Tract 6 would serve as a "buffer zone," so that if CO_2 flooding was ever determined to be feasible, Exxon would use part of Tract 6 for CO_2 injection wells to improve recovery from the Yates' tracts.

{6} Exxon and Yates proposed a participation formula for the Unit Area. Under this formula, out of each unit of production, or the proceeds therefrom, each tract receives a share proportionate to its share of total remaining reserves. This figure is divided into share of primary reserves, share of waterflood or secondary reserves, and share of CO_2 flood or tertiary reserves. Then, these shares are weighted to reflect their respective worth. Exxon's experts found that primary reserves are worth 25% of total reserves, waterflood 50%, and CO_2 flood 25%. Given that Premier's tract has no remaining primary or secondary reserves, Premier will receive allocations representing the tertiary reserves only. Because the tertiary reserves constitute only approximately 25% of total reserves, and because only about 4% of these reserves lie under the Premier tract, Premier will be entitled to roughly 1% of total unit production.

{7} The Division held a hearing on the application at which Exxon, Premier, and Yates appeared and were represented by counsel. The Division entered its order granting Exxon's request for statutory unitization and allowing Exxon to institute a waterflood project.

{8} Premier appealed the Division order to the OCC pursuant to NMSA 1978, § 70-2-13 (1955, as amended through 1981). The OCC held its de novo hearing on December 14, 1995, at which all parties appearing at the Division hearing appeared and were represented by counsel before the OCC.

The OCC entered its order on March 12, 1996, ordering the statutory unitization of the Unit Area and allowing Exxon to institute a waterflood project. Premier filed its Application for Rehearing with the OCC on March 20, 1996.

{9} The OCC did not act on the Application, and it was therefore deemed denied pursuant to NMSA 1978, § 70-2-25(A) (1935, as amended through 1981). Premier filed a Petition for Review of the Decision of the OCC in the district court on April 12, 1996, under Section 70-2-25(B). It was dismissed with prejudice on March 12, 1997, and Premier now appeals to this Court.

II. Standard of Review

{10} In Johnson v. New Mexico Oil Conservation Comm'n, 1999-NMSC-021, ¶ 16, __ N.M. __, __ P.2d __, we explained how an appellate court reviews legal and factual conclusions reached by the Commission:

> This Court conducts a whole-record review of the OCC's factual findings. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the [Oil and Gas Act] and its implementing regulations, we may afford some deference to the OCC, particularly if the question at hand implicates agency expertise. See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. "However, the [C]ourt may always substitute its interpretation of the law for that of the [OCC] 'because it is the function of courts to interpret the law.'" Fitzhugh v. New Mexico Dep't of Labor, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (quoting Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

Although this formulation is an accurate statement of the law, it does not account for each type of issue that may come before the OCC.

{11} If the issue is purely a question of law, and if it does not involve an interpretation of the statutes, rules, and regulations within the province and proficiency of the OCC, then we afford no deference to the OCC at all. Rather, we review the question de novo. If, on the other hand, the issue is merely one of fact, then we review for substantial evidence. See Bd. of Educ. v. Harrell, 118 N.M. 470, 486, 882 P.2d 511, 527 (1994) ("We hold that due process is satisfied by de novo review of [administrative] questions of law and substantial evidence review of [administrative] findings of fact."); see also Texas Nat'l Theatres, Inc. v. City of Albuquerque, 97 N.M. 282, 287, 639 P.2d 569,

574 (1982) (standard of review of a legal conclusion bearing upon administrative action is "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party[,] . . . indulg[ing] all reasonable inferences in support of the court's decision, and disregard[ing] all inferences or evidence to the contrary") In Santa Fe Exploration Co., 114 N.M. at 114, 835 P.2d at 830, we explained how this Court determines whether the OCC's factual findings are supported by substantial evidence:

> In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [Nat'l Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988)]. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. Id.

Applying these standards to the issues before us on appeal, we affirm the district court in all regards.

III. The Role Of Commissioner Bailey

{12} Premier's argument on this issue is that there was an inherent conflict of interest involved in the same person handling a unitization matter for the CPL and then sitting as the CPL's designee on the Oil Conservation Commission. The issue whether Commissioner Bailey should have been disqualified is a legal question that is clearly outside the province and proficiency of the OCC; accordingly, as discussed above, we review this question de novo without according any deference to the OCC. We begin analyzing this issue by looking at our constitution, which provides, "The commissioner of public lands shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." N.M. Const. art. XIII, § 2. This authority is further defined by statute:

> For the purpose of more properly conserving the oil and gas resources of the state, the commissioner of public lands may consent to and approve the development or operation of state lands under agreements made by lessees of the state land jointly or severally with other lessees of state lands, with lessees of the United States or with others, including the consolidation or combination of two or more leases of state lands held by the same lessee. The agreements may provide for one or more of the following: for the cooperative or unit operation or

development of part or all of any oil or gas pool, field or area . . . .

NMSA 1978, § 19-10-45 (1961). Pursuant to this statute, Exxon, in May of 1995, requested and received the preliminary approval of the Commissioner of Public Lands for the Avalon-Delaware Unit, including CPL-owned Unit Tract 6 in which Premier held the leasehold interest. The approval letter was signed by Bailey as Deputy Director of the Oil, Gas, and Minerals Division. The letter indicated that final approval was conditioned "upon subsequent favorable approval by the New Mexico Oil Conservation Division." Following CPL action, Exxon proceeded to the Oil Conservation Division for an order of statutory unitization. See Section 70-7-3. A unitization order was issued by the Division, to which Premier objected, and a hearing de novo was held before the OCC. See NMSA 1978, § 70-2-6(B) (1979) (Division and Commission have concurrent jurisdiction). Pursuant to NMSA 1978, § 70-2-4 (1987), Bailey was the CPL's designee on the OCC, which has the power and the duty to prevent waste in the production or handling of crude petroleum or natural gas of any type or in any form, and to protect correlative rights. See NMSA 1978, § 70-2-2 (1949); NMSA 1978, § 70-2-11 (1977).

{13} Premier argues this is a case of hearing officer bias and conflict of interest. As to bias, the relevant inquiry is "whether, in the natural course of events, there is an indication of a possible temptation to an average man [or woman] sitting as a judge to try the case with bias for or against any issue presented to him [or her]." Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). This is part of the minimum due process requirement of a fair and impartial tribunal and a trier of fact free from any form of bias or predisposition regarding the outcome of the case. See id. These requirements apply most strictly to an administrative adjudication, where otherwise there is a tendency to relax safeguards customary in court proceedings "in the interest of expedition and a supposed administrative efficiency." Id. The law has also been stated that the mere appearance of partiality is enough to sanction a government decision-maker. Id.

{14} The idea of "appearance" has been discussed in the judicial context. "The leading view is that a court should review judicial behavior by its appearance 'to a reasonable person following review of the totality of the circumstances.'" Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 Marquette L. Rev. 949, 956 (1996) (quoting Matter of Larsen, 616 A.2d 529, 584 (Pa. 1992), cert.

denied, In re Larsen, 510 U.S. 815 (1993)). "Reasonable citizens require more than vague conjectures and subtle innuendo before they will entertain suspicions of judicial misconduct or ascribe the 'appearance of impropriety' to ambiguous facts and circumstances." Larsen, 616 A.2d at 584. Also, "when dealing with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct." Int'l Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975).

{15} These guideline statements about the standard of review in cases of bias or conflict of interest are brought into focus in State ex rel. Bardacke v. Welsh, 102 N.M. 592, 606, 698 P.2d 462, 470 (Ct. App. 1985), which, collecting New Mexico cases, held that to establish the appearance of impropriety, "there must be a reasonable *factual basis* for doubting the judge's impartiality." (Emphasis added.) Thus it follows that in Reid, for example, bias was found where the decision-maker actually voiced bias prior to the hearing. 92 N.M. at 415, 589 P.2d at 199. In Santa Fe Exploration Co., 114 N.M. at 108-10, 835 P.2d at 824-26, the appellant argued that there was an appearance of impropriety, and that its procedural due process rights were denied when the Oil Conservation Division Director had ex parte contact with another party before the Division prior to a certain drilling attempt, then approved the drilling, and then sat as a member of the OCC which affirmed the Division. We said:

> Unlike the Board member in Reid, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. . . . Moreover, by statute, the Director is a member of the Commission . . . and has a duty to prevent waste . . . .

Id. at 109, 835 P.2d at 825.

{16} Here, as in Santa Fe Exploration, where an OCC member had previously dealt with the same matter, Bailey's act of having merely given preliminary approval to the project on behalf of the CPL did not by itself create bias. With Premier as an objecting party whose due process rights were in issue, it was a different matter entirely, and the only question is whether Bailey, judging the need for or value of the unit from the point of view of the CPL, could have an open mind in judging its need

or value vis-à-vis Premier. There is no evidence that she had a fixed and preconceived opinion as to the facts such that it can be said that she had completely closed her mind to the proceeding. See Michael B. Browde & Andrew J. Schultz, Survey of New Mexico Law: Administrative Law, 15 N.M. L. Rev. 119, 134 (1985); see also Las Cruces Prof'l Firefighters v. City of Las Cruces, 1997-NMCA-031, ¶ 24, 123 N.M. 239, 938 P.2d 1384. At no time did Bailey give an indication of any inclination she might have as an OCC member. Her role as Deputy Director in granting preliminary approval does not equate to an opinion or commitment concerning the outcome of the OCC hearing. Nor, what amounts to the same analysis, is there a factual basis for concluding she carried a transactional conflict of interest from one position or decision to the other. Despite the relatedness of the two decisions, there was nothing apparently "tugging" at Bailey to decide a certain way in the second matter in light of her decision in the first.

{17} It is argued that a conflict of interest inheres in the statutory scheme. We think the statutory scheme is delicate but "where two statutes are related to the same general subject, the court will generally construe them *in pari materia* to give effect to each." Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 45, 125 N.M. 721, 965, P.2d 305. In this case, there was no financial incentive for Bailey to proceed in particular conformity with her action on behalf of the CPL, since she is not compensated for the performance of her duties on the OCC. §70-2-4. Any incentive to illegitimately align the carrying out of one public duty with another was non-existent. The statutes at issue here permit the exercise of reasonable discretion by agents such as Bailey unless impropriety or the appearance of impropriety is shown.

{18} There is a letter that was sent to the CPL by Premier complaining of the fact that Bailey was acting in two roles, and now Premier argues that the CPL's response constituted an admission of a conflict of interest. The letter from the CPL acknowledges that: (1) Premier's letter raised a conflict of interest question; (2) the role of the CPL designee on the Oil Conservation Commission results in an "institutional conflict" created by the legislature; and (3) the Land Commissioner will avoid a transactional conflict whenever it can "by making sure the [Land] Commissioner's designee has not worked directly on the matter before the Commission." However, contrary to the assertions of Premier, this letter does not admit a conflict of interest exists in this case. The letter states that the

CPL is satisfied that Bailey will act in this case "free from bias and prejudgment" and that "she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality." The facts support a finding that Bailey could have and did act without bias or prejudgment.

IV. The Fairness of the Participation Formula

{19} The next issue before us is whether the adoption by the OCC of the participation formula proposed by Exxon and Yates was supported by substantial evidence. The question whether the OCC complied with the Statutory Unitization Act in approving Exxon's participation formula implicates the OCC's expertise; therefore, as mentioned earlier, we will accord some deference to the OCC's interpretation of the Act, but we may offer an interpretation of our own. If we conclude that the OCC's interpretation is not legally flawed, we will reverse only if the record lacks substantial evidence supporting the OCC's fact-specific determinations.

{20} The underlying basis for the participation formula recited above was explained by one of Exxon's experts, engineer Gilbert G. Beuhler:

> The intent was to base the formula on recoverable oil, and include risk, including economic factors. Remaining primary oil has the lowest risk, since it's already developed and has an established decline. It also has the highest value per barrel with low operating cost and no future development cost. While there is a fair amount of remaining primary reserves, they do constitute a low amount of unit potential reserves: about two percent. Therefore, primary oil was given the 25% weight factor . . . .
>
> Tertiary reserves are by far the largest in potential recovery, being approximately 81% of the unit's potential future production. However, they're also the highest risk, encompassing large areal expansions, and they're also very sensitive to future pricing. Tertiary reserves also have the lowest value per barrel, with the highest development and operating costs. Thus, they were given a 25% factor . . . .
>
> Secondary reserves are between primary and tertiary in both amount and value, but the main objective of the unit is the implementation of the water flood, and the secondary reserves also have relatively low risk with the project area encompassing the primary development area. Thus, they were given the highest weighting factor, 50%.

It was also clearly explained that under the formula, Premier's tract and other fringe tracts are assigned participation "in return for their acreage being used in future development." The participation formula proposed by Premier was based on 50% original oil in place, 10% January 1993 production rate, 20% remaining primary reserves, and 20% future production. Premier argues that

the OCC failed to comply with the Statutory Unitization Act by adopting the Exxon formula, which it is claimed does not allocate unitized hydrocarbons according to relative value. See Section 70-7-6(A)(6).

{21} The first issue here concerns Section 70-7-6(B), which states:

> *If* the division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable, and equitable basis, the division shall determine the relative value, from evidence introduced at the hearing, taking into account the separately owned tracts in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.

(Emphasis added.) It is clear by the plain meaning of the conditional language of Section 70-7-6(B) that it is only once the participation formula proposed by the applicant has been shown to be unfair, unreasonable, or inequitable that the Division (or the OCC) need consider alternatives. Because the OCC found that the participation formula was fair, reasonable, and equitable, the OCC was not required to determine each tract's relative value.

{22} Premier's next issue is that its correlative rights,[2] which the OCC is bound to protect under Section 70-7-1, are being violated, and it advances two principal arguments attacking the fairness of the formula. First is that the Premier tract was included in the unit despite the OCC's findings that it is capable of only uneconomic primary production, and that it is incapable of any secondary production. The unit will take advantage solely of the tertiary potential of the Premier tract, if CO_2 flooding is undertaken. The question bearing on correlative rights is whether and how the Premier tract could be used for CO_2 flooding outside the unit. A review of the record reveals that Ken Jones,

---

[2]Under NMSA 1978, § 70-2-33(H) (1986),

> "correlative rights" means 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 oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

owner-operator of Premier, testified that it would not conduct a CO_2 flood on its own. There were conflicting statements as to whether waste would occur in overall recovery terms without unitization, but there was substantial evidence in the form of expert testimony that waste would occur. On the basis of this expert testimony and Jones' testimony that Premier would not conduct a CO_2 flood on its own, we hold that substantial evidence supports the Commission's order and that Premier's correlative rights were not violated. See NMSA 1978, § 70-7-1 (1975). Premier argued to the Commission that its inclusion should be delayed until the CO_2 stage, but the technique it put forth to eliminate the resulting waste (the drilling of four lease-line CO_2 flood injection wells) was found, on the basis of substantial evidence in the record, to be unfeasible because of the relatively small 160-acre size of the Premier tract.

{23} Taking another tack, Premier brings out the fact that there was a difference of opinion among the experts as to whether the formula allocated water flood and CO_2 flood reserves equitably among the tracts. There was in fact some disagreement as to whether waterflooding would be advisable or possible on the Premier acreage—if so, its relative share of water flood reserves would be higher and it would receive a greater overall share of the unit. As noted, experts for Exxon and Yates testified before the Commission that Premier had a zero share of waterflood reserves. The expert for Premier disputed this, and testified that there were waterflood reserves; however, Premier only produced figures on "target oil in place." As the OCC recited in its order, "target oil in place" is a mere starting point in calculating recoverable reserves, on which equity is based. It must be adjusted by factors such as well-to-well continuity, sweep efficiency, affordable oil, pattern effects, and development costs to obtain recoverable reserves.

{24} The reason for the differing views was the way in which the lead well on the Premier tract, the FV3, was "modeled" or sampled for waterflood reserves, which was explained in detail to the OCC. The Commission members are required to have "expertise in the regulation of petroleum production by virtue of education or training." § 70-2-4. The director of the Division, who sits on the OCC, is required to be a registered petroleum engineer or have expertise in the field by virtue of education and experience. NMSA 1978, § 70-2-5 (1977, as amended through 1987). They are properly entrusted to bring these qualifications to bear in deciding technical issues which come before

them. Because there is substantial evidence in the record which could support the judgment of the OCC on the matter in issue, we defer to that judgment. See Santa Fe Exploration, 114 N.M. at 114-15, 835 P.2d 830-31. It may therefore be concluded that there are no waterflood reserves on the Premier tract.

{25} At most, according to the Technical Report prepared by Exxon but accepted by all parties as the basis for their opinions, Premier can say it has zero percent of economically producible primary reserves (though this is separately disputed; see below), 8.29% of water flood *oil in place*, and 5.88% of CO_2 flood *oil in place*. It is assigned, by the approved formula, a total of 4.08% of CO_2 reserves, and, even though the CO_2 flood may never happen, Premier will receive 1.02% of the unit proceeds. Payments are to begin not at the inception of the possible CO_2 flood, but immediately, Premier thus receiving a unit share whether its own reserves are ever tapped or not. Premier has not demonstrated that the mechanism employed in this unit was undeserving of Commission approval in its geology (Premier itself only claims 5.17% of total remaining reserves, mostly CO_2 flood, although it is unclear from where this figure is derived), or in its economics (Premier immediately receives a substantial benefit despite the fact that it is marginal, depending on future oil prices, whether it will contribute any oil to the unit.) There was substantial evidence upon which the OCC could conclude that a justifiable trade-off existed between the mere possibility of future production and a lower percentage participation for Premier. Similarly with the alleged presence of waterflood reserves, no hard facts were marshaled by Premier in a way that would refute the OCC's conclusion that, under Section 70-7-6(B), the proposed formula was a fair one.

{26} Premier also makes a general argument that the formula fails to use "traditional participation parameters." However, it has been observed,

> To use the language of the garment industry, pooling and unitization agreements are "tailor-made" and not "ready-made." Each negotiation has its own unique problems and substantial care must be exercised in the drafting of provisions appropriate for the particular situation. It is not possible to suggest language or clauses appropriate for all circumstances.

6 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 920 (1998). While some work has been done on the factors most commonly used, the "difficulty of obtaining agreement on a

participation formula has been a considerable barrier to the adoption of plans for cooperative, pooled, or unitized development." 8 id. at 763-64. We agree with Exxon and Yates that there are no "traditional values to be included in any participation formula," contrary to what Premier's expert seems to believe. See Amoco Prod. Co. v. Heimann, 904 F.2d 1405,1411 (10th Cir. 1990); Gilmore v. Oil and Gas Conservation Comm'n, 642 P.2d 773, 780 (Wyo. 1982). Furthermore, Premier's argument, here and elsewhere, for the comparable fairness of its own formula is not in itself compelling because as the OCC states: "It is not the Commission's responsibility to change a formula which was the product of negotiation [among interest owners] if that formula is 'fair.' That is not to say that other formulas, derived as a result of negotiations would not be 'fair' because there is no one perfect formula."

{27} In summary, because the formula in issue could be found on substantial evidence to "allocate unitized hydrocarbons on a fair, reasonable and equitable basis," and because it did not infringe on Premier's correlative rights, its adoption did not violate the Act.

V. Other Grounds on Which Premier Argues That the OCC's Order is Arbitrary and Capricious, Fails to Protect Correlative Rights, and is Not Supported by Substantial Evidence

{28} We said in Santa Fe Exploration:

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.'"

114 N.M. at 115, 835 P.2d at 831 (citations omitted.) We consider three areas of argument, each as to arbitrariness and capriciousness, violation of correlative rights, and lack of substantial evidence. We will review the OCC's actions and then determine whether they must be stricken for any of these reasons. Adhering to the principles of substantial evidence that we discussed earlier, we review each point with an eye to support in the record.

A. Disputed "Pay"

{29} "Pay" is reservoir rock containing oil or gas. 8 Williams & Meyers at 767. Premier argues that Exxon's experts mistakenly left out 82 feet of pay at the bottom of Upper Cherry Canyon in the FV3 well which would produce economically in the primary and water flood stages and attacks the

OCC's failure to credit them with such pay. The first aspect of the argument on this issue is the disagreement between experts on the geology of the well. A well log is a "record of the formations penetrated by a well, their depth, thickness, and (if possible) their contents." 8 id. at 1176. Both witnesses for Premier and Exxon discussed at some length various well logs. Exxon geologist David L. Cantrell introduced an exhibit showing a mud log and "several of the raw wireline log curves that [were] used in the geological and volumetric modeling," which included a gamma ray log, a depth track showing perforated intervals, a resistivity log, a water saturation log, and a porosity log. Cantrell interpreted these logs, testifying also to the meaning of observed surface and subsurface formations and phenomena. On the basis of these facts, he "picked" the base of the Upper Cherry Canyon reservoir some 82 feet higher than did Stuart D. Hanson, the Premier geologist, who, concentrating on the porosity log, argued he had found extra depth and theoretically greater pay. The OCC found that "the geological interpretation of Premier was a more believable and scientifically sound interpretation," but that "the production results show the pay to be uneconomic."

{30} The first production factor considered by the OCC and placed in issue by Premier involves some work that was performed in connection with the FV3 well, known as "the October 1995 test." Premier argues that it "attempted to test for oil production in its [FV3] well in zones *other than* the UCC reservoir and did not have sufficient time to test either the overlying or the disputed 82 foot interval before the test was terminated when Exxon disputed Premier's right to operate," but there is only tenuous support in the record for this assertion, to wit the testimony of Ken Jones that the well could conceivably have been economic at certain higher-than-expected levels of production. Premier then details what the work did involve. But the evidence is substantial that Gulf, the company that originally drilled the well, did not perforate the 82-foot interval and carried out its geology in contemplation of the non-existence of the additional pay, that Premier owned the well for five years without testing for or working over for this oil, and that in October of 1995, Premier would have or should have indeed tested for this oil if it thought it could have been produced economically. The Commission's findings that the work in question resulted in six to seven barrels of oil and 300 barrels of water per day and that such production is uneconomic, are supported directly by the testimony of Jones.

{31} The second factor relevant to production is the non-productivity of the south offset well to the FV3, the Yates ZG1. The OCC concluded, largely on the basis of the testimony and underlying exhibits of the geologist and the engineer for Exxon, that the similarity in the geology and production history of the two wells indicated that current and future production would also be similar, and that the additional pay would be unproductive. Hanson, testifying for Premier, in fact agreed that the "ZG1 looks a lot like the FV3," and did not contradict the fact that a valid comparison could be made between the two wells.

{32} With regard to the pay issue, therefore, having looked at the evidence upon which the OCC relied, the conflicting evidence, and the reasoning process used, we hold that the conclusion of the Commission—that additional pay did not exist so as to preclude inclusion of Premier oil in anything other than the CO_2 flood—was supported by evidence that was credible in light of the whole record and that was sufficient for a reasonable mind to accept as adequate. See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988). Our review of the record also shows that the conclusions of the OCC were rationally based and served ultimately to protect Premier's correlative rights.

B. Did the OCC Approve the CO_2 Project Prematurely?

{33} Premier argues that the supposedly speculative nature of the CO_2 flood means that its approval at the present time cannot be supported by substantial evidence, that Premier's correlative rights are being slighted, and that the OCC has acted arbitrarily and capriciously. In this case, the facts found surrounding CO_2 flooding at the Avalon Unit were based on extensive expert testimony received at the hearing. There was testimony that omission of the Premier tract would mean that CO_2 operations would have to be scaled back and that Premier's absence would result in the waste of as much as two million barrels of oil. With the CO_2 project, the potential additional recovery is 39.9 million barrels. Further, there was expert testimony that before a CO_2 flood could be implemented, sufficient volumes of water would have to be injected to "pressure up the reservoir," and that exclusion of Premier would lead to future problems with the development of the reservoir. This evidence in the record supports the OCC's conclusions. As discussed above, we also think Premier's correlative rights were considered and protected by the Commission in adopting the participation

formula. Premier had the opportunity, over a five-year period culminating in the disappointing test project in 1995, to develop whatever oil it could on its tract. There was ample evidence that there are no recoverable primary or secondary reserves there, and the suggestion that the tract could first be brought into the unit later, at the CO_2 phase, was discredited by expert testimony.

C. Including Unit Tract 6 in the Waterflood Project

{34} Finally, citing Section 70-7-4(J), Premier argues that "there is no substantial evidence to support including Premier's Tract 6 in the water flood project" because "Exxon, who operates or owns working interests in all tracts (except Tracts 6, 7 and 8), seeks to include the Premier Tract 6 only as a 'protection buffer' and contrary to [the Statutory Unitization Act], assigned no 'contributing value' for secondary oil recovery." The cited section reads:

> "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 likely 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.

{35} As we have discussed, however, Section 70-7-6(B) only necessitates a determination of relative value when the Division or OCC determine that a participation formula is unfair, unreasonable, or inequitable. In any event, the fact that a tract is included in a unit now for development later is not contrary to Section 70-7-4(J). Clearly, that section recognizes the nature of a unit as existing through a period of time during which its physical characteristics will change, including, in this case, the contribution being made by a given tract. Premier has not shown that the OCC acted arbitrarily or capriciously in accepting the plan. And to reiterate, the Commission could decide on the basis of substantial evidence, that the likelihood of a tertiary phase being instituted and of waste without the participation of Premier from the outset, were sufficient to create this unit.

VI. Conclusion

{36} Having considered all of the substantive arguments raised in this matter, we affirm the order of the district court.

{37} **IT IS SO ORDERED.**

PETRA J. MAES, Justice

WE CONCUR:

PAMELA B. MINZNER, Chief Justice

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PATRICIO M. SERNA, Justice

July 7, 1999

Litigation Update

Premier Oil & Gas Co. v. OCC, Exxon Corp. and Yates Petroleum Corp., No. 24,311, Supreme Court –

The Supreme Court affirmed the decision of the District Court which affirmed the decision of the OCC that there was no bias or prejudice in the Land Commissioner's designee taking part in the decision of the Commission and that there was substantial evidence to support the Commission's allocation formula in the Pooling Order.

ATTEST: A TRUE COPY
Kathleen Jo Gibson
Clerk of the Supreme Court
State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 24,311

TO the District Court sitting in and for the county Eddy GREETINGS:

WHEREAS, in cause numbered CV-96-121-JWF on your civil docket wherein Premier Oil & Gas, Inc., was petitioner, Oil Conservation Commission, et al., were respondents, the ruling of the New Mexico Oil Conservation Commission was affirmed by the district court;

WHEREAS, the cause and judgment were afterwards brought into this Court by petitioner for review by appeal, whereupon such proceedings were had that on June 28, 1999, a decision was issued affirming judgment of the district court.

. NOW, THEREFORE, this cause is remanded to you for further proceedings, if any, consistent and in conformity with the decision of this Court.

WITNESS, The Hon. Pamela B. Minzner, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of July, 1999.

(S E A L)

Kathleen Jo Gibson

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

"In contract to pooling, where production and costs are customarily allocated on a surface-acreage basis, unit-wide allocations are usually based on a combination of factors, such as the acreage of each tracct, the net acre feet of pay and the volume of oil in place beneath each tract, the differences in porosity within the field, current production, cumulative production, the projected primary recovery from each well, and other factors." *See Gilmore v. Oil & Gas Conservation Comm'm,* 642 P.2d 773 (Wyo. 1983) (where the working interest owners conseidered over 71 formulas before arriving at a compromise formula that was still challenged by one interest owner). From "Terminating Units: Can the Lights Be Turned Off?" Owen L. Anderson, 1997 Professor in Oil, Gas and Natural Resources Law, University of Oklahoma College of Law. -

State of New Mexico
Commissioner of Public Lands
310 OLD SANTA FE TRAIL P.O. BOX 1148
SANTA FE, NEW MEXICO 87504-1148

AY POWELL, M.S., D.V.M.
COMMISSIONER

(505) 827-5760
FAX (505) 827-5766

May 15, 1995

Exxon Company USA
P.O. Box 1600
Midland, Texas 79702-1600

Attention: Mr. Joe Thomas

MDA	RECEIVED LAND SERVICES	MPC
RLA		RGG
RKF		RTL
SHJ		TAL
PLK	MAY 17 1995	JBE
DCR		SHK
JBT		LLM
		SES
	MPO - MIDLAND	JHT
HANDLE	REVIEW | SEE ME | CIRC	FILE

Re: Request for Preliminary Approval
Avalon Delaware Unit
Eddy County, New Mexico

Dear Mr. Thomas:

This office has reviewed the unexecuted copy of the unit agreement for the proposed Avalon Delaware Unit, ~~Eddy County, New Mexico~~. This agreement meets the general requirements of the Commissioner of Public Lands who has this date granted you preliminary approval as to form and content.

Preliminary approval shall not be construed to mean final approval of this agreement in any way and will not extend any short term leases until final approval and an effective date are given.

When submitting your agreement for final approval, please submit the following:

1. Application for final approval by the Commissioner setting forth the tracts that have been committed and the tracts that have not been committed.

2. Two copies of the Unit Agreement.

3. All ratifications from the Lessees of Record and Working Interest Owners. All signatures should be acknowledged before a notary. One set of ratifications must contain original signatures.

4. Initial Plan of Operation.

5. Order of the New Mexico Oil Conservation Division. Our approval will be conditioned upon subsequent favorable approval by the New Mexico Oil Conservation Division.

6. A copy of the Unit Operating Agreement.

Exhibit No. 6-A
Exxon Corporation
NMOCD Cases 11297 & 11
Hearing Date: June 29, 1995

EXHIBIT
3

7. Per your telephone conversation with Pete Martinez of this office, please revise Exhibit "A" & "B" to coincide with the BLM's survey plats. The following unit acreage should be changed: Federal Acreage, State Acreage, Fee Acreage and Total Acreage.

8. In Unit Agreement Page 3, Section 2(a), the acreage should be changed to 2,118.78.

9. Please date the unit agreement on Page 1.

10. A redesignation of all well names and numbers. The list should include the OCD property name, property number, pool name , pool code and API number.

If you have any questions, or if we may be of further help, please contact Pete Martinez at (505) 827-5791.

Very truly yours,

RAY POWELL, M.S., D.V.M.
COMMISSIONER OF PUBLIC LANDS

BY:
JAMI BAILEY, Deputy Director
Oil/Gas and Minerals Division
(505) 827-5745

RP/JB/cpm
Enclosure
cc: Reader File
BLM-Roswell--Attention: Mr. Armando Lopez
OCD-Santa Fe--Attention: Mr. Roy Johnson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number_____
Filing Date: _____

Docket No. 24,311

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION, and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

Jay W. Forbes, District Judge

Kellahin & Kellahin
W. Thomas Kellahin
Santa Fe, NM
for Appellant

Hon. Patricia A. Madrid, Attorney General
Marilyn S. Hebert,
Rand Carroll, Special Assistant Attorneys General
Santa Fe, NM
for Appellee Oil Conservation Comm.

James Bruce
Santa Fe, NM
for Appellee Exxon Corp.

Campbell, Carr, Berge & Sheridan, P.A.
William F. Carr
Santa Fe, NM
for Appellee Yates Petroleum Corp.

DECISION

MAES, Justice.

{1} This is an appeal of a district court order affirming the decision of the New Mexico Oil Conservation Commission ("OCC" or "Commission") to allow Exxon Corporation's ("Exxon's")

application for unitization under the Statutory Unitization Act, NMSA 1978, §§ 70-7-1 to -21 (1975, as amended through 1987), of the Avalon-Delaware oil field in Eddy County. We have jurisdiction pursuant to NMSA 1978, § 70-2-25(B) (1981, prior to 1998 amendment).[1]

{2} Premier Oil & Gas, Inc. ("Premier") brings three issues before us on this appeal. First, it argues that Commissioner Jami Bailey improperly functioned both as the representative approving unitization for the Commissioner of Public Lands ("CPL") and as a member of the OCC. Second, Premier argues that Exxon's proposed participation formula is not a fair one and that the OCC therefore violated the Statutory Unitization Act. Third, Premier argues that the order is arbitrary and capricious, fails to protect correlative rights, and is not supported by substantial evidence in view of (a) the failure of the OCC to appreciate the existence of disputed "pay" at well FV3, (b) the alleged premature approval of a CO_2 flood, and (c) the alleged wrongful inclusion of Premier in a waterflood. For the reasons hereinafter stated we affirm the order of the district court.

I. Facts and Issues

{3} In May 1995 Exxon Corporation applied to the Oil Conservation Division ("Division") for statutory unitization of approximately 2118.78 acres, including an outer ring of 40 acres of edge tracts or "buffer zone," of state, federal, and fee lands to be known as the Avalon-Delaware Unit Area ("Unit Area"). Exxon also applied for authority from the Division to institute the waterflood project in a portion of the Unit Area.

{4} Twelve separate tracts of land are contained in the Unit Area. Appellant Premier owns a state oil and gas lease of a tract of land known as Unit Tract 6, which Exxon's application sought to include in the Unit Area. Yates Petroleum Corporation ("Yates"), which voluntarily included its tracts in the unit, appears in support of Exxon. Before the date of unitization, October 1, 1995, Exxon operated five of the tracts, Yates operated five, and Premier and MWJ Producing Company operated one each.

{5} Exxon's project is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and work-over reserves by adding

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[1]We do not consider the bearing, if any, the 1998 amendment to NMSA 1978, § 70-2-25(B) (1981) would have on our jurisdiction in this case, because this appeal was taken well before the effective date of that amendment.

additional perforation in existing wells and by injecting water into the reservoir to recover more oil; and CO_2 oil reserves by injecting a combination of carbon dioxide and water into the reservoir. The waterflood plan is an attempt to recover more oil from Exxon's and Yates' wells by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells of all which would be surrounded by the outer ring of 40-acre tracts. Premier owns the working interest in one of these buffer zone tracts, Unit Tract 6. While Premier's Tract 6 was to be included within the western boundary of the Unit Area, Exxon did not intend to attempt to recover from Tract 6 any remaining primary oil, any work-over oil, or any secondary oil by waterflooding. Only one of Premier's two wells in Unit Tract 6 was to be included in the Unit Area. Exxon contemplated that Unit Tract 6 would serve as a "buffer zone," so that if CO_2 flooding was ever determined to be feasible, Exxon would use part of Tract 6 for CO_2 injection wells to improve recovery from the Yates' tracts.

{6} Exxon and Yates proposed a participation formula for the Unit Area. Under this formula, out of each unit of production, or the proceeds therefrom, each tract receives a share proportionate to its share of total remaining reserves. This figure is divided into share of primary reserves, share of waterflood or secondary reserves, and share of CO_2 flood or tertiary reserves. Then, these shares are weighted to reflect their respective worth. Exxon's experts found that primary reserves are worth 25% of total reserves, waterflood 50%, and CO_2 flood 25%. Given that Premier's tract has no remaining primary or secondary reserves, Premier will receive allocations representing the tertiary reserves only. Because the tertiary reserves constitute only approximately 25% of total reserves, and because only about 4% of these reserves lie under the Premier tract, Premier will be entitled to roughly 1% of total unit production.

{7} The Division held a hearing on the application at which Exxon, Premier, and Yates appeared and were represented by counsel. The Division entered its order granting Exxon's request for statutory unitization and allowing Exxon to institute a waterflood project.

{8} Premier appealed the Division order to the OCC pursuant to NMSA 1978, § 70-2-13 (1955, as amended through 1981). The OCC held its de novo hearing on December 14, 1995, at which all parties appearing at the Division hearing appeared and were represented by counsel before the OCC.

The OCC entered its order on March 12, 1996, ordering the statutory unitization of the Unit Area and allowing Exxon to institute a waterflood project. Premier filed its Application for Rehearing with the OCC on March 20, 1996.

{9} The OCC did not act on the Application, and it was therefore deemed denied pursuant to NMSA 1978, § 70-2-25(A) (1935, as amended through 1981). Premier filed a Petition for Review of the Decision of the OCC in the district court on April 12, 1996, under Section 70-2-25(B). It was dismissed with prejudice on March 12, 1997, and Premier now appeals to this Court.

II. Standard of Review

{10} In Johnson v. New Mexico Oil Conservation Comm'n, 1999-NMSC-021, ¶ 16, __ N.M. __, __ P.2d __, we explained how an appellate court reviews legal and factual conclusions reached by the Commission:

> This Court conducts a whole-record review of the OCC's factual findings. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the [Oil and Gas Act] and its implementing regulations, we may afford some deference to the OCC, particularly if the question at hand implicates agency expertise. See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. "However, the [C]ourt may always substitute its interpretation of the law for that of the [OCC] 'because it is the function of courts to interpret the law.'" Fitzhugh v. New Mexico Dep't of Labor, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (quoting Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

Although this formulation is an accurate statement of the law, it does not account for each type of issue that may come before the OCC.

{11} If the issue is purely a question of law, and if it does not involve an interpretation of the statutes, rules, and regulations within the province and proficiency of the OCC, then we afford no deference to the OCC at all. Rather, we review the question de novo. If, on the other hand, the issue is merely one of fact, then we review for substantial evidence. See Bd. of Educ. v. Harrell, 118 N.M. 470, 486, 882 P.2d 511, 527 (1994) ("We hold that due process is satisfied by de novo review of [administrative] questions of law and substantial evidence review of [administrative] findings of fact."); see also Texas Nat'l Theatres, Inc. v. City of Albuquerque, 97 N.M. 282, 287, 639 P.2d 569,

574 (1982) (standard of review of a legal conclusion bearing upon administrative action is "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party[,] . . . indulg[ing] all reasonable inferences in support of the court's decision, and disregard[ing] all inferences or evidence to the contrary") In Santa Fe Exploration Co., 114 N.M. at 114, 835 P.2d at 830, we explained how this Court determines whether the OCC's factual findings are supported by substantial evidence:

> In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [Nat'l Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988)]. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. Id.

Applying these standards to the issues before us on appeal, we affirm the district court in all regards.

III. The Role Of Commissioner Bailey

{12} Premier's argument on this issue is that there was an inherent conflict of interest involved in the same person handling a unitization matter for the CPL and then sitting as the CPL's designee on the Oil Conservation Commission. The issue whether Commissioner Bailey should have been disqualified is a legal question that is clearly outside the province and proficiency of the OCC; accordingly, as discussed above, we review this question de novo without according any deference to the OCC. We begin analyzing this issue by looking at our constitution, which provides, "The commissioner of public lands shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." N.M. Const. art. XIII, § 2. This authority is further defined by statute:

> For the purpose of more properly conserving the oil and gas resources of the state, the commissioner of public lands may consent to and approve the development or operation of state lands under agreements made by lessees of the state land jointly or severally with other lessees of state lands, with lessees of the United States or with others, including the consolidation or combination of two or more leases of state lands held by the same lessee. The agreements may provide for one or more of the following: for the cooperative or unit operation or

development of part or all of any oil or gas pool, field or area . . . .

NMSA 1978, § 19-10-45 (1961). Pursuant to this statute, Exxon, in May of 1995, requested and received the preliminary approval of the Commissioner of Public Lands for the Avalon-Delaware Unit, including CPL-owned Unit Tract 6 in which Premier held the leasehold interest. The approval letter was signed by Bailey as Deputy Director of the Oil, Gas, and Minerals Division. The letter indicated that final approval was conditioned "upon subsequent favorable approval by the New Mexico Oil Conservation Division." Following CPL action, Exxon proceeded to the Oil Conservation Division for an order of statutory unitization. See Section 70-7-3. A unitization order was issued by the Division, to which Premier objected, and a hearing de novo was held before the OCC. See NMSA 1978, § 70-2-6(B) (1979) (Division and Commission have concurrent jurisdiction). Pursuant to NMSA 1978, § 70-2-4 (1987), Bailey was the CPL's designee on the OCC, which has the power and the duty to prevent waste in the production or handling of crude petroleum or natural gas of any type or in any form, and to protect correlative rights. See NMSA 1978, § 70-2-2 (1949); NMSA 1978, § 70-2-11 (1977).

{13} Premier argues this is a case of hearing officer bias and conflict of interest. As to bias, the relevant inquiry is "whether, in the natural course of events, there is an indication of a possible temptation to an average man [or woman] sitting as a judge to try the case with bias for or against any issue presented to him [or her]." Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). This is part of the minimum due process requirement of a fair and impartial tribunal and a trier of fact free from any form of bias or predisposition regarding the outcome of the case. See id. These requirements apply most strictly to an administrative adjudication, where otherwise there is a tendency to relax safeguards customary in court proceedings "in the interest of expedition and a supposed administrative efficiency." Id. The law has also been stated that the mere appearance of partiality is enough to sanction a government decision-maker. Id.

{14} The idea of "appearance" has been discussed in the judicial context. "The leading view is that a court should review judicial behavior by its appearance 'to a reasonable person following review of the totality of the circumstances.'" Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 Marquette L. Rev. 949, 956 (1996) (quoting Matter of Larsen, 616 A.2d 529, 584 (Pa. 1992), cert.

denied, In re Larsen, 510 U.S. 815 (1993)). "Reasonable citizens require more than vague conjectures and subtle innuendo before they will entertain suspicions of judicial misconduct or ascribe the 'appearance of impropriety' to ambiguous facts and circumstances." Larsen, 616 A.2d at 584. Also, "when dealing with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct." Int'l Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975).

{15} These guideline statements about the standard of review in cases of bias or conflict of interest are brought into focus in State ex rel. Bardacke v. Welsh, 102 N.M. 592, 606, 698 P.2d 462, 470 (Ct. App. 1985), which, collecting New Mexico cases, held that to establish the appearance of impropriety, "there must be a reasonable *factual basis* for doubting the judge's impartiality." (Emphasis added.) Thus it follows that in Reid, for example, bias was found where the decision-maker actually voiced bias prior to the hearing. 92 N.M. at 415, 589 P.2d at 199. In Santa Fe Exploration Co., 114 N.M. at 108-10, 835 P.2d at 824-26, the appellant argued that there was an appearance of impropriety, and that its procedural due process rights were denied when the Oil Conservation Division Director had ex parte contact with another party before the Division prior to a certain drilling attempt, then approved the drilling, and then sat as a member of the OCC which affirmed the Division. We said:

> Unlike the Board member in Reid, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. . . . Moreover, by statute, the Director is a member of the Commission . . . and has a duty to prevent waste . . . .

Id. at 109, 835 P.2d at 825.

{16} Here, as in Santa Fe Exploration, where an OCC member had previously dealt with the same matter, Bailey's act of having merely given preliminary approval to the project on behalf of the CPL did not by itself create bias. With Premier as an objecting party whose due process rights were in issue, it was a different matter entirely, and the only question is whether Bailey, judging the need for or value of the unit from the point of view of the CPL, could have an open mind in judging its need

or value vis-à-vis Premier. There is no evidence that she had a fixed and preconceived opinion as to the facts such that it can be said that she had completely closed her mind to the proceeding. See Michael B. Browde & Andrew J. Schultz, Survey of New Mexico Law: Administrative Law, 15 N.M. L. Rev. 119, 134 (1985); see also Las Cruces Prof'l Firefighters v. City of Las Cruces, 1997-NMCA-031, ¶ 24, 123 N.M. 239, 938 P.2d 1384. At no time did Bailey give an indication of any inclination she might have as an OCC member. Her role as Deputy Director in granting preliminary approval does not equate to an opinion or commitment concerning the outcome of the OCC hearing. Nor, what amounts to the same analysis, is there a factual basis for concluding she carried a transactional conflict of interest from one position or decision to the other. Despite the relatedness of the two decisions, there was nothing apparently "tugging" at Bailey to decide a certain way in the second matter in light of her decision in the first.

{17} It is argued that a conflict of interest inheres in the statutory scheme. We think the statutory scheme is delicate but "where two statutes are related to the same general subject, the court will generally construe them *in pari materia* to give effect to each." Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 45, 125 N.M. 721, 965, P.2d 305. In this case, there was no financial incentive for Bailey to proceed in particular conformity with her action on behalf of the CPL, since she is not compensated for the performance of her duties on the OCC. §70-2-4. Any incentive to illegitimately align the carrying out of one public duty with another was non-existent. The statutes at issue here permit the exercise of reasonable discretion by agents such as Bailey unless impropriety or the appearance of impropriety is shown.

{18} There is a letter that was sent to the CPL by Premier complaining of the fact that Bailey was acting in two roles, and now Premier argues that the CPL's response constituted an admission of a conflict of interest. The letter from the CPL acknowledges that: (1) Premier's letter raised a conflict of interest question; (2) the role of the CPL designee on the Oil Conservation Commission results in an "institutional conflict" created by the legislature; and (3) the Land Commissioner will avoid a transactional conflict whenever it can "by making sure the [Land] Commissioner's designee has not worked directly on the matter before the Commission." However, contrary to the assertions of Premier, this letter does not admit a conflict of interest exists in this case. The letter states that the

CPL is satisfied that Bailey will act in this case "free from bias and prejudgment" and that "she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality." The facts support a finding that Bailey could have and did act without bias or prejudgment.

IV. The Fairness of the Participation Formula

{19} The next issue before us is whether the adoption by the OCC of the participation formula proposed by Exxon and Yates was supported by substantial evidence. The question whether the OCC complied with the Statutory Unitization Act in approving Exxon's participation formula implicates the OCC's expertise; therefore, as mentioned earlier, we will accord some deference to the OCC's interpretation of the Act, but we may offer an interpretation of our own. If we conclude that the OCC's interpretation is not legally flawed, we will reverse only if the record lacks substantial evidence supporting the OCC's fact-specific determinations.

{20} The underlying basis for the participation formula recited above was explained by one of Exxon's experts, engineer Gilbert G. Beuhler:

> The intent was to base the formula on recoverable oil, and include risk, including economic factors. Remaining primary oil has the lowest risk, since it's already developed and has an established decline. It also has the highest value per barrel with low operating cost and no future development cost.
> While there is a fair amount of remaining primary reserves, they do constitute a low amount of unit potential reserves: about two percent. Therefore, primary oil was given the 25% weight factor . . . .
> Tertiary reserves are by far the largest in potential recovery, being approximately 81% of the unit's potential future production. However, they're also the highest risk, encompassing large areal expansions, and they're also very sensitive to future pricing. Tertiary reserves also have the lowest value per barrel, with the highest development and operating costs. Thus, they were given a 25% factor . . . .
> Secondary reserves are between primary and tertiary in both amount and value, but the main objective of the unit is the implementation of the water flood, and the secondary reserves also have relatively low risk with the project area encompassing the primary development area. Thus, they were given the highest weighting factor, 50%.

It was also clearly explained that under the formula, Premier's tract and other fringe tracts are assigned participation "in return for their acreage being used in future development." The participation formula proposed by Premier was based on 50% original oil in place, 10% January 1993 production rate, 20% remaining primary reserves, and 20% future production. Premier argues that

the OCC failed to comply with the Statutory Unitization Act by adopting the Exxon formula, which it is claimed does not allocate unitized hydrocarbons according to relative value. See Section 70-7-6(A)(6).

{21} The first issue here concerns Section 70-7-6(B), which states:

> *If* the division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable, and equitable basis, the division shall determine the relative value, from evidence introduced at the hearing, taking into account the separately owned tracts in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.

(Emphasis added.) It is clear by the plain meaning of the conditional language of Section 70-7-6(B) that it is only once the participation formula proposed by the applicant has been shown to be unfair, unreasonable, or inequitable that the Division (or the OCC) need consider alternatives. Because the OCC found that the participation formula was fair, reasonable, and equitable, the OCC was not required to determine each tract's relative value.

{22} Premier's next issue is that its correlative rights,[2] which the OCC is bound to protect under Section 70-7-1, are being violated, and it advances two principal arguments attacking the fairness of the formula. First is that the Premier tract was included in the unit despite the OCC's findings that it is capable of only uneconomic primary production, and that it is incapable of any secondary production. The unit will take advantage solely of the tertiary potential of the Premier tract, if CO_2 flooding is undertaken. The question bearing on correlative rights is whether and how the Premier tract could be used for CO_2 flooding outside the unit. A review of the record reveals that Ken Jones,

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[2]Under NMSA 1978, § 70-2-33(H) (1986),

> "correlative rights" means 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 oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

owner-operator of Premier, testified that it would not conduct a CO_2 flood on its own. There were conflicting statements as to whether waste would occur in overall recovery terms without unitization, but there was substantial evidence in the form of expert testimony that waste would occur. On the basis of this expert testimony and Jones' testimony that Premier would not conduct a CO_2 flood on its own, we hold that substantial evidence supports the Commission's order and that Premier's correlative rights were not violated. See NMSA 1978, § 70-7-1 (1975). Premier argued to the Commission that its inclusion should be delayed until the CO_2 stage, but the technique it put forth to eliminate the resulting waste (the drilling of four lease-line CO_2 flood injection wells) was found, on the basis of substantial evidence in the record, to be unfeasible because of the relatively small 160-acre size of the Premier tract.

{23} Taking another tack, Premier brings out the fact that there was a difference of opinion among the experts as to whether the formula allocated water flood and CO_2 flood reserves equitably among the tracts. There was in fact some disagreement as to whether waterflooding would be advisable or possible on the Premier acreage—if so, its relative share of water flood reserves would be higher and it would receive a greater overall share of the unit. As noted, experts for Exxon and Yates testified before the Commission that Premier had a zero share of waterflood reserves. The expert for Premier disputed this, and testified that there were waterflood reserves; however, Premier only produced figures on "target oil in place." As the OCC recited in its order, "target oil in place" is a mere starting point in calculating recoverable reserves, on which equity is based. It must be adjusted by factors such as well-to-well continuity, sweep efficiency, affordable oil, pattern effects, and development costs to obtain recoverable reserves.

{24} The reason for the differing views was the way in which the lead well on the Premier tract, the FV3, was "modeled" or sampled for waterflood reserves, which was explained in detail to the OCC. The Commission members are required to have "expertise in the regulation of petroleum production by virtue of education or training." § 70-2-4. The director of the Division, who sits on the OCC, is required to be a registered petroleum engineer or have expertise in the field by virtue of education and experience. NMSA 1978, § 70-2-5 (1977, as amended through 1987). They are properly entrusted to bring these qualifications to bear in deciding technical issues which come before

them. Because there is substantial evidence in the record which could support the judgment of the OCC on the matter in issue, we defer to that judgment. See Santa Fe Exploration, 114 N.M. at 114-15, 835 P.2d 830-31. It may therefore be concluded that there are no waterflood reserves on the Premier tract.

{25} At most, according to the Technical Report prepared by Exxon but accepted by all parties as the basis for their opinions, Premier can say it has zero percent of economically producible primary reserves (though this is separately disputed; see below), 8.29% of water flood *oil in place*, and 5.88% of CO_2 flood *oil in place*. It is assigned, by the approved formula, a total of 4.08% of CO_2 reserves, and, even though the CO_2 flood may never happen, Premier will receive 1.02% of the unit proceeds. Payments are to begin not at the inception of the possible CO_2 flood, but immediately, Premier thus receiving a unit share whether its own reserves are ever tapped or not. Premier has not demonstrated that the mechanism employed in this unit was undeserving of Commission approval in its geology (Premier itself only claims 5.17% of total remaining reserves, mostly CO_2 flood, although it is unclear from where this figure is derived), or in its economics (Premier immediately receives a substantial benefit despite the fact that it is marginal, depending on future oil prices, whether it will contribute any oil to the unit.) There was substantial evidence upon which the OCC could conclude that a justifiable trade-off existed between the mere possibility of future production and a lower percentage participation for Premier. Similarly with the alleged presence of waterflood reserves, no hard facts were marshaled by Premier in a way that would refute the OCC's conclusion that, under Section 70-7-6(B), the proposed formula was a fair one.

{26} Premier also makes a general argument that the formula fails to use "traditional participation parameters." However, it has been observed,

> To use the language of the garment industry, pooling and unitization agreements are "tailor-made" and not "ready-made." Each negotiation has its own unique problems and substantial care must be exercised in the drafting of provisions appropriate for the particular situation. It is not possible to suggest language or clauses appropriate for all circumstances.

6 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 920 (1998). While some work has been done on the factors most commonly used, the "difficulty of obtaining agreement on a

participation formula has been a considerable barrier to the adoption of plans for cooperative, pooled, or unitized development." 8 id. at 763-64. We agree with Exxon and Yates that there are no "traditional values to be included in any participation formula," contrary to what Premier's expert seems to believe. See Amoco Prod. Co. v. Heimann, 904 F.2d 1405,1411 (10th Cir. 1990); Gilmore v. Oil and Gas Conservation Comm'n, 642 P.2d 773, 780 (Wyo. 1982). Furthermore, Premier's argument, here and elsewhere, for the comparable fairness of its own formula is not in itself compelling because as the OCC states: "It is not the Commission's responsibility to change a formula which was the product of negotiation [among interest owners] if that formula is 'fair.' That is not to say that other formulas, derived as a result of negotiations would not be 'fair' because there is no one perfect formula."

{27} In summary, because the formula in issue could be found on substantial evidence to "allocate unitized hydrocarbons on a fair, reasonable and equitable basis," and because it did not infringe on Premier's correlative rights, its adoption did not violate the Act.

V. Other Grounds on Which Premier Argues That the OCC's Order is Arbitrary and Capricious, Fails to Protect Correlative Rights, and is Not Supported by Substantial Evidence

{28} We said in Santa Fe Exploration:

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.'"

114 N.M. at 115, 835 P.2d at 831 (citations omitted.) We consider three areas of argument, each as to arbitrariness and capriciousness, violation of correlative rights, and lack of substantial evidence. We will review the OCC's actions and then determine whether they must be stricken for any of these reasons. Adhering to the principles of substantial evidence that we discussed earlier, we review each point with an eye to support in the record.

A. Disputed "Pay"

{29} "Pay" is reservoir rock containing oil or gas. 8 Williams & Meyers at 767. Premier argues that Exxon's experts mistakenly left out 82 feet of pay at the bottom of Upper Cherry Canyon in the FV3 well which would produce economically in the primary and water flood stages and attacks the

OCC's failure to credit them with such pay. The first aspect of the argument on this issue is the disagreement between experts on the geology of the well. A well log is a "record of the formations penetrated by a well, their depth, thickness, and (if possible) their contents." 8 id. at 1176. Both witnesses for Premier and Exxon discussed at some length various well logs. Exxon geologist David L. Cantrell introduced an exhibit showing a mud log and "several of the raw wireline log curves that [were] used in the geological and volumetric modeling," which included a gamma ray log, a depth track showing perforated intervals, a resistivity log, a water saturation log, and a porosity log. Cantrell interpreted these logs, testifying also to the meaning of observed surface and subsurface formations and phenomena. On the basis of these facts, he "picked" the base of the Upper Cherry Canyon reservoir some 82 feet higher than did Stuart D. Hanson, the Premier geologist, who, concentrating on the porosity log, argued he had found extra depth and theoretically greater pay. The OCC found that "the geological interpretation of Premier was a more believable and scientifically sound interpretation," but that "the production results show the pay to be uneconomic."

{30} The first production factor considered by the OCC and placed in issue by Premier involves some work that was performed in connection with the FV3 well, known as "the October 1995 test." Premier argues that it "attempted to test for oil production in its [FV3] well in zones *other than* the UCC reservoir and did not have sufficient time to test either the overlying or the disputed 82 foot interval before the test was terminated when Exxon disputed Premier's right to operate," but there is only tenuous support in the record for this assertion, to wit the testimony of Ken Jones that the well could conceivably have been economic at certain higher-than-expected levels of production. Premier then details what the work did involve. But the evidence is substantial that Gulf, the company that originally drilled the well, did not perforate the 82-foot interval and carried out its geology in contemplation of the non-existence of the additional pay, that Premier owned the well for five years without testing for or working over for this oil, and that in October of 1995, Premier would have or should have indeed tested for this oil if it thought it could have been produced economically. The Commission's findings that the work in question resulted in six to seven barrels of oil and 300 barrels of water per day and that such production is uneconomic, are supported directly by the testimony of Jones.

{31} The second factor relevant to production is the non-productivity of the south offset well to the FV3, the Yates ZG1. The OCC concluded, largely on the basis of the testimony and underlying exhibits of the geologist and the engineer for Exxon, that the similarity in the geology and production history of the two wells indicated that current and future production would also be similar, and that the additional pay would be unproductive. Hanson, testifying for Premier, in fact agreed that the "ZG1 looks a lot like the FV3," and did not contradict the fact that a valid comparison could be made between the two wells.

{32} With regard to the pay issue, therefore, having looked at the evidence upon which the OCC relied, the conflicting evidence, and the reasoning process used, we hold that the conclusion of the Commission—that additional pay did not exist so as to preclude inclusion of Premier oil in anything other than the CO_2 flood—was supported by evidence that was credible in light of the whole record and that was sufficient for a reasonable mind to accept as adequate. See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988). Our review of the record also shows that the conclusions of the OCC were rationally based and served ultimately to protect Premier's correlative rights.

B. Did the OCC Approve the CO_2 Project Prematurely?

{33} Premier argues that the supposedly speculative nature of the CO_2 flood means that its approval at the present time cannot be supported by substantial evidence, that Premier's correlative rights are being slighted, and that the OCC has acted arbitrarily and capriciously. In this case, the facts found surrounding CO_2 flooding at the Avalon Unit were based on extensive expert testimony received at the hearing. There was testimony that omission of the Premier tract would mean that CO_2 operations would have to be scaled back and that Premier's absence would result in the waste of as much as two million barrels of oil. With the CO_2 project, the potential additional recovery is 39.9 million barrels. Further, there was expert testimony that before a CO_2 flood could be implemented, sufficient volumes of water would have to be injected to "pressure up the reservoir," and that exclusion of Premier would lead to future problems with the development of the reservoir. This evidence in the record supports the OCC's conclusions. As discussed above, we also think Premier's correlative rights were considered and protected by the Commission in adopting the participation

formula. Premier had the opportunity, over a five-year period culminating in the disappointing test project in 1995, to develop whatever oil it could on its tract. There was ample evidence that there are no recoverable primary or secondary reserves there, and the suggestion that the tract could first be brought into the unit later, at the CO_2 phase, was discredited by expert testimony.

C. Including Unit Tract 6 in the Waterflood Project

{34} Finally, citing Section 70-7-4(J), Premier argues that "there is no substantial evidence to support including Premier's Tract 6 in the water flood project" because "Exxon, who operates or owns working interests in all tracts (except Tracts 6, 7 and 8), seeks to include the Premier Tract 6 only as a 'protection buffer' and contrary to [the Statutory Unitization Act], assigned no 'contributing value' for secondary oil recovery." The cited section reads:

> "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 likely 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.

{35} As we have discussed, however, Section 70-7-6(B) only necessitates a determination of relative value when the Division or OCC determine that a participation formula is unfair, unreasonable, or inequitable. In any event, the fact that a tract is included in a unit now for development later is not contrary to Section 70-7-4(J). Clearly, that section recognizes the nature of a unit as existing through a period of time during which its physical characteristics will change, including, in this case, the contribution being made by a given tract. Premier has not shown that the OCC acted arbitrarily or capriciously in accepting the plan. And to reiterate, the Commission could decide on the basis of substantial evidence, that the likelihood of a tertiary phase being instituted and of waste without the participation of Premier from the outset, were sufficient to create this unit.

VI. Conclusion

{36} Having considered all of the substantive arguments raised in this matter, we affirm the order of the district court.

{37} **IT IS SO ORDERED.**

PETRA J. MAES, Justice

WE CONCUR:

PAMELA B. MINZNER, Chief Justice

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PATRICIO M. SERNA, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted
Monday, September 8, 1997

ORAL ARGUMENT WILL BE HEARD IN THE FOLLOWING CASES.
THE CALL OF THE DOCKET IS AT 9:00 A.M.
COUNSEL SHOULD CHECK IN WITH THE CLERK'S OFFICE PRIOR TO 9:00 A.M.

CERTIFICATION FROM NEW MEXICO COURT OF APPEALS:
(Justice Serna recuses)

NO. 24,469 Record (11 vols.); Proceedings (12 vols.); Tapes (19); Exhibits; Br Ch; Ans Br; Reply Br; Additional Authorities.

LINDA KING, as personal representative of the Estate of Loreen King, and EUGENE JARAMILLO, as personal representative of the Estate of Theodore Jaramillo, deceased,	Berardinelli & Associates David J. Berardinelli Santa Fe, NM
Plaintiffs-Appellees,	
vs. (Serna, Patricio M., D.J.)	
PROVIDENCE WASHINGTON INSURANCE COMPANY,	Civerolo, Wolf, Gralow & Hill William P. Gralow Lisa Entress Pullen
Defendant-Appellant.	Ellen Kelly Albuquerque, NM

CERTIFICATION FROM NEW MEXICO COURT OF APPEALS:
(Justice Minzner recuses)

NOS. 24,136 and 24,235 Record (6 vols.); Supp'l Record; Proceedings; Exhibits; Brs Ch (3); Ans Brs (8); **Reply Brs due 7/31**.

BARBARA SRADER, TONY SRADER, SUSAN PADILLA, ELIAS ARCHIBEQUE, HILLIARD CROWN, A PAKARINEN, WARREN SNYDER, STEPHEN T. TOWNE, and OTHERS SIMILARLY SITUATED,	Victor R. Marshall & Associates Victor R. Marshall Albuquerque, NM William F. Riordan Albuquerque, NM (for Verant & Dansfelser)
Plaintiffs-Appellants,	
vs. (Thompson, Robert L., D.J.)	John T. Porter Albuquerque, NM (for 1st Security)
WILLIAM J. VERANT, Director, NM Financial Institutions Division, DOROTHY A. DANSFELSER, Secretary, New Mexico Human Services Department, FIRST SECURITY BANK OF NEW MEXICO, FIRST SECURITY CORPORATION,	Modrall, Sperling, Roehl, Harris & Sisk Timothy R. Van Valen Kenneth Harrigan Albuquerque, NM (for Sunwest)
SUNWEST BANK OF ALBQ, NA, SUNWEST BANK OF RIO ARRIBA, NA, BOATMEN'S BANCSHARES, 1st FINANCIAL OF NEW MEXICO FED CRED UNION, NORWEST BANK NEW MEXICO, N.A., NORWEST CORPORATION,	Kemp, Smith, Duncan & Hammond Nickay B. Manning Dennis E. Jontz Albuquerque, NM (for 1st Financial)
MASTERCARD INT;L, INC., VISA USA, INC, PLUS, CIRRUS, LYNX, CURRENCY EX OF WISC, CITIBANK (SD) NA, NEW MEXICO EDUCATORS CREDIT UNION, COMCHECK,	Rodey, Dickason, Sloan, Akin & Robb Jonathan W. Hewes Albuquerque, NM (for Norwest)

SMARTCHCK,COLLECTRITE INC OF ALBQ, TELECHECK SVCS, ROBERT M SCHWARTZ, DA, Second Judicial District, JOE BOWDICK,Bern. Co Sheriff, JOE POLISAR,Albq Pol. Chief,TOM UDALL, New Mexico Attorney General, FRANK TAYLOR, NM State Police Chief, and ISLETA BINGO AND GAMING PALACE,

Defendants-Appellees.

Madison, Harbour & Mroz
William C. Madison
Robert E. Hanson
Michael Dekleva
Albuquerque, NM (for Lynx)

Butt, Thornton & Baehr, P.C.
James E. Johansen
Rodney Schlagel
Albuquerque, NM (for NM Educators)

Gordon S. Little
Albuquerque, NM (for Comcheck)

Gallagher, Casados & Mann, P.C.
Nathan H. Mann
Reed S. Sheppard
Albuquerque, NM (for Collectrite)

Hinkle, Cox, Eaton, Coffield & Hensley
William P. Slattery
Albuquerque, NM (for Telecheck Svcs)

Robert D. Lohbeck
Santa Fe, NM (for Schwartz, Bodwich, Taylor)

Butkus & Reimer
Carl J. Butkus
Albuquerque, NM (for Bodwich)

William D. Winter, Asst. City Atty
Albuquerque, NM (for Polisar)

Tom Udall, Attorney General
Christopher Coppin, Asst. A.G.
Santa Fe, NM

Ussery & Parish
L. Lamar Parrish
Albuquerque, NM (for Isleta)

Civerolo, Wolf, Gralow & Hill
Leslie Apodaca
Albuquerque, NM (for 1st Financial)

Freedman, Boyd, Daniels, Hollander, Guttmann & Goldberg
Charles Daniels
Albuquerque, NM (for NM Educators)

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES IS 1:30 P.M. COUNSEL SHOULD CHECK IN WITH THE CLERK'S OFFICE PRIOR TO 1:30 P.M.

NO. 23,815 Record (2 vols.); Proceedings (17 vols.); Exhibits; Br Ch; Ans Br; **Reply Br due 8/1**.

STATE OF NEW MEXICO,	Tom Udall, Attorney General M. Victoria Wilson, Asst. A.G.
Plaintiff-Appellee,	Santa Fe, NM
vs. (Murdoch, Albert S., D.J.)	
CURTIS COFFIN,	Phyllis H. Subin, Chief Public Defender Will O'Connell, Asst. Appellate Def'r
Defendant-Appellant.	Santa Fe, NM

NO. 24,311 Record; Tapes (4); Exhibits; Br Ch; Ans Brs (2); **Reply Br due 8/15/97**.

PREMIER OIL & GAS, INC.,	Kellahin & Kellahin W. Thomas Kellahin
Petitioner-Appellant,	Santa Fe, NM
vs. (Forbes, Jay W., D.J.)	Marilyn S. Hebert, Asst. A.G. Santa Fe, NM (for Oil Cons)
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION, and YATES PETROLEUM CORPORATION,	James Bruce Santa Fe, NM (for Exxon)
Respondents-Appellees.	Campbell, Carr, Berge, Sheridan William F. Carr Santa Fe, NM (for Yates Petroleum)

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.
LAWYERS

MICHAEL B. CAMPBELL
WILLIAM F. CARR
BRADFORD C. BERGE
MARK F. SHERIDAN
MICHAEL H. FELDEWERT
ANTHONY F. MEDEIROS
PAUL R. OWEN

JACK M. CAMPBELL
OF COUNSEL

JEFFERSON PLACE
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September 3, 1997

VIA HAND DELIVERY

Kathleen Jo Gibson, Esq.
Clerk of the Supreme Court
of the State of New Mexico
237 Don Gaspar
Santa Fe, New Mexico 87504-0848

Re: ***Premier Oil & Gas, Inc. v. Oil Conservation Commission, et. al.***
New Mexico Supreme Court No. 24,311

Dear Ms. Gibson:

We represent Yates Petroleum Corporation in the above-captioned case. On July 23, 1997, we filed our Joint Answer Brief with the New Mexico Supreme Court. In reviewing that brief, a potentially significant typographical error has come to our attention.

Line 3 of Page 28 of the Joint Answer Brief of Respondents-Appellees Exxon Corporation and Yates Petroleum Corporation reads as follows:

No. R-10460-B, Finding ¶ 29(d).

Instead, that line should read as follows:

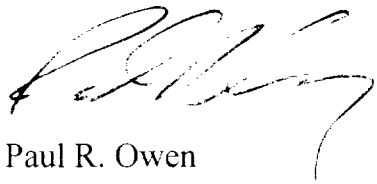
No. R-10460-B, Finding ¶ 20(d).

I have discussed this matter with counsel for all parties, and there is no opposition to my calling this matter to the Court's attention. I have also discussed this matter with Jane in your office. Jane advised me that because the briefs have already been distributed in

anticipation of the September 9, 1997 Oral Argument, I should bring this matter to the Court's attention through a letter to you.

If you have any questions, please call.

Very truly yours,



Paul R. Owen

PRO/edr

cc: James Bruce, Esq.
W. Thomas Kellahin, Esq.
Marilyn S. Hebert, Esq.

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.
LAWYERS

MICHAEL B. CAMPBELL
WILLIAM F. CARR
BRADFORD C. BERGE
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August 21, 1997

VIA FACSIMILE

Marilyn Hebert, Esq.
Special Assistant Attorney General
New Mexico Energy, Minerals &
Natural Resources Department
Oil Conservation Division
2040 South Pacheco Street
Santa Fe, NM 87505

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Kellahin & Kellahin
Post Office Box 2265
Santa Fe, NM 87504-2265

James Bruce, Esq.
Hinkle, Cox, Eaton, Coffield & Hensley, LLP
Post Office Box 2068
Santa Fe, NM 87504-2068

Re: ***Premier Oil & Gas, Inc. v. Oil Conservation Commission, et. al.***
New Mexico Supreme Court No. 24,311

Dear Lyn, Tom and Bruce:

Upon review of the Joint Answer Brief of Yates and Exxon in the above matter, we noticed a typographical error. We would like to call it to the Court's attention. I understand that Bill Carr already discussed this matter with Tom Kellahin and Jim Bruce.

I have discussed this matter with the Supreme Court Clerk's staff. The briefs have already been distributed to the Justices and law clerks working on the case in anticipation of the September 8, 1997 Oral Argument. The Clerk's office advised me to bring this matter to the Court's attention by letter to Kathleen Gibson.

Please review the attached letter and let me know whether you will oppose it. Thank you for your attention to this matter.

Very truly yours,

Paul R. Owen

PRO/edr
Attachment

NEW MEXICO ENERGY, MINERALS
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-7131

August 26, 1997

Ms. Kathleen Jo Gibson
District Court Clerk
Supreme Court
237 Don Gaspar
Santa Fe, New Mexico 87504-0848

Re: Premier Oil & Gas, Inc. v. New Mexico Oil Conservation Commission, et. al.
New Mexico Supreme Court No. 24,311

Dear Ms. Gibson:

Enclosed you will find an **Entry of Appearance** and **Certificate of Service** in the above referenced case. Please file these and send the copy back to me in the self addressed stamped envelope. Thank you.

Sincerely,

Sally E. Martinez
Administrative Secretary

Enclosures

cc: James Bruce
William F. Carr
W. Thomas Kellahin

IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs. No. 24,311

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Entry of Appearance** was delivered by first-class mail, postage prepaid, this 25th day of August, 1997, to:

James Bruce
Post Office Box 1056
Santa Fe, NM 87504
Attorney for Exxon Corporation

William F. Carr
Post Office Box 2208
Santa Fe, NM 87504
Attorney for Yates Petroleum Corporation

W. Thomas Kellahin
Post Office Box 2265
Santa Fe, NM 87504-2265
Attorney for Premier Oil & Gas Inc.

Rand Carroll

IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs. No. 24,311

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

ENTRY OF APPEARANCE

Comes now Rand Carroll, Special Assistant Attorney General, and enters his appearance on behalf of the New Mexico Oil Conservation Commission.

Rand Carroll
Special Assistant Attorney General
2040 South Pacheco
Santa Fe, NM 87505
(505)827-8156

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

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

CASE NO. 11297
(DE NOVO)

APPLICATION OF EXXON CORPORATION FOR A WATERFLOOD PROJECT, QUALIFICATION FOR THE RECOVERED OIL TAX RATE PURSUANT TO THE "NEW MEXICO ENHANCED OIL RECOVERY ACT" FOR SAID PROJECT, AND FOR 18 NON-STANDARD OIL WELL LOCATIONS, EDDY COUNTY, NEW MEXICO.

CASE NO. 11298

APPLICATION OF EXXON CORPORATION FOR STATUTORY UNITIZATION, EDDY COUNTY, NEW MEXICO.

ORDER NO. R-10460-B

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on December 14, 1995 at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the "Commission".

NOW, on this 12th day of March, 1996, the Commission, a quorum being present, having considered the testimony and the record, and being fully advised in the premises,

FINDS THAT:

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

(2) Case Nos. 11297 and 11298 were consolidated at the time of the hearing, and the record from the Examiner hearing held on June 29 and 30, 1995 was incorporated into the record without objection by any party.

EXHIBIT
6

(3) The applicant in Case No. 11298, Exxon Corporation ("Exxon"), seeks the statutory unitization, pursuant to the "Statutory Unitization Act," Sections 70-7-1 through 70-7-21 NMSA (1978), for the purpose of establishing a secondary recovery project, of all mineral interests in the designated and Undesignated Avalon-Delaware Pool, underlying its proposed Avalon (Delaware) Unit Area, comprising 2118.78 acres, more or less, of State, Federal, and fee lands in Eddy County, New Mexico, said unit to henceforth be known as the Avalon (Delaware) Unit Area; the applicant further seeks approval of the Unit Agreement and the Unit Operating Agreement which were submitted in evidence at the time of the hearing as applicant's Exhibit Nos. 2 and 3.

(4) In Case No. 11297, Exxon seeks authority to:

(a) institute a waterflood project in its proposed Avalon (Delaware) Unit Area by the injection of water into the designated and Undesignated Avalon-Delaware Pool through 18 new wells to be drilled as injection wells and one well to be converted from a producing oil well to an injection well;

(b) qualify the project for the recovered oil tax rate pursuant to the "New Mexico Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Sections 1 through 5); and

(c) drill 18 new producing wells throughout the project area at locations considered to be unorthodox.

(5) The applicant proposes that the unit comprise the following described area in Eddy County, New Mexico:

Township 20 South, Range 27 East, NMPM
Section 25: E½E½
Section 26: E½E½

Township 20 South, Range 28 East, NMPM
Section 29: SW¼SW¼
Section 30: Lots 1-4, E½W½, SW¼NE¼, SE¼
Section 31: Lots 1-4, E½W½, E½ (All)
Section 32: SW¼NE¼, W½, W½SE¼

Township 21 South, Range 27 East, NMPM

Section 4: Lot 4
Section 5: Lots 1 and 2
Section 6: Lots 1 and 2

(6) The proposed Unit Area includes portions of the designated and Undesignated Avalon-Delaware Pool. The pool was discovered in 1983, and no development wells have been drilled in the pool since 1985. The horizontal and vertical limits of the Unit Area have been reasonably defined by development.

(7) The proposed "unitized formation" is that interval underlying the Unit Area described as the Delaware Mountain Group, extending from 100 feet above the base of the Goat Seep Reef to the top of the Bone Spring formation and including, but not limited to, the Cherry Canyon and Brushy Canyon Formations, as identified by the Compensated Neutron/Lithodensity/Gamma Ray Log dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines of Section 31, Township 20 South, Range 28 East, NMPM, Eddy County, New Mexico, with the top of the unitized formation being found in said well at a depth of 2,378 feet below the surface (869 feet above sea level) and the base of the unitized formation being found at a depth of 4,880 feet below the surface (1,633 feet below sea level), or stratigraphic equivalents thereof.

(8) The proposed Unit Area contains twelve separate tracts of land, the working interests in which are owned by forty-three different persons. Prior to October 1, 1995, Exxon operated five of the twelve tracts, five tracts were operated by Yates Petroleum Corporation ("Yates"), one tract was operated by Premier Oil & Gas, Inc. ("Premier"), and one tract was operated by MWJ Producing Company. There are twenty-four royalty and overriding royalty interest owners in the Unit Area.

(9) At the time of the hearing, the owners of 98.66% of the working interest, and the owners of over 98% of the royalty and overriding interest, had voluntarily joined the Unit. The 98% royalty owner approval includes the U.S. Bureau of Land Management and the Commissioner of Public Lands, who are the two largest royalty owners in the unit. The participation formula, proposed by Exxon and Yates and approved by all parties except Premier, is as follows:

25% remaining primary reserves as of 1/1/93;
50% waterflood reserves; and
25% tertiary reserves.

(10) The applicant has conducted negotiations with interest owners within the Unit Area for over four years. Therefore, the applicant has made a good faith effort to secure voluntary unitization within the above-described Unit Area.

(11) All interested parties who have not agreed to unitization were notified of the hearing by applicant. At the hearing on these matters, Yates entered its appearance and presented evidence in support of the applications. Unit Petroleum Company made a statement in support of the applications. At the examiner hearing on these matters, MWJ Producing Company made a statement in support of the applications.

(12) Premier, the working interest owner of Tract 6 of the unit, comprising the E/2 E/2 of Section 25, Township 20 South, Range 27 East, NMPM, entered an appearance and presented evidence in opposition to the application, and requested that Tract 6 be deleted from the Unit Area. In the alternative, Premier requested that the following participation formula be adopted by the Commission:

50% original oil in place;
10% 1/1/93 producing rate;
20% remaining primary; and
20% future production.

Premier did not propose the above formula until December 13, 1995, the day before the hearing. No interest owner has approved this formula.

(13) Exxon is the largest working interest owner in the proposed Unit Area with 61 percent of the unit acreage and approximately 80% of current production. A substantial majority of working interest acreage owners, excluding Exxon, requested that Exxon prepare a technical report of the Avalon-Delaware Pool. Exxon prepared the "Report of the Technical Committee for the Working Interest Owners" (Exxon Exhibit 10, Volumes I and II; hereafter, the "Technical Report") at its own expense which according to testimony, cost Exxon approximately $500,000.

(14) The applicant proposes to institute a waterflood project at an expected initial cost of $14,400,000 for the secondary recovery of oil and associated gas, condensate, and all associated liquefiable hydrocarbons within and to be produced from the proposed Unit Area (being the subject of Case No. 11297). The estimated reserves recoverable from the waterflood project are 8.2 million barrels of oil.

(15) The Unit also has potential as a tertiary (CO_2 injection) project. Evidence presented at the hearing shows that:

(a) estimated recoverable tertiary reserves are 39.9 million barrels of oil;

(b) if such a CO_2 flood is instituted in the proposed Unit Area, it will likely be the first CO_2 project in the area and could facilitate other CO_2 floods;

(c) this project will provide valuable data which could justify additional waterflood projects and tertiary projects in other Delaware pools in New Mexico;

(d) institution of the CO_2 flood depends upon waterflood performance, results of future CO_2 injectivity tests, and perception of future oil prices. A minimum of 3 years of water injection would probably be required to repressure the reservoir prior to commencing a CO_2 injection project;

(e) the risk associated with a successful CO_2 flood in the Avalon Delaware Field is significantly higher than risk associated with the proposed waterflood because CO_2 technology is relatively new to Delaware Sand Fields and there is less data available; and

(f) CO_2 injection in the Delaware is of major importance to the State because primary and secondary recovery in the Delaware amounts to less than 10% of the original oil-in-place. CO_2 could greatly increase the recovery factor. A successful CO_2 project would serve as a catalyst for others in New Mexico.

(16) At issue are the various factors which form the basis for the participation formula which in turn governs the relative ownership of future oil and gas produced from the unit.

(17) Exxon presented evidence that:

(a) the pay in the Avalon Field is Upper Cherry Canyon and Upper Brushy Canyon Sands. There is no Bell Canyon Sand present;

(b) Exxon's geologic model was calibrated by actual production and verified by a reservoir simulation program;

(c) Exxon's geological pick of the base of the Upper Cherry reservoir is consistent with regional geologic markers found throughout the Avalon-Delaware Pool (Exxon Exhibits 16, 19a, and 19b);

(d) the waterflood project area includes 1088.50 acres in the center of the Unit Area. The outer or "fringe" tracts were included in the Unit Area based upon their CO_2 flood potential and not their waterflood potential. The "fringe" tracts will participate in production from inception of the Unit due to their CO_2 potential and the agreement to a single stage formula;

(e) a well critical to both sides' interpretation is the Premier's FV3 Well which produced 5100 barrels of oil prior to ceasing production. The nearest geologically analogous well to the FV3 Well, the Yates Citadel ZG1 Well, located in the NE/4 NE/4 of Section 36, Township 20 South, Range 27 East (Unit Tract 7), immediately to the South of the FV3 Well, produces from an interval similar to the FV3 Well, and is expected to produce equivalent amounts of oil (6000 barrels of primary oil);

(f) Premier claimed that the FV3 Well suffered completion problems, but Exxon claimed that completion problems were highly unlikely and that production is in line with Gulf's initial expectations;

(g) the Technical Report and the Unit Agreement attribute no remaining primary or waterflood reserves to Tract 6, operated by Premier. Primary production data from the Yates Citadel ZG1 Well, and other offset wells, support the Technical Report's estimate of primary and waterflood reserves in Unit Tract 6;

(h) Premier's engineering consultant stated that Tract 6 was not given credit for waterflood target "reserves" (referencing Technical Report Exhibit E-6). However, Technical Report Exhibit E-6 does not set forth "reserves," but rather "waterflood target oil-in-place." "Target oil-in-place" is a volumetric value used as a starting point in calculating recoverable reserves, on which equity is based. In order to obtain recoverable reserves, the "target oil-in-place" must be adjusted by factors such as well-to-well continuity, sweep efficiency, floodable oil, pattern effects, and development costs. This was done on all tracts, including Premier's Tract 6;

(i) The inclusion of Tract 6 in the Unit will enhance CO_2 flood sweep efficiency. Conversely, omitting Tract 6 from the Unit, as Premier advocated will diminish CO_2 flood sweep efficiency in that area of the Unit resulting in waste.

(j) the unit boundary has not changed since 1991.

(18) Yates presented evidence that:

(a) deleting Tract 6 from the Unit would substantially reduce recoverable tertiary reserves under Tracts 3, 5, and 7, which are adjacent to Tract 6;

(b) deletion of Tract 6 from the Unit will decrease the amount of oil produced from the Unit by approximately 2,000,000 barrels, thus causing loss of royalties and severance taxes to the State;

(c) Yates' geologist had done independent work which confirmed Exxon's geologic interpretation in the area contested by Premier;

(d) in June 1994 the working interest owners considered excluding Tract 6 from the Unit, but never agreed to do so. However, Premier thought that they were excluded;

(e) moving the proposed western CO_2 injection wells further west, as advocated by Premier, will diminish the CO_2 sweep efficiency on Unit Tracts 3 and 5; and

(f) negotiations over the equity formula in the Unit Agreement lasted approximately one year. Deleting Tract 6 from the Unit Area would require additional negotiations among working interest owners, revision of unit documents, and other delays. Yates' witness testified that if Tract 6 is deleted, unitization may never occur.

(19) Premier presented evidence that:

(a) Tract 6 has substantial primary and waterflood reserves which were not properly evaluated when participation percentages were formulated. Premier's claim is based upon "oil-in-place" log calculations which excludes recovery efficiency. The only Delaware completion on Tract 6, the FV3 Well, produced only 5100 barrels of oil (the analogous offset well, the Yates Citadel ZG1 Well, will produce an estimated 6000 barrels of oil);

(b) Premier's FV3 Well was drilled and completed by Gulf in 1984, and purchased by Premier in 1990. The interval below the Exxon pick of the base of the Upper Cherry Canyon reservoir is claimed by Premier to be productive in the FV3 Well. Premier's geologist utilizing detailed mapping techniques has made different "picks" in the FV3 Well resulting in an additional 82 feet of net pay which, based upon log analysis, would increase Premier's Unit participation percentage;

(c) Gulf improperly drilled and completed the FV3 Well. They used a fresh water mud which tends to swell clays within the Delaware Sand, thus creating damage and reduced productivity. The acid job channeled 50 feet above the top of their perforations and the frac job further extended the channel behind pipe because of its high pumping rate;

(d) Exxon proposes to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary of the Avalon Unit but does not intend to attempt to recover from those tracts any remaining primary oil, any workover oil or any secondary oil by waterflooding;

(e) Premier's's hydrocarbon pore volume map shows that there is substantial recoverable oil remaining under Premier's Tract 6.

(f) the Exxon - Yates participation formula is flawed because it failed to allocate total unit waterflood and CO_2 reserves equitably among the tracts;

(g) the best formula is Premier's proposed participation formula which distributes equity based upon the following:

50% original oil in place;
10% 1/93 rate;
20% remaining primary and
20% future production

(h) the Premier geology is correct and their participation formula is fair because:

(i) it uses more traditional parameters like those adopted for Parkway Delaware Unit while the Exxon proposal does not;

(ii) it allocates the total unit future oil production equitably among the tracts while the Exxon participation formula is flawed because it fails to do so.

(20) Based upon the foregoing, the Commission concludes that:

(a) Premier's claim of an additional 82 feet of "pay" is refuted by their own workover attempt in October, 1995. Their workover of the FV3 Well in what they considered to be "pay not accounted for in the Unit participation formula", resulted in 6 to 7 barrels of oil and 300 barrels of water per day, which is uneconomic. This section overlies the disputed 82 feet of additional pay, but both zones correlate with uneconomic production from the Yates Citdel ZG "Stat" No. 1, the south offset to this well;

(b) Premier's arguments and proposed participation formula is limited to oil-in-place calculations. The oil-in-place is a log calculation which may or may not be producible. Equal value was given to potential CO_2 reserves compared to primary and secondary recoveries which are far less risky operations.

(c) the geological interpretation of Premier's was a more believable and scientifically sound interpretation. Unfortunately, for Premier, the production results show the additional potential pay to be uneconomic;

(d) Premier has had five years to test the Delaware potential on their marginally economic lease. They have failed to prove additional recoverable reserves, leaving only the risky potential of CO_2 flooding;

(e) Premier did not present their proposal to Exxon in a timely manner, although they were afforded the opportunity from the beginning to do so. Premier did not carry out their responsibilities, by delaying involvement in negotiations. They benefited from Yates' efforts at negotiation, but did not contribute to the process. An estimated six to twenty-four months would be required to re-negotiate a new unitization formula. Such a delay constitutes waste;

(f) the correlative rights of all interest owners are protected by the Exxon Unit participation formula. It is not the Commission's responsibility to change a formula which was the product of negotiation if that formula is "fair". That is not to say that other formulas, derived as a result of negotiations would not be "fair" because there is no one perfect formula. Premier will benefit by receiving income from the start even though their tract is uneconomic today. However, CO_2 "potential" earns Premier the right according to Exxon's formula to receive income from the start of unit operation;

(g) Premier protests the division of its property for the formation of the unit, but no convincing alternative was presented to demonstrate that the ultimate recovery of reserves would result from such proposed division. Excluding Premier's tract would in fact delay unitization and disrupt the orderly development of a CO_2 flood.

(21) The proposed unitized method of operation as applied to the Avalon (Delaware) Unit is feasible and will result with reasonable probability in the recovery of substantially more oil and gas from the unitized portion of the Avalon-Delaware Pool than would otherwise be recovered without unitization.

(22) Such unitization and adoption of applicant's proposed unitized method of operation will benefit the working interest owners and royalty owners of the oil and gas rights within the Avalon (Delaware) Unit Area.

(23) The granting of the applications in these cases will have no adverse effect upon the interest owners in the Avalon-Delaware Pool.

(24) The estimated additional costs of such operations will not exceed the estimated value of the additional oil so recovered.

(25) The applicant's Exhibit Nos. 2 and 3 in this case, being the Unit Agreement and the Unit Operating Agreement, should be incorporated by reference into this order.

(26) The unitized management, operation and further development of the Avalon (Delaware) Unit Area, as proposed, is necessary to effectively increase the ultimate recovery of oil and gas from the unitized portion of the Avalon-Delaware Pool.

(27) The Avalon (Delaware) Unit Agreement and the Avalon (Delaware) Unit Operating Agreement provide for unitization and unit operation of the Avalon (Delaware) Unit Area upon terms and conditions that are fair, reasonable and equitable, and include:

(a) a participation formula which will result in fair, reasonable and equitable allocation to the separately owned tracts of the Unit Area of all oil and gas that is produced from the Unit Area and which is saved, being the production that is (i) not used in the conduct of unit operations, or (ii) unavoidably lost;

(b) a provision for the credits and charges to be made in the adjustment among the owners in the Unit Area for their respective investments in wells, tanks, pumps, machinery, materials and equipment contributed to unit operations;

(c) a provision governing how the costs of unit operations including capital investments shall be determined and charged to the separately-owned tracts and how said costs shall be paid, including a provision providing when, how and by whom such costs shall be charged to each owner, or the interest of such owner, and how his interest may be sold and the proceeds applied to the payment of his costs;

(d) a provision for carrying any working interest owner on a limited or carried basis payable out of production, upon terms and conditions which are just and reasonable, and which allow an appropriate charge for interest for such service payable out of production, upon such terms and conditions determined by the Commission to be just and reasonable;

(e) a provision designating the Unit Operator and providing for supervision and conduct of the unit operations, including the selection, removal and substitution of an operator from among the working interest owners to conduct the unit operations;

(f) a provision for a voting procedure for decisions on matters to be decided by the working interest owners in respect to which each working interest owner shall have a voting interest equal to his unit participation; and

(g) a provision specifying the time when unit operations shall commence and the manner in which, and the circumstances under which, the operations shall terminate and for the settlement of accounts upon such termination.

(28) The applicant requested that a 200 percent penalty of cost incurred be assessed against those working interest owners who do not voluntarily agree to join the proposed unit.

(29) Section 70-7-7.F NMSA (1978) provides that the unit plan of operation shall include a provision for carrying any working interest owner subject to limitations set forth in the statute, and any non-consenting working interest owner so carried shall be deemed to have relinquished to the unit operator all of his operating rights and working interest in and to the unit until his share of the costs has been repaid plus an amount not to exceed 200 percent thereof as a non-consent penalty.

(30) The Unit Operating Agreement contains a provision whereby any working interest owner who elects not to pay his share of unit expense shall be liable for his share of such unit expense plus an additional 200 percent thereof as a non-consent penalty, and that such costs and non-consent penalty may be recovered from each non-consenting working interest owner's share of unit production.

(31) A non-consent penalty of 200 percent should be adopted in this case. The applicant should be authorized to recover from unit production each non-consenting working interest owner's share of unit expense plus 200 percent thereof as provided in the Unit Operating Agreement.

(32) The statutory unitization of the Avalon (Delaware) Unit Area is in conformity with the above findings, and will prevent waste and protect the correlative rights of all interest owners within the proposed Unit Area, and should be approved.

(33) The proposed Avalon (Delaware) Unit Area contains undeveloped acreage and acreage that will not be part of the initial waterflood project. Therefore, in compliance with Division General Rule 701.G(3), the initial waterflood project area for allowable and tax credit purposes should be reduced to include the following described 1088.50 acres in Eddy County, New Mexico:

Township 20 South, Range 28 East, NMPM

Section 30: Lots 1 through 4, SE¼NW¼, E½SW¼, and S½SE¼
Section 31: Lots 1 through 3, NE¼, E½NW¼, NE¼SW¼, N½SE¼, and SE¼SE¼
Section 32: W½NW¼, N½SW¼, and SW¼SW¼

(34) Exhibit "A", attached hereto and made a part hereof, lists the 19 proposed injection wells (18 of which are to be new drills and one of which is to be a conversion) for the initial waterflood project. It is the applicant's intent to drill the 18 new wells and initially complete them first as oil producing wells and eventually convert them to water injectors. Approval of the unorthodox locations is necessary for "start-up" of said waterflood project.

(35) The waterflood pattern to be utilized initially is to be a 40-acre inverted five-spot comprising the 19 aforementioned water injection wells and 27 producing wells.

(36) The present Delaware oil producing wells within the subject project area and interval are in an advanced state of depletion and should therefore be properly classified as "stripper wells."

(37) The operator of the proposed Avalon (Delaware) Unit Waterflood Project should take all steps necessary to ensure that the injected water enters and remains confined to only the proposed injection interval and is not permitted to escape from that interval and migrate into other formations, producing intervals, pools, or onto the surface from injection, production, or plugged and abandoned wells.

(38) Injection should be accomplished through lined or otherwise corrosion-resistant tubing installed in a packer set within 500 feet of the uppermost injection perforation; the casing-tubing annulus in each well should be filled with an inert fluid and equipped with an approved gauge or leak-detection device. The supervisor of the Artesia District Office of the Division may authorize the setting of the casing-tubing isolation device at a shallower depth if appropriate.

(39) Prior to commencing injection operations, each injection well should be pressure tested throughout the interval from the surface down to the proposed upper-most perforation to assure mechanical integrity of each well.

(40) The injection wells or pressurization system for each well should be so equipped as to limit injection pressure at the wellhead to no more than 490 psi; however, the Division Director should have the authority to administratively authorize a pressure increase upon a showing by the operator that such higher pressure will not result in the fracturing of the injection formation or confining strata.

(41) The operator should give advance notification to the supervisor of the Artesia District Office of the Division of the date and time of the installation of injection equipment and of the mechanical integrity pressure-tests in order that the same may be witnessed.

(42) The proposed waterflood project should be approved and the project should be governed by the provisions of Rule Nos. 701 through 708 of the Oil Conservation Division Rules and Regulations.

(43) The applicant further requests that the subject waterflood project be approved by the Division as a qualified Enhanced Oil Recovery Project ("EOR") pursuant to the "Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Section 1 through 5).

(44) The evidence presented indicates that the subject waterflood project meets all the criteria for approval.

(45) The approved "project area" should initially comprise that area described in Finding Paragraph No. (33) above.

(46) To be eligible for the EOR credit, prior to commencing injection operations the operator must request from the Division a Certificate of Qualification, which Certificate will specify the proposed project area as described above.

(47) At such time as a positive production response occurs and within five years from the date of the Certificate of Qualification, the operator must apply to the Division for certification of a positive production response, which application shall identify the area actually benefitting from enhanced recovery operations, and identifying the specific wells which the operator believes are eligible for the credit. The Division may review the application administratively or set it for hearing. Based upon evidence presented, the Division will certify to the Department of Taxation and Revenue those lands and wells which are eligible for the credit.

(48) The injection authority granted herein for the proposed injection wells should terminate one year after the effective date of this order if the operator has not commenced injection operations into the subject wells, provided, however, the Division, upon written request by the operator, may grant an extension thereof for good cause shown.

(49) Division Order No. R-10460, entered September 18, 1995, approved statutory unitization, and unitization became effective October 1, 1995.

IT IS THEREFORE ORDERED THAT:

(1) The application of Exxon Corporation for the Avalon (Delaware) Unit, covering 2118.78 acres, more or less, of State, Federal, and fee lands in the Avalon-Delaware Pool, Eddy County, New Mexico, is hereby approved for statutory unitization pursuant to the "Statutory Unitization Act," Section 70-7-1 through 70-7-21 NMSA (1978).

(2) The Avalon (Delaware) Unit Agreement and the Avalon (Delaware) Unit Operating Agreement, which were submitted to the Commission at the time of the hearing as Exhibits 2 and 3, are hereby incorporated by reference into this order.

(3) The lands herein designated the Avalon (Delaware) Unit Area shall comprise the following described acreage in Eddy County, New Mexico:

Township 20 South, Range 27 East, NMPM
Section 25: E½E½
Section 36: E½E½

Township 20 South, Range 28 East, NMPM
Section 29: SW¼SW¼
Section 30: Lots 1-4, E½W½, SW¼NE¼, SE¼
Section 31: Lots 1-4, E½W½, E½ (All)
Section 32: SW¼NE¼, W½, W½SE¼

Township 21 South, Range 27 East, NMPM
Section 4: Lot 4
Section 5: Lots 1 and 2
Section 6: Lots 1 and 2

(4) The vertical limits or "unitized formation" of the unitized area shall include that interval underlying the Unit Area described as the Delaware Mountain Group, extending from 100 feet above the base of the Goat Seep Reef to the top of the Bone Spring formation and including, but not limited to, the Cherry Canyon and Brushy Canyon Formations, as identified on the Compensated Neutron/Lithodensity/Gamma Ray Log dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines of Section 31, Township 20 South, Range 28 East, NMPM, Eddy County, New Mexico, with the top of the unitized formation being found in said well at a depth of 2,378 feet below the surface (869 feet above sea level) and the base of the unitized formation being found at a depth of 4,880 feet below the surface (1,633 feet below sea level), or stratigraphic equivalents thereof.

(5) Since the persons owning the required statutory minimum percentage of interest in the Unit Area have approved, ratified, or indicated their preliminary approval of the Unit Agreement and the Unit Operating Agreement, the interests of all persons within the Unit Area are hereby unitized whether or not such persons have approved the Unit Agreement or the Unit Operating Agreement in writing.

(6) The applicant, hereby designated as Unit Operator, shall notify in writing the Division Director of any removal or substitution of said Unit Operator by any other working interest owner within the Unit Area.

(7) A non-consent penalty of 200 percent is hereby adopted in this case. The unit operator shall be authorized to recover from unit production each non-consenting working interest owner's share of unit expense plus 200 percent thereof as provided in the Unit Operating Agreement.

IT IS FURTHER ORDERED THAT:

(8) Exxon is hereby authorized to institute a waterflood project in its Avalon (Delaware) Unit Area by the injection of water into the designated and Undesignated Avalon-Delaware pool, as found in that stratigraphic interval between 2378 feet to 4880 feet and identified by the Compensated Neutron/Lithodensity/Gamma Ray Log dated September 14, 1990 run in the Exxon Corporation Yates "C" Federal Well No. 36, located 1305 feet from the North and East lines (Unit A) of Section 31, Township 20 South, Range 28 East, NMPM, Eddy County, New Mexico. Injection will be through nineteen wells described in Exhibit "A" attached hereto and made a part hereof.

(9) In compliance with Division General Rule 701.G(3), the initial waterflood project area, for allowable and tax credit purposes, shall comprise the following described 1088.50 acres in Eddy County, New Mexico:

Township 20 South, Range 28 East, NMPM

Section 30:	Lots 1 through 4, SE¼NW¼, E½SW¼, and S½SE¼
Section 31:	Lots 1 through 3, NE¼, E½NW¼, NE¼SW¼, N½SE¼, and SE¼SE¼
Section 32:	W½NW¼, N½SW¼, and SW¼SW¼

(10) The applicant must take all steps necessary to ensure that the injected water only enters and remains confined to the proposed injection interval and is not permitted to escape to other formations or onto the surface from injection, production, or plugged and abandoned wells.

IT IS FURTHER ORDERED THAT:

(11) Injection shall be accomplished through lined or otherwise corrosion-resistant tubing installed in a packer set within 500 feet of the uppermost injection perforation: the casing-tubing annulus in each well shall be filed with an inert fluid and equipped with an approved gauge or leak-detection device. The supervisor of the Artesia District Office of the Division can authorize the setting of the casing-tubing isolation device at a shallower depth if appropriate.

(12) The 19 water injection wells or pressurization system shall be initially equipped with a pressure control device or acceptable substitute which will limit the surface injection pressure to no more than 490 psi.

(13) The Division Director shall have the authority to administratively authorize a pressure limitation in excess of the 490 psi herein authorized upon a showing by the operator that such higher pressure will not result in the fracturing of the injection formation or confining strata.

(14) Prior to commencing injection operations, each injection well shall be pressure tested throughout the interval from the surface down to the proposed upper most perforation to assure mechanical integrity of each well.

(15) The operator shall give advance notification to the supervisor of the Artesia District Office of the Division of the date and time of the installation of injection equipment and of the mechanical integrity pressure-test in order that the same may be witnessed.

(16) The applicant shall immediately notify the supervisor of the Artesia District Office of the Division of the failure of the tubing, casing or seal bore assembly in any of the injection wells, the leakage of water or oil from or around any producing well, or the leakage of water or oil from any plugged and abandoned well within the project area, and shall take such steps as may be timely and necessary to correct such failure or leakage.

(17) The applicant shall conduct injection operations in accordance with Division Rule Nos. 701 through 708 and shall submit monthly progress reports in accordance with Division Rule Nos. 706 and 1115.

FURTHERMORE:

(18) The subject waterflood project is hereby approved as an Enhanced Oil Recovery Project ("EOR") pursuant to the "Enhanced Oil Recovery Act" (Laws 1992, Chapter 38, Sections 1 through 5).

(19) The approved "project area" shall initially comprise that area described in Decretory Paragraph No. (9) above.

(20) To be eligible for the EOR credit, prior to commencing injection operations the operator must request from the Division a Certificate of Qualification, which certificate will specify the proposed project area as described above.

(21) At such time as a positive production response occurs and within five years from the date of the Certificate of Qualification, the operator must apply to the Division for certification of a positive production response, which application shall identify the area actually benefitting from enhanced recovery operations, and identifying the specific wells which the operator believes are eligible for the credit. The Division may review the application administratively or set it for hearing. Based upon evidence presented the Division will certify to the Department of Taxation and Revenue those lands and wells which are eligible for the credit.

(22) The injection authority granted herein for the proposed injection wells shall terminate one year after the effective date of this order if the operator has not commenced injection operations into the subject wells, provided, however, the Division, upon written request by the operator, may grant an extension thereof for good cause shown.

FURTHERMORE:

(23) The applicant is authorized to drill the first eighteen wells listed on Exhibit "A" attached thereto. The applicant may complete the wells as producers and later convert them to injection.

(24) Division Order No. R-10460 is hereby affirmed.

(25) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, Member

WILLIAM W. WEISS, Member

WILLIAM J. LEMAY, Chairman

S E A L

EXHIBIT "A"

CASE NO. 11297
ORDER NO. R-10460-B

EXXON CORPORATION
PROPOSED WATER INJECTION WELLS/UNORTHODOX OIL WELL LOCATIONS
AVALON (DELAWARE) UNIT WATERFLOOD PROJECT AREA

TOWNSHIP 20 SOUTH, RANGE 28 EAST, NMPM,
EDDY COUNTY, NEW MEXICO

WELL NO.	ORIGINALLY PROPOSED LOCATION	SECTION	ACTUAL STAKED LOCATION	PROPOSED PERFORATED INTERVAL FEET
1212	1668' FNL & 1455' FWL	30	1665' FNL & 1452' FWL	2486 - 4817
1412	2310' FSL & 1485' FWL	30	2301' FSL &1485' FWL	2509 - 4832
1612	992' FSL & 1489' FWL	30	1152' FSL & 1489' FWL	2492 - 4798
1614	1046' FSL & 2677' FWL	30	NO CHANGE	2498 - 4853
1812	183' FNL & 1397' FWL	31	101' FNL & 1355' FWL	2467 - 4774
1814	123' FNL & 2673' FEL	31	NO CHANGE	2496 - 4844
1816	46' FNL & 1402' FEL	31	43' FNL & 1458' FEL	2520 - 4902
2012	1386' FNL & 1314' FWL	31	NO CHANGE	2481 - 4800
2014	1335' FNL & 2681' FWL	31	1388' FNL & 2750' FWL	2495 - 4843
2018	1317' FNL & 97' FEL	31	1310' FNL & 97' FEL	2501 - 4924
2212	2600' FSL & 1322' FWL	31	NO CHANGE	2496 - 4817
2214	2699' FSL & 2549' FWL	31	2610' FSL & 2549' FWL	2509 - 4841

EXHIBIT "A"
PAGE TWO

WELL NO.	ORIGINALLY PROPOSED LOCATION	SECTION	ACTUAL STAKED LOCATION	PROPOSED PERFORATED INTERVAL FEET
2216	2566' FNL & 1377' FEL	31	2564' FNL & 1377' FEL	2505 - 4885
2218	2423' FSL & 78' FEL	31	2517' FSL & 78' FEL	2477 - 4918
2220	2648' FSL & 1127' FWL	32	2658' FSL & 1127' FWL	2489 - 4945
2412	1337' FSL & 1324' FWL	31	NO CHANGE	2535 - 4826
2418	1356' FSL & 99' FEL	31	NO CHANGE	2478 - 4911
2420	1323' FSL & 1107' FWL	32	1333' FSL & 1107' FWL	2479 - 4935
2016*	1305' FNL & 1305' FEL	31	NO CHANGE	2478 - 4880

*Already drilled under prior Division Order (previously designated the Exxon Corporation Yates "C" Federal No. 36).

COPY

IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.

Petitioner-Appellant,

vs. No. 24,311

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION, and
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

JOINT ANSWER BRIEF OF RESPONDENTS-APPELLEES EXXON CORPORATION AND YATES PETROLEUM CORPORATION

Appeal from the Fifth Judicial District Court
Eddy County, New Mexico
Honorable Jay W. Forbes, Presiding

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I. SUMMARY OF PROCEEDINGS

Due to mischaracterizations of fact in the Brief-in-Chief of Premier Oil and Gas, Inc. ("Premier"), Exxon Corporation ("Exxon") and Yates Petroleum Corporation ("Yates") submit the following summary of proceedings.

A. Nature of the Case.

This case involves an appeal of a decision of the New Mexico Oil Conservation Commission ("Commission") pursuant to NMSA 1978, Section 70-2-25(B) (Repl. Pamp. 1995).

B. Course of Proceedings.

In May 1995 Exxon applied to the Oil Conservation Division ("Division") in Case No. 11298 for statutory unitization of certain lands in Eddy County, New Mexico, to be known as the Avalon (Delaware) Unit ("the Avalon Unit"). This application was filed pursuant to the Statutory Unitization Act, NMSA 1978 Sections 70-7-1 through 21 (Repl. Pamp. 1995) ("the Act").[1] Exxon also applied to the Division in Case No. 11297 for

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[1] The Act authorizes the Commission under specific circumstances to combine tracts of land, for the purpose of conducting enhanced recovery operations. Statutory unitization orders become effective and bind all owners in the unitized pool or portion thereof upon voluntary ratification of the Commission Order by at least 75% of working interest owners and 75% of royalty owners in the unit area. Under the Act, "royalty owners" includes all non-cost bearing interests, including royalty, overriding royalty, and production payment interests.

authority, *inter alia*, to institute a waterflood project in the Avalon Unit. The Division heard the applications on June 29 and 30, 1995. Exxon's applications were supported by Yates and other interest owners. Premier opposed the applications, contending that either: (1) its acreage should not be unitized; or (2) if unitized, its acreage was entitled to a greater share of unit production than proposed by Exxon.

By Order No. R-10460, the Division approved the Avalon Unit and the waterflood project, and denied Premier's requests. Premier appealed the Division's Order to the Commission pursuant to NMSA 1978, Section 70-2-13 (Repl. Pamp. 1995). The Commission held its *de novo* hearing on December 14 and 15, 1995, at which all parties hereto appeared and were represented by counsel. The Commission entered Order No. R-10460-B on March 12, 1996, again approving statutory unitization of the Avalon Unit and authorizing Exxon to institute a waterflood project in the unit.[2] Premier filed its Application for Rehearing with the Commission on March 20, 1996. The Commission did not act on the application, and it was therefore deemed denied pursuant to NMSA 1978, Section 70-2-25(A) (Repl. Pamp. 1995). Premier then filed its Petition for Review of review the

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[2] Premier claims this order "confiscates" its property. That is incorrect. The order combined a Premier tract with other tracts in the Avalon Unit, and expressly found that the unit participation formula allocated a share of unit production to Premier on a fair, reasonable and equitable basis. **Order No. R-10460-B, Finding ¶20(f) and 27(a).**

Commission's order with the District Court of Eddy County on April 12, 1996. The District Court entered its order affirming the Commission on March 12, 1997.

C. **Summary of Facts**.

1. **Unitization Process**.

In 1991 Exxon began considering unitization of the Delaware formation underlying the Avalon Unit in order to conduct enhanced recovery operations.[3] In March 1992 Exxon wrote to the other working interest owners within the proposed unit area, formally proposing an enhanced recovery unit. Because Exxon was the largest working interest owner in the unit, owning over 80% of current production, the other working interest owners asked Exxon to take the lead in preparing a technical study of the proposed unit area. The technical study ("the Technical Report," **Exxon Exhibit 10**)[4] was completed in August 1992 and made available to all working interest owners.[5] It examined and

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3 A discussion of the unitization process during the years 1991-1995 is given by Exxon landman J. Thomas. **See Tr. I at 27-36.** (In accordance with Premier's Brief-in-Chief, references to "Tr. I" refer to the transcript of the Division hearing held on June 29-30, 1995, and references to "Tr. II" refer to the transcript of the Commission hearing held on December 14-15, 1995.)

4 The exhibit numbers refer to the exhibits submitted at the Commission hearing on December 14-15, 1995.

5 The Technical Report was prepared at Exxon's sole expense at an estimated cost of $500,000. **Testimony of J. Thomas, Tr. II at 37-38; Testimony of D. Cantrell (Exxon geologist), Tr. I at 104-105; Testimony of G. Beuhler (Exxon engineer), Tr. II at 196-**

analyzed all available geologic data on the Delaware formation on a regional basis, and integrated engineering and actual well performance into the geologic model, to determine the area to be unitized and the feasibility of enhanced recovery operations. **Testimony of D. Cantrell, Tr. II at 57-64, 69-70, 100, 104; Testimony of G. Beuhler, Tr. II at 136-138, 189-191.**

The Technical Report showed that: (1) the Delaware formation underlying the Avalon Unit has been reasonably defined by development; (2) the Avalon Unit covers the productive limits of the Delaware formation in the subject area; and (3) a waterflood project for the Avalon Unit is economically feasible. As a result, Exxon proposed that the Avalon Unit be comprised of 2118.78 acres of state, federal, and fee lands[6] in Eddy County, New Mexico. **See Exxon Exhibit 1.** Exxon also proposed a waterflood project for the Avalon Unit, which will cost $14.4 million and recover an additional 8.2 million barrels of oil which will not be recovered by primary production operations. The waterflood project area encompasses 1088.55 acres within the Avalon Unit. **See Exxon Exhibit 27A.** Tracts lying outside the waterflood project area, on the outer boundary of the Avalon Unit, are deemed

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197.

[6] The tracts within the Avalon Unit, and their ownership, are listed in Exhibit "B" of the Unit Agreement (**Exxon Exhibit 2**).

by all working interest owners in the Avalon Unit (except Premier) to be uneconomic for the recovery of waterflood reserves. This is evidenced by the fact that these outer tracts have little or no primary or secondary reserves. **Exxon Exhibit 22; Testimony of G. Beuhler, Tr. II at 133, 145-148.** Thus, these tracts will produce no oil during the waterflood project. **See Exxon Exhibit 36.**

In addition to a waterflood project, the Technical Report also investigated the feasibility of a carbon dioxide injection project ("the CO_2 flood"). The CO_2 flood, if instituted, will encompass the entire unit area. All unit tracts have CO_2 flood reserves, and will produce oil during this phase. **Exxon Exhibits 28, 36.** The CO_2 flood is expected to cost at least $70 million and will recover an estimated 39.9 million barrels of oil. **Exxon Exhibit 29.** Whether the CO_2 flood will be instituted depends upon a review of waterflood performance for at least a three year period, the results of injectivity tests, and a future determination as to the economics of the CO_2 flood. **Testimony of G. Beuhler, Tr. II at 138-140.**

As of late 1992 there was a general consensus on unitization among working interest owners. As a result, Exxon met with representatives of the Bureau of Land Management ("BLM"), the Commissioner of Public Lands ("Land Commissioner"), and the Division in early 1993 to discuss the project. (The Land Commissioner and the BLM are the two

largest royalty owners in the Avalon Unit.) Exxon then forwarded ballots to the working interest owners, and over 90% of them approved the Technical Report. In January 1994 Exxon requested title data from working interest owners so that it could proceed with preparation of exhibits to the Unit Agreement.

In April 1994, Exxon notified working interest owners that the Technical Report was approved, and substantively held two working interest owner meetings to discuss unitization. Due to concerns expressed by Yates, Premier, and other working interest owners regarding the participation formula,[7] voting percentages, and other matters, Yates was asked to take the lead in developing a single phase participation formula, under which all interest owners would share in production from the inception of the Avalon Unit. Yates developed several single phase formulas, which they discussed with Exxon during the next several months. As a result of these discussions, Exxon and Yates agreed to present a single phase participation formula to the other interest owners, which allocated production to each unit tract based upon:

25% Remaining primary reserves as of 1/1/93
50% Waterflood reserves

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[7] Exxon had initially proposed a two-phase participation formula. Under that formula, tracts without waterflood reserves, like Premier's Tract 6, would be included in the Avalon Unit but would not share in unit production until the CO_2 flood was instituted. **Testimony of J. Thomas, Tr. II at 54-55; Testimony of G. Beuhler, Tr. II at 145.**

25% CO_2 flood reserves

See **Order No. R-10460-B, Finding ¶9**. This formula was based on an equitable weighing of the amount of reserves under each tract, and the risk and cost involved in each phase of primary or enhanced recovery operations. **Testimony of G. Beuhler, Tr. II at 145-147, 156; Testimony of D. Boneau (Yates engineer), Tr. II at 257-259.**

While Premier claims this formula was devised to minimize its interest in the unit (**Brief-in-Chief at 11**), the formula was in fact designed to maximize Premier's interest from the date of first unit production. **Testimony of D. Boneau, Tr. II at 220, 252.** In fact, if Premier had drilled a successful well, it would have been given credit under the unit participation formula. **Testimony of K. Jones (Premier owner), Tr. I at 253-254.**

In February 1995 Exxon sent the working interest owners a letter making certain revisions to the proposed Unit Agreement and the Unit Operating Agreement (**Exxon Exhibit 3**), and proposing this single phase formula. A non-binding ballot on unitization was approved by 97.4% of the working interest owners, and preliminary approval for unitization was obtained from the Land Commissioner and the BLM. Final copies of the Unit Agreement, together with ratification forms, were sent to all interest owners in May 1995, and Exxon filed its unitization and waterflood applications with the Division.

2. **Premier's Interest**.

Premier is the sole working interest owner of Tract 6[8] of the Avalon Unit, which is comprised of the E½E½ of Section 25, Township 20 South, Range 27 East. **Exxon Exhibit 20**. Premier purchased Tract 6 in 1990, but has never drilled any wells thereon. Although Premier now claims that it "postponed" drilling on Tract because of unitization talks (**Brief-in-Chief at 2**), Premier's engineer testified that he urged Premier to drill wells on Tract 6 during 1993 (**Testimony of P. White (Premier engineer), Tr. I at 231-232**) , but Premier refused to drill for economic reasons. **Testimony of K. Jones Tr. I at 296**. In short, Premier's actions do not match its words.[9] A quick look at Exxon Exhibit 22 shows why no additional wells were drilled on the fringe tracts after 1990: The evidence shows that such wells would be uneconomic.

During the period 1992-1995, Premier was provided the same information as all other working interest owners in the unit, participated at working interest owner meetings, and was offered the opportunity to propose a participation formula. It did not propose a

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[8] The state is the royalty owner of Tract 6.

[9] Premier did test its FV3 Well in September 1995. It states that the test was halted due to Exxon's opposition. That is untrue. Premier testified that the well test was shut down because it was uneconomic. **Testimony of K. Jones, Tr. II at 287**. Premier's brief contradicts its own testimony.

formula until the day before the Commission hearing. **Testimony of K. Jones, Tr. II at 284.**

Premier's tract has no remaining primary reserves. Moreover, it is not within the project area for the waterflood because it has no waterflood reserves. **Testimony of G. Beuhler, Tr. II at 146-147.** Thus, it will not contribute any hydrocarbons during the waterflood project. It does have about 4% of the CO_2 flood reserves. Thus, under the Commission-approved participation formula, its tract is entitled to approximately 4% x 25% = 1% of unit production, which it will receive from the date of the first production from the Avalon Unite, even if the CO_2 flood is never instituted.

3. **Division and Commission Hearings.**

At the Division hearing in June 29 and 30, 1995, Exxon and Yates submitted land, geologic, and engineering evidence in support of the applications.[10] Premier presented geologic and engineering testimony in opposition to unitization. Premier claimed that its acreage was not necessary to unitization, and thus should be excluded from the Avalon Unit. Alternatively, Premier asserted that, if its acreage were unitized, its tract was entitled to a substantially larger participation factor than proposed by Exxon. However, Premier

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[10] There are 43 working interest owners and 24 royalty owners in the unit. By the hearing date, 98.6% of working interest owners and 98% of royalty owners had voluntarily approved or ratified Exxon's unitization proposal. **Testimony of J. Thomas, Tr. II at 30-32.**

did not present a participation formula at the Division hearing.

After weighing all the evidence, the Division entered its Order No. R-10460 in September 1995, approving unitization and the waterflood project, and denying Premier's requests. This Order was appealed to the Commission, which held a *de novo* hearing, pursuant to statute, on December 14 and 15, 1995. The Commission heard two days of technical testimony, involving six expert witnesses and dozens of exhibits. Thereafter, the Commission entered Order No. R-10460-B, again authorizing unitization and the institution of a waterflood project for the Avalon Unit. This appeal followed.

Additional facts pertinent to Exxon's and Yates' arguments are set forth below in the Argument section of this brief.

II. ARGUMENT

A. Standard of Review.

The appeal of the Commission's order is before the Court on the record established at the Commission hearing. **NMSA § 70-2-25(B) (Repl. Pamp. 1995).** This Court must determine whether Order No. R-10460-B is lawful and is supported by substantial evidence in the record. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 532 P.2d 582 (1975)** ("substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); **Grace v. Oil Conservation Comm'n,**

87 N.M. 205, 531 P.2d 939 (1975). The Commission's order is prima facie valid. **NMSA 1978 §70-2-25(B) (Repl. Pamp. 1995)**. Moreover, this Court gives special weight and credence to the experience, technical competence, and specialized knowledge of the Commission, **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, supra**, and reviews the record in a light most favorable to upholding the Commission's decision. **Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 835 P.2d 819 (1992)**. As a result, Premier has the burden to show that the Commission's order: (1) is contrary to statute; or (2) has no support in the record.

B. Point I: Commissioner Bailey Was Not Biased And Was Entitled To Hear This Case.

Unable to prevail on the technical merits of this dispute, Premier attacks the impartiality of the Commission. It contends that Commissioner Bailey, in her role as a representative of the Commissioner of Public Lands, had pre-judged this case. A full review of the facts shows no bias. Instead, the facts demonstrate that Commissioner Bailey performed her duties in this case with complete impartiality as an employee of the Land Commissioner and as a member of the Oil Conservation Commission.

Premier attempts to find collusion between Exxon and Commissioner Bailey by the fact that Exxon met with personnel in the Land Commissioner's office, including

Commissioner Bailey, before filing its unitization application with the Division. However, Exxon was simply following the Land Commissioner's regulations governing unitization. **State Land Office ("SLO") Rules 1.044 through 1.052**. Those rules required Exxon to submit to the Land Commissioner an application for approval of unitization before the application was heard by the Division. **SLO Rule 1.045**. Moreover, Exxon was required to submit geological and engineering data to the Land Commissioner with its application. **SLO Rule 1.046**. Thus, the inference that Exxon, Yates, or Commissioner Bailey acted improperly is rebutted by the fact that Exxon was strictly following the pertinent regulations.

Pursuant to these regulations and long established practice, the Land Commissioner, through his staff, reviewed the information submitted with the Exxon application, found it met the requirements of his regulations, and issued the preliminary approval of unitization. **Exxon Exhibit 6A**. ("the Preliminary Approval Letter")

Premier contends that Ms. Bailey was biased because she attended the meeting in the Land Commissioner's office at which the proposed Avalon Unit was reviewed, and later signed the Preliminary Approval Letter. Premier asserts she had made the decision "to include the Premier Tract in the unit." **Brief-in-Chief at 13**. This statement is fully refuted by an examination of the language of the Preliminary Approval Letter, and the conditions

it imposed for final approval of the Avalon Unit.

The Preliminary Approval Letter did not constitute a determination by the Land Commissioner that Tract 6 should be included in this unit, for it did not address the technical aspects of the proposed unit. It found that the unit agreement "meets the general requirements of the Commissioner of Public Lands who has this date granted you preliminary approval as to form and content." This was not a technical determination on any engineering or geological issue but, instead, a finding that the Unit Agreement document was complete. The letter warned that preliminary approval "shall not be construed to mean final approval. . .in any way."

The Preliminary Approval Letter then set conditions for final approval, including the requirement of "upon subsequent favorable approval by the New Mexico Oil Conservation Division." **Exxon Exhibit 6A.**

Pursuant to regulation, the Land Commissioner's final decision was postponed to allow the Division to consider unitization. **SLO Rule 1.047**. Division approval involved a hearing before an Examiner and, in this case, a *de novo* hearing before the full Commission. In each case, the technical data concerning the waterflood (and potential CO_2 flood) were presented to Division and Commission engineers and geologists, including Ms. Bailey, who applied their special expertise in engineering and other technical matters to

evidence. After that review, the Division concluded that the unit's boundaries were appropriate, the allocation formula was fair reasonable and equitable, the proposed waterflood project and the potential CO_2 flood were proper conservation projects which would maximize recovery of oil from the subject pool. **See Order No. R-10460.** The Land Commissioner defers to this process on issues of the waste of oil and the protection of the rights of the owners of production. After the Division issued its order approving unitization, the Land Commissioner issued a final decision approving unitization.[11] **Exxon Exhibit 6B.**

Premier suggests that the Land Commissioner, through its counsel, admitted that Ms. Bailey's participation in this Commission case constituted a conflict of interest. **Brief-in-Chief at 14.** The letter from the Land Commissioner's attorney says something quite different. It does acknowledge that: (1) Premier's letter to Ms. Bailey raises a conflict of interest question; (2) the role of the Commissioner of Public Lands on the Oil Conservation Commission results in an "institutional conflict" created by the Legislature; and (3) the Land Commissioner will avoid transactional conflict whenever it can "by making sure the [Land] Commissioner's designee has not worked directly on the matter before the

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[11] It should also be noted that the Land Commissioner can only commit the state's royalty interest to the unit; he cannot commit Premier's working interest to the Avalon Unit. That can only be done voluntarily by Premier, or by the Division or Commission under the Act.

Commission". **Premier Exhibit B.** However, contrary to the assertions of Premier, this letter does not admit a conflict of interest exists in this case. This letter states that the Land Commissioner is satisfied that Ms. Bailey will act in this case "free from bias and prejudgment" and that "she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality." **Id.** That is what the Land Commissioner said and that is what Commissioner Bailey did.

The acts of Commissioner Bailey do not show any evidence of pre-judgment. As a result, she was not disqualified from hearing this case. **Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 835 P.2d 819 (1992).** This case is clearly distinguishable from **Reid v. N.M. Board of Examiners in Optometry, 92 N.M. 414, 489 P.2d 198 (1979).** In **Reid**, a board member had unequivocally stated before the hearing that Mr. Reid would lose his license after the hearing. In the present case, a decision as to unitization was left to the consideration of the Division and the Commission.[12]

The Land Commissioner oversees the lands acquired by the state upon statehood,

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12 There is no claim that, at the time she signed the letter preliminarily approving unitization of the state's interest, Commissioner Bailey or the Land Commissioner were even aware of Premier's objection to unitization. Further more, none of the parties knew whether this case would be appealed to the Oil Conservation Commission.

and has a duty to maximize revenues from those lands.[13] The legislature saw fit, when it enacted the Oil and Gas Act in the 1930's, to appoint the Land Commissioner or his designee to the Commission. **NMSA 1978 Section 70-2-4 (Repl. Pamp. 1995)**. It should be left to the legislature to change the Commission's composition.

Finally, Premier asks that this Court appoint a special master to re-hear the unitization application. There is absolutely no statutory authority for such a request.

C. Point II: Commission Order No. R-10460-B Complies with The Statutory Act and Protects Premier's Correlative Rights.

Ignoring statutory definitions and oversimplifying selected evidence, Premier contends that the formation of the Avalon Unit and the commitment of the Premier tract thereto violates the Act and Premier's correlative rights. The Court must not allow itself to be drawn into Premier's subtle trap of second-guessing the factual findings which are explicitly within the expertise of the Commission.

1. Statutory Unitization Act.

The Statutory Unitization Act was adopted by the legislature in 1975. **NMSA 1978 Section 70-7-1, et. seq. (Repl. Pamp. 1995)**. The purpose of the Act is to provide for

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[13] Premier does not state why the Land Commissioner would be biased against it. In fact, if there was a bias, it would be a bias by the Land Commissioner to maximize Tract 6's (Premier's) share of production, because that would also maximize the state's revenue.

unitized management of reservoirs, or portions thereof, for secondary and tertiary recovery operations where control of an entire producing area is needed to maximize the recovery of oil and gas. §70-7-1. The Act contains specific requirements for the creation of a statutory unit, see Sections 70-7-5 through 7, and authorizes the Commission to carry out the purposes of the Act. § 70-7-3. This authority is based on the general jurisdiction of the Division to prevent the waste of oil and gas and to protect the correlative rights of the owners thereof, Section 70-2-11, and the specific requirements of the Act to assure that a proposed unit plan is "fair, reasonable and equitable" to the owners of interest therein. § 70-7-7.

2. **The Participation Formula Is Fair**.

Premier misstates the law is when it asserts the Commission erred in failing to determine the "relative value" of the tracts in the unit. **Brief-in-Chief at 16**. That is a blatant misreading of the Act. Section 70-7-6(B) clearly states:

> If the Division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis, the Division shall determine relative value... (emphasis added).

The problem for Premier is that the Division and the Commission expressly found that the participation formula proposed by Exxon and Yates was fair and equitable. **Order**

No. R-10460-B Finding ¶¶20(f)[14] and 27(a); Order No. R-10460, Finding ¶¶ 22(a). Because of these findings, the Commission was not required to determine each tract's relative value, and in fact would have violated the Act if it had done so. Therefore, Premier's first argument on the Act is without merit.

Moreover, there is abundant evidence in the record to support the conclusion that the participation formula is "fair." Statutory unitization applications involve complicated geological and engineering issues. In this case, technical data and reports which had taken years to prepare were reviewed by expert engineering and geological witnesses called by Exxon, Yates, and Premier. The evidence, however, was in conflict as to whether the Premier tract should be included in the Avalon Unit, and whether the participation formula was fair. Those issues were properly resolved by the Commission and may not now be revisited by the Court.

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[14] Finding 20(f) provides:

> The correlative rights of all interest owners are protected by the Exxon Unit participation formula. As long as the formula is fair, it is not the Commission's responsibility to change a formula which was the product of negotiations. That is not to say that other formulas, derived as a result of negotiation would not be "fair" because there is no one perfect formula. Premier will benefit by receiving income from the start even though their tract is uneconomic today. However, CO_2 "potential" earns Premier the right according to Exxon's formula to receive income from the start of unit operation.

In **Santa Fe Exploration Co. v. Oil Conservation Comm'n, supra**, the New Mexico Supreme Court reviewed a decision of the Commission following administrative hearings in which conflicting geological and engineering evidence was produced. The Court stated that when expertise, technical competence and specialized knowledge is required to resolve and interpret evidence, the courts defer to the judgement of the administrative agency which "possesses and exercises such knowledge and expertise."[15] The Commission has special expertise in oil and gas matters. **See Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 315-16, 373 P.2d 809, 814-15 (1962).**

In this case, the Commission applied its expertise, technical competence, and specialized knowledge of engineering and geology to the evidence, and concluded that: (1)

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[15] This Court, in **Santa Fe**, stated:

> In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. See NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978, § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for petroleum engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience (has) expertise in the field of petroleum engineering.") **Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. Stokes v. Morgan, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984): Groendyke Transp. Inc. v. New Mexico State Corp. Comm'n, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984).**

Santa Fe, 114 N.M. at 114-15, 835 P.2d at 830-831. (Emphasis added).

formation of the Avalon Unit was "necessary to effectively increase the ultimate recovery of oil and gas from the unitized portion of the Avalon-Delaware Pool" **(Order No. R-10460-B, Finding ¶26)**; (2) the unit plan would have no adverse effect upon the interest owners in the Avalon Unit **(Order No. R-10460-B, Finding ¶23)**; and (3) the proposed unit would protect the correlative rights of all interest owners in the unit area **(Order No. R-10460-B, Finding ¶32)**. Furthermore, the Commission expressly found that the Unit participation formula was "fair." **Order No. R-10460-B, Finding 20(f)**. Premier's recitation of evidence at pp. 18-22 and 25-33 of its Brief-in-Chief only serve to reinforce why the courts defer to the special expertise of the Commission.

By inclusion of Premier's tracts in the Avalon Unit, Premier receives revenue under the unit participation formula from the commencement of production of unitized substances, regardless of whether or not a CO_2 flood is ever initiated. **Testimony of G. Beuhler, Tr. II at 146, 188**. Moreover, the Exxon formula appropriately weighed the risk involved in each stage of the project. **See Order No. R-10460-B, Finding ¶¶ 15(e) and 20(d)**. After considering the geological and engineering evidence presented by the parties, the Commission determined that the Unit participation formula was "fair," **Order No. R-10460-B, Finding ¶20(f)**, and that it would protect the correlative rights of all interest owners in the Unit area. **Order No. R-10460-B, Finding ¶32**. The court must defer to

this Commission's decision.

3. **Participation Formula Parameters**.

Premier then claims that the Commission's decision was erroneous because it failed to use "traditional participation parameters." There is no such thing. The courts have recognized that, in unitization cases, no single participation formula is appropriate for all situations. **Amoco Production Co. v. Heimann, 904 F.2d 1405 at 1411 (10th Cir. 1990), cert. denied 498 U.S. 942 (1990). Accord, Gilmore v. Oil and Gas Conservation Comm'n, 642 P.2d 773 (Wyo. 1982)** (seventy-one formula considered; the approved participation formula used 11 parameters). Moreover, the percentage of voluntary approval is a factor to be considered. **Hunter v. Hussey, 90 So.2d 429 (La. App. 1956)**. As noted above, over 98% of working interest and royalty owners voluntarily approved the unit. The parties in a unit are free to use whatever parameters are fair under the circumstances.

4. **Relative Value**.

Even if the Commission had found Exxon's formula unfair, and had instead determined the relative value of each tract, the review would have entailed much more than a simple comparison of remaining reserves or surface acres. The Act defines the "relative value" of tracts in terms of "its contributing value to the unit," "location on structure," and

"its probable productivity of oil and gas in the absence of unit operations."[16] All are matters which cannot be properly evaluated without technical expertise in geology and engineering. All are matters on which courts should defer to the Commission.

Likewise, the Commission reviewed the data regarding the participation formula and found that it was fair to all interest owners. As the Commission stated, there is no perfect formula. **Order No. R-10460-B, Finding 20(f)). Accord, 6 Williams & Meyers, Oil and Gas Law, §§ 970-970.2**. However, under the Act, there must be a final interpreter of the data, and that interpreter is the Commission. **6 Williams & Meyers, Oil and Gas Law, §970.2**. Based upon: (1) minuscule primary production on Premier's tract; (2) lack of waterflood reserves on Premier's tract; (3) the cost and risk associated with CO_2 reserves; and (4) the fact that over 98% of all other interests owners voluntarily committed their interests to the Avalon Unit, the Commission decided that the participation formula developed by Exxon and Yates was fair and, in effect, provided "relative value" to Premier.

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16 "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 quality 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 likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating of pricing factors, as may be reasonably susceptible of determination. **NMSA 1978 Section 70-7-4 (J) (Repl. Pamp. 1995)**.

This Court should not substitute an participation formula advanced by Premier for one which the Commission, in its expertise, found to be appropriate. "[W]here an agency such as the [Commission] passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated." **Amoco Production v. Heimann, 904 F.2d 1405, 1413 (10th Cir. 1990), supra**.

5. **Correlative Rights**.

As noted above, the Avalon Unit is comprised of 2118.78 acres, including a ring of 40-acre edge tracts. Premier owns the working interest in one of these edge tracts, Unit Tract 6, which has no waterflood potential, but only potential for production during the CO_2 flood.

Premier again asserts its faulty relative value argument and states that by not determining relative value of each tract in the unit, the Commission violated Premier's correlative rights. **Brief-in-Chief at 16-23**. To support this contention, Premier cites the Technical Report **(Exxon Exhibit 10)** and points out that while the unit participation formula allocates 1.0192% of all unit production to Premier's Tract 6, this tract has 4.16% of the total remaining reserves. Premier asserts that its correlative rights are violated for, on the basis of this data, "(s)uch a participation formula does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis." **Brief-in-Chief at 17-18**.

The fallacy of this argument is apparent when the statutory definition of correlative rights is examined. "Correlative rights" is defined by the Oil and Gas Act as follows:

> "correlative rights" means **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, 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 or gas or both under the property bears to the total **recoverable** oil or gas or both in the pool and, for such purposes, to use his just and equitable share of the reservoir energy.

NMSA 1978 Section 70-2-33 H (Repl. Pamp. 1995) (emphasis added). Premier's argument appears to be that since it has 4.16% of the remaining reserves under its Tract 6, it should receive that percentage of the unit production or its correlative rights are violated. As "correlative rights" is defined by statute, however, this term only means Premier is entitled to an **opportunity**[17] to produce **recoverable reserves**[18] as far as it is practicable and

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17 Premier has had an opportunity to produce reserves from these tracts for the last five years and failed to do so. **Testimony of D. Boneau, Tr. II at 220.** Furthermore, one way for an owner to avail itself of the opportunity to produce its reserves is to commit its interest to a unit plan. Premier declined to join in the Avalon Unit. Having failed to avail itself of two opportunities, Premier should not be rewarded for its lack of diligence.

18 The Premier tracts are edge tracts that have been demonstrated to be capable of only uneconomic primary production (**Exxon Exhibit 22; Testimony of G. Beuhler, Tr. II at 132-33**), no secondary production (**Testimony of G. Beuhler, Tr. II at 180**), and only have tertiary "potential"(**Testimony of G. Beuhler, Tr. II at 188**). The recoverable nature of the oil under the edge tracts is a matter properly within the Commission's expertise.

only as long as this can be done without causing waste.[19] Premier has never seized the opportunity to drill for and recover the oil it claims is under its tract. **See Order No. R-10460-B, Finding ¶ 20(d).**

Again, these concepts and the interplay between them, are matters properly vested in the Commission.

Based on its review of detailed technical evidence, the Commission found that Premier's correlative rights were protected by the Exxon/Yates participation formula. **Order No. R-10460-B, Finding ¶20(f).** This Court does not have the authority or technical expertise necessary to overrule the Commission's interpretation of this evidence.

D. Point III: Commission Order No. R-10460-B Is Supported By Substantial Evidence And Protects Premier's Correlative Rights.

Order No. R-10460-B includes over 75 findings of fact. Of those, Premier has challenged only six specific findings, incorrectly asserting that they are not supported by

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[19] Even if the reserves under the Premier tracts were "recoverable," the Commission would violate its statutory duties if it omitted the Premier tracts from the unit, and such action caused the waste of oil. "Waste" is defined as the ". . . 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 . . . ." **NMSA 1978 Section 70-2-3 (Repl. Pamp. 1995).** The prevention of waste is the paramount duty of the Commission and overrides correlative rights concerns when these duties are in conflict. **See Continental Oil Co., 70 N.M. at 319, 373 P.2d at 818.** The record shows that waste will occur if Premier's tract is excluded from the Avalon Unit. **Testimony of D. Boneau, Tr. II at 220-221.** Again, this is an issue within the expertise of the Commission. That determination must be left with the Commission.

substantial evidence. Each of these findings is summarized below, together with evidence in the record supporting those findings.

1. **Finding 20(a)**.

Premier claimed that the Technical Report did not attribute an additional 82 feet of "pay" to its FV3 well; therefore, its tract was improperly classified as uneconomic for primary and waterflood production, and its reserves were not properly credited in the Technical Report.

In Finding 20(a), the Commission found that the claim to 82 feet of additional pay was contradicted by Premier's workover of the FV3 Well and by the offsetting Yates ZG1 Well. The Commission's finding is supported by the following evidence:

(a) Gulf, the company that drilled the FV3 Well in 1989, did not perforate the well in this 82 foot interval, and thus did not think this "pay" existed. **Testimony of D. Cantrell, Tr. II at 477**.

(b) Premier's workover of the FV3 well in October 1995 did not test the claimed "pay" interval. **Testimony of K. Jones (owner of Premier), Tr. II at 285-288, 300-301**. Thus, Premier did not believe the subject interval was productive.

(c) The Yates ZG1 well, which immediately offsets the FV3 Well, is similar geologically and in producibility to the FV3 Well, and is uneconomic. **Testimony**

of D. Cantrell, Tr. II at 112, 472-474; Testimony of D. Beuhler, Tr. II at 161-163.

(d) The claimed 82 feet of additional pay in the FV3 Well does not exist. **Testimony of D. Cantrell, Tr. II at 106-112; Exxon Exhibits 19A and 19B.**

(e) The FV3 well was an uneconomic well. **Testimony of G. Beuhler, Tr. II at 161.**

In attacking this one finding, Premier finds fault with one data point out of massive technical report containing thousands of data points. **See Exxon Exhibit 10.** Nonetheless, there is conflicting evidence in the record upon which the Commission based its finding.

2. Finding 20(c).

In Finding 20(c), the Commission found that, while it favored Premier's general geologic interpretation of the area around the FV3 Well, the production from Premier's acreage and offsetting acreage proved that the additional claimed "pay" was uneconomic. This finding is supported by the following testimony:

(a) Primary production from the FV3 Well and the offsetting ZG1 Well was uneconomic. **Testimony of G. Beuhler, Tr. II at 161-163; Testimony of D. Cantrell, Tr. II at 119, 472-474.**

(b) To determine whether a tract has primary or secondary reserves, the geologic model must be verified by actual production. **Testimony of G. Beuhler,**

Tr. II at 136-137, 180-182.

(c) Premier has failed to prove additional recoverable reserves. **Order No. R-10460-B, Finding ¶ 29(d).**

In short, the Commission favored Premier's theoretical geology. However, the best data is actual production. When calibrated against actual, proven production data from the FV3 Well, Premier's geology was found wanting.

3. Finding 17(h).

Premier's engineer stated that Premier was not given credit for waterflood reserves. Finding 17(h) stated that he confused "reserves" with oil-in-place. Supporting evidence is as follows:

(a) Premier's engineer used oil-in-place rather than "reserves." **Testimony of T. Payne (Premier engineer), Tr. II at 443; Premier Exhibit 9 at pp. 4, 6.**

(b) Oil-in-place does not equal "reserves." **Testimony of G. Beuhler, Tr. II at 180-182.**

(c) Oil-in-place is a starting point in calculating reserves, and must be adjusted by factors such as well-to-well continuity, sweep efficiency, pattern effects, and development costs. **Id.**

In short, the Commission found exactly what the testimony (from both sides) showed.

4. Finding 19(a).

Premier claimed that its primary and waterflood reserves were not properly evaluated in the Technical Report. In Finding 19(a), the Commission stated that Premier's assertion: (1) ignores recovery efficiency; and (2) ignores the analogous offset well, the ZG1 Well. This finding is directly supported by the following evidence:

(a) Premier's acreage is outside the waterflood pattern, and thus will produce no oil during the waterflood project. **Id. Tr. II at 180-182, 187.** In addition, Premier's engineer did not advocate expanding the waterflood project. **Testimony of T. Payne, Tr. II at 444-445.**

(b) Premier's assertion ignores recovery efficiency and the higher risk associated with non-primary reserves. **Testimony of D. Boneau, Tr. II at 260-261; Testimony of G. Beuhler, Tr. II at 145-147.**

(c) The ZG1 Well is analogous to the Premier FV3 Well, and both wells have produced uneconomic amounts of oil. **Id., Tr. II at 161-163; Testimony of D. Cantrell, Tr. II at 472-474.**

(d) **See the testimony cited to support Finding 17(h), above.**

Even assuming the Premier tract has waterflood oil (and the Commission found otherwise), no waterflood oil will be recovered from that tract without expanding the project. The testimony supports the Commission's finding.

5. Finding 20(f).

In this finding, the Commission stated that the participation formula proposed by Exxon is fair and protects the correlative rights of all interest owners. This is supported by the following:

(a) The participation formula is fair and protects everyone's interests. **Testimony of G. Beuhler, Tr. II at 143-146, 150; Testimony of D. Boneau, Tr. II at 218-221, 223, 257.**

(b) Premier's tract has no primary or waterflood reserves. **Testimony of G. Beuhler, Tr. II at 147, 158, 187-190.**

(c) Although Premier's tract has no primary or waterflood reserves, it is attributed production from the inception of the unit. **Testimony of D. Boneau, Tr. II at 219-220; Testimony of G. Beuhler, Tr. II at 146-148; Testimony of D. Cantrell, Tr. II at 117.**

(d) Premier will receive a share of unit production, based on its CO_2 flood reserves, even though those reserves may never be produced. **Testimony of G. Beuhler, Tr. II at 194-195; Testimony of D. Boneau, Tr. II at 220.**

(e) See **Order No. R-10460-B, Finding ¶ 20(d).**

(f) See also the discussion at pp. 23-25 of this brief.

6. Finding 20(b).

Premier's proposed participation formula[20] places primary weight on oil-in-place. Such a formula gives equal value to all types of reserves, and ignores risks and costs associated with the CO_2 flood. The following evidence supports this finding:

(a) Premier's participation formula is limited primarily to oil in place. **Testimony of T. Payne, Tr. II at 448-449.**

(b) Oil-in-place does not take into account the higher cost of recovering oil in a waterflood or CO_2 flood situation, as opposed to primary oil. **Testimony of G. Beuhler, Tr. II at 156.**

(c) The oil-in-place under Premier's tract is not being produced under primary or waterflood conditions; it will only be produced if a CO_2 flood is

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[20] Premier's participation formula, set forth in Finding ¶19(g) of Order No. R-10460-B, was submitted to Exxon one day before the Commission hearing. **Testimony of K. Jones, Tr. II at 284-285.**

instituted. Id., **Tr. II at 143-145, 180-182.**

(d) Equal value was given by Premier to CO_2 flood, waterflood, and primary oil. **Premier Exhibit 9 at page 36; Testimony of T. Payne, Tr. II at 447-450.** However, the CO_2 flood is a riskier and costlier project than primary or secondary recovery. **Testimony of G. Beuhler, Tr. II at 145-147; Order No. R-10460-B, Finding ¶¶15(c) and 20(d).**

Again, there is testimony in the record supporting this finding of the Commission.

7. **Inclusion Of The Premier Tracts In The Unit Is Not Premature.**

Premier asserts that approval of the CO_2 project is premature at this time, and that its tracts should therefore be omitted from the Avalon Unit. It further contends that approval of the CO_2 flood at this time is not supported by substantial evidence. **Brief-in-Chief at 23-34.** A review of the record shows the contrary to be true.

Exxon reviewed its potential development plan for CO_2 flood **(Exxon Exhibit 28, Testimony of G. Beuhler, Tr. II at p. 138)**, and stated that with a CO_2 project, there was potential additional recovery of 39.9 million barrels of oil from the Avalon Unit. **Exxon Exhibit 29; Testimony of G. Beuhler, Tr. II at 139.** Without the inclusion of Premier's tracts, CO_2 operations would have to be scaled back. **Testimony of G. Beuhler, Tr. II at**

147-48. The omission of the Premier tracts would result in the waste of as much as 2 million barrels of oil. **Testimony of D. Boneau, Tr. II at 220-221.**

Exxon testified that it would take three years or more to study the reservoir's waterflood performance, **(Testimony of G. Beuhler, Tr. II at 140)**, and that before a CO_2 project could be implemented, sufficient volumes of water needed to be injected to "pressure up the reservoir." **Id., Tr. II at 184**. However, it would be short sighted not to anticipate a CO_2 flood at this time **(Id., Tr. II at 147)**, Exxon was planning for CO_2 injection at this time **(Id., Tr. II at 188)**, and exclusion of the Premier tract would only lead to future problems with development of the reservoir and result in the waste of oil. **Testimony of D. Boneau, Tr. II at 217, 220.**

Based on this evidence and the record as a whole, the Commission found that inclusion of the Premier tracts would enhance the CO_2 flood sweep. **Order No. R-10460-B, Finding ¶19(i)**. It also concluded that the CO_2 flood would increase the production of reserves and was important to the State of New Mexico. **Order No. R-10460-B, Finding ¶¶15(a)-(f)**. Finally, the Commission found that "Excluding Premier's tract would in fact delay unitization and disrupt the orderly development of a CO_2 flood." **Order No. R-**

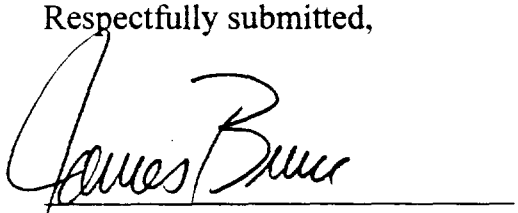
> of the Board where the Board has reached its decision on conflicting evidence and where its conclusions are supported by substantial evidence.

Ohio Oil Co. v. Porter, 225 Miss. 55, 82 So.2d 636 (1955). Although Premier disagrees with a few findings in a 20 page order, the Commission reviewed voluminous testimony, weighed the evidence, and made its decision. Since there is sufficient evidence in the record to support Order No. R-10460-B, the Commission's decision should be upheld. **Santa Fe Exploration Co. v. Oil Conservation Comm'n, supra; Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okla. 543, 231 P.2d 977 (1951).**

III. CONCLUSION

Based on the foregoing, Exxon and Yates request this Court to affirm the District Court's order affirming Commission Order No. R-10460-B.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Joint Answer Brief of Exxon Corporation and Yates Petroleum Corporation** was mailed, by first-class mail, postage prepaid, to the following counsel of record, on this 23rd day of July 1997:

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IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs. No. 24,311

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

ANSWER BRIEF OF THE
NEW MEXICO OIL CONSERVATION COMMISSION
Respondent-Appellee

Civil Appeal from the District Court for the Fifth Judicial District
Eddy County
The Honorable Jay W. Forbes, District Judge

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SUMMARY OF PROCEEDINGS

Exxon Corporation (Exxon) applied to the Oil Conservation Division (Division) for statutory unitization pursuant to the Statutory Unitization Act, NMSA 1978, §§ 70-7-1 through 70-7-21 (Repl. Pamp. 1995), of approximately 2118.78 acres comprised of state, federal and fee lands to be known as the Avalon (Delaware) Unit Area (Unit Area) in Eddy County, New Mexico. Exxon also sought authority from the Division, *inter alia,* to institute a waterflood project in a portion of the Unit Area. Pursuant to NMSA 1978, § 70-2-12 (Supp. 1996), the Division held a hearing on the application on June 29 and 30, 1995, at which Exxon, Premier Oil and Gas Corporation (Premier), and Yates Petroleum Corporation (Yates) appeared and were represented by counsel. (Tr. 6-29-95, 6 & 7) The Division entered its Order R-10460 granting Exxon's request for statutory unitization and allowing Exxon, *inter alia,* to institute a waterflood project.

Premier appealed the Division order to the Oil Conservation Commission (OCC) pursuant to NMSA 1978, § 70-2-13 (Repl. Pamp. 1995). The OCC held its *de novo* hearing on December 14, 1995, at which all parties appearing at the Division hearing appeared and were represented by counsel before the OCC. (Tr. 12-14-95, 2) The OCC entered its Order R-10460-B on March 12, 1996, ordering the statutory unitization of the Unit Area and allowing, *inter alia,* Exxon to institute a waterflood project. (R.P. 65) Premier filed its Application for Rehearing with the OCC on March 20, 1996. (R.P. 7) The OCC did not act on the Application, and it was therefore deemed denied pursuant to NMSA 1978, § 70-2-25 (Repl. Pamp. 1995).

ARGUMENT

I. COMMISSIONER BAILEY WAS NOT DISQUALIFIED FROM PARTICIPATING IN THE CASE BEFORE THE OCC

Commissioner Bailey's involvement in reviewing the unitization application as part of her duties at the State Land Office did not result in a prejudgment of the issues in the OCC case which would require her disqualification. "Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts." *Las Cruces Professional Fire Fighters v. City of Las Cruces, 36 Bar Bull.*, No. 18, (May 1, 1997) (*cert. not appl'd for*) p 20, quoting 3 Kenneth Culp Davis, Administrative Law Treatise, § 19:1, at 371-72 (2d ed. 1980).

The issues before the OCC were not the same issues before the State Land Office and Ms. Bailey acted in entirely different capacities. While Ms. Bailey may have considered some of the same facts in both instances, in making her decision concerning the preliminary approval of the unitization agreement, Ms. Bailey did not make a "prior commitment" on the issues before the OCC

Commissioner Bailey is the designee of the Commissioner of Public Lands (State Land Office) on the OCC; such designee is required by statute to have expertise in the area of oil and gas production. NMSA 1978, § 70-2-4 (Repl. Pamp. 1995) states, in part: "The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue of education or training." The duties and responsibilities of the State Land Office and those of the OCC are distinct. The State Land Office is the trustee of state lands and its duty is to the trust for the benefit of the state institutions. N.M. Const., art. XIII; NMSA 1978, § 19-1-2 (Repl. Pamp. 1994) The OCC has as its principal duties the prevention of waste and the protection of correlative rights in the

production of oil and gas. *Sims v. Mechem*, 72 N.M. 186, 189, 382 P.2d 183, 185 (1963). Even so, there is a specific statute, NMSA 1978, § 19-10-48, that addresses the interplay between the powers of the OCC and the powers of the State Land Office stating: "Nothing herein [NMSA 1978, §§ 19-10-45 to 19-10-48 (Repl. Pamp. 1994)] contained shall be held to modify in any manner the power of the oil conservation commission under laws now existing or hereafter enacted with respect to the proration, and conservation of oil or gas and the prevention of waste, nor as limiting in any manner the power and the authority of the commissioner of public lands now existing or hereafter vested in him."

The Commissioner of Public Lands has a constitutional duty to manage state trust lands in a manner that serves the best interest of the beneficiary institutions over which he is trustee. Enabling Act, § 10, N.M. Const. art. XIII, § 2. The State Land Office leases certain state lands to private entities for oil and gas production in accord with the state statutory scheme. *See* NMSA 1978, §§ 19-10-1 through 19-10-70 (Repl. Pamp. 1994). NMSA 1978, §§ 19-10-45 through 19-10-47 (Repl. Pamp. 1994) address cooperative agreements for the development or operation of oil and gas pools between state lessees and others; additionally, the State Land Office has adopted rules as to how a state lands lessee can obtain the approval of the State Land Office for these cooperative agreements as well as the effect on state lands leases when forced pooling is ordered by the Division. *See* Commissioner of Public Lands Rules 1.044 through 1.052. NMSA 1978, § 19-1-2.1 (Repl. Pamp. 1994) and Rule 1.046 require the State Land Office to keep the geological and engineering data supplied by the applicant confidential for a certain period of time. There is no provision for an adversarial hearing in this process.

The issue before the State Land Office was limited to Exxon's desire to obtain the approval

of the State Land Office to include certain state lands leased to Exxon in a cooperative agreement for the development and operation of oil and gas pools with others.[1] Once Exxon had submitted its request for unitization, Ms. Bailey acted in her capacity as Deputy Director of the Oil, Gas and Minerals Division by having her staff evaluate the application, including the geological and engineering data for unitization. In evaluating the application and analysis by her staff, Ms. Bailey considered the criteria set forth in Commissioner of Public Lands Rule 1.045. Briefly, the criteria concern whether the proposed unitization tends "to promote the consevation of oil and gas and the better utilization of reservoir energy;" that the beneficiaries and New Mexico receive "a fair and equitable share of the recoverable oil and gas;" and the final overriding criterion, that it is in the best interest of the trust. Rule 1.045. In her role at the State Land Office, her duty is to ensure that all decisions will benefit the trust and beneficiary institutions that rely on the income from the oil and gas leases administered by the State Land Office.

The issue before the OCC, however, was Exxon's request for a statutory unitization order as to approximately 2118.78 acres that included state trust land, federal land and land owned by private entities. Also, Exxon sought approval from the OCC to: 1) institute a waterflood project in part of the proposed unit; 2) qualify the waterflood project for the recovered oil tax rate; and 3) drill 18 new producing wells at unorthodox locations. These issues differ greatly from that issue before

[1] There is a difference between the terms "pooling" and "unitization" even though they are at times used interchangeably. "Pooling" is the bringing together of small tracts for the granting of a drilling permit under applicable spacing rules; it is important for the prevention of drilling unnecessary and uneconomical wells. "Unitization" is the joint operation of all or some portion of a producing reservoir. Unitization is important where there is separate ownership in a common producing pool which requires the operator to engage in cycling pressure maintenance, or secondary recovery operations and to explore for minerals at considerable depths. T. Brown and S. Miller, *Layman's Guide to Oil & Gas* 132 (1985).

the State Land Office, even though some of the proposed unit included state trust lands.

In the third paragraph on page 9 of its Application for Rehearing, Premier states: "By her [Commissioner Bailey's] actions, the SLO [the State Land Office] agreed to include the State Oil & Gas lease which it has leased to Premier and which Premier objects to being included in the unit." (R.P. 15) This statement is incorrect so far as the State Land Office's power granted by NMSA 1978, §§ 19-10-45 through 19-10-47 (Repl. Pamp. 1994) *vis a vis* Premier's state oil and gas leases. Commissioner Bailey, as an employee of the State Land Office, did not have the power to include the Premier lease without its permission as to any cooperative agreement on unit production; this can only be done by the OCC pursuant to the Statutory Unitization Act. The State Land Office, as a royalty owner pursuant to NMSA 1978, § 70-7-8 (Repl. Pamp. 1995), did eventually approve Exxon's proposed unitization as to state trust lands in the Unit Area, including Premier's state oil and gas leases in the Unit Area. The final approval was not issued on Commissioner Bailey's preliminary approval for the State Land Office; rather, the final approval letter was signed by another State Land Office employee, Larry Kehoe. (Tr. 12-14-95, 52)

In *Santa Fe Exploration Co. v. Oil Conservation Commission*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992), the New Mexico Supreme Court stated that prior involvement by an OCC member does not require disqualification from a case before the OCC. Just as the Division Director of OCD in the *Santa Fe Exploration Co.* case had been involved in the facts of a case before the OCC, so too had Ms. Bailey. The Division Director in *Santa Fe Exploration Co.* had expressed no opinion concerning the outcome of the OCC case prior to hearing just as there is no evidence here that Ms. Bailey had expressed an opinion concerning this case before the OCC. Any information gathered in her role of Deputy Director at the State Land Office through a meeting with Exxon or the

application process did not create bias. Her capacity in granting preliminary approval at the State Land Office does not equate to an opinion or commitment concerning the outcome of the OCC case.

The legislative scheme shows that the very circumstance presented in this appeal was contemplated by the Legislature in enacting NMSA 1978, § 70-2-5 (Repl. Pamp. 1995). Mr. Unna pointed this out in his letter to Mr. Kellahin. (R.P. 31) When read in context, this letter does not constitute an admission of a conflict. Mr. Unna stated that there is no conflict or bias in this particular case and that the statutory scheme created "at least a potential" conflict of interest. (R.P. 32) What is important about the legislative framework is that the Legislature made a conscious choice to put an appointee from the State Land Office on the OCC. Having a State Land Office designee on the OCC means that the Legislature intended to have issues concerning the State Land Office represented. Having a designee from the State Land Office who is knowledgeable about oil and gas issues presumes that the State Land Office designee will have knowledge of the SLO process concerning unitization.

It is not unusual in state administrative matters for a decision maker in an administrative hearing to have prior involvement in some or all aspects of an issue. For instance, the Secretary of the Environment Department or his designee is a member of the state mining commission. *See* NMSA 1978, § 69-36-6 (Repl. Pamp. 1993). Applicants for new mine permits must obtain from the Secretary of the Environment Department a written determination that the permitted activities will be expected to achieve environmental standards. The Secretary's written determination must be obtained by the applicant prior to the issuance of a new mine permit by the Mining and Minerals Division. *See* NMSA 1978, § 69-36-7(P)(2) (Repl. Pamp. 1993). However, if there is an appeal of the Mining and Minerals Division Director's order either to issue or not issue a new mine permit,

then the appeal is heard by the Mining Commission of which the Environment Department Secretary is a member. *See* NMSA 1978 § 69-36-15 (Repl. Pamp 1993).

Another example of a similar statutory scheme is that of the Oil Conservation Division director who is also a member of the OCC. *See* NMSA 1978, § 70-2-4 (Repl. Pamp. 1995). The Division hearing examiners make reports and recommendations regarding hearings to the director. The director, based on such reports and recommendations as well as his own review of the hearing record, then renders the Division decision in the form of an order which can then be appealed to the OCC. *See* NMSA 1978, § 70-2-13 (Repl. Pamp. 1995). Clearly, by the argument advanced by the Premier, the director would have a "predisposition" from his prior involvement in Division orders that would disqualify him from participating as an OCC member in every appeal from a Division order.

The officials and employees of the state are making decisions in the interest of the state, not for any pecuniary individual gain. In her capacity as an employee of the State Land Office, Commissioner Bailey has to comply with the statutes and rules that circumscribe her duties in that employment. In her capacity as the designee of the State Land Office on the OCC, Commissioner Bailey is subject to a different set of statutes and rules. In acting in an adjudicatory capacity on the OCC, Commissioner Bailey addresses different issues and considers different evidence from that as an employee of the State Land Office. The fact that one individual holds both of these positions does not create a conflict that in any manner prejudiced Premier's interests. The hearing before the OCC conformed with the principles of due process set forth in *Santa Fe Exploration Co.* at 109, 835 P.2d 819, 825 (1992).

In its Application for Rehearing, Premier cites correctly *Santa Fe Exploration Co.* as setting forth the minimum due process requirements that must be afforded parties before administrative adjudicatory bodies such as the OCC. (R.P. 15) In turn, *Santa Fe Exploration Co.* at page 109 cites *Reid v. New Mexico Bd. of Examiners in Optometry*, 92 N.M. 414, 589 P.2d 198 (1979) as an example in which the Supreme Court found that the statements of the trier of fact were biased and indicated a predisposition regarding the outcome of the case.

The facts in *Reid* involved a licensing hearing before the Board of Examiners of Optometry (Board) in which one of the Board's licensees was accused of wrongdoing. The Board, after conducting an administrative adjudicatory hearing, had the authority to revoke the licensee's license. The licensee sought to disqualify one of the Board members based on statements the Board member had made prior to the hearing to the effect that the licensee would lose his license after the hearing. The license was, in fact, revoked, and the licensee appealed to the Court. The Supreme Court found that the Board member's statement indicated prejudgment, and the Board's failure to disqualify the member from participating in that hearing violated the licensee's right to due process.

Recently, Chief Judge Harris L Hartz of the New Mexico Court of Appeals authored an opinion that discussed the general law regarding allegations of bias against administrative tribunals. *See Las Cruces Professional Fire Fighters, Bar Bull. 18* (May 1, 1997). Judge Hartz reviewed several United States Supreme Court opinions on the issues of prejudgment and bias *vis a vis* prior conduct or knowledge of members of administrative tribunals. Judge Hartz stated:

> These actions by members of the Supreme Court reflect a recognition that members of all courts (and administrative agencies) are human beings. They cannot avoid having histories or opinions; indeed, they may well have been selected for their offices in part on that basis. Recognition of this reality counsels us against requiring that every

decision maker start with a clean slate.

Id. at 20.

As with the *Santa Fe Exploration Co.* case, the facts in this case are distinguishable. Premier has not alleged any kind of statement or other action by Commissioner Bailey that remotely approaches the prejudice and bias exhibited by the *Reid* Board member. In fact, at the very opening of the OCC hearing, Premier's attorney stated that there was a conflict of interest in regard to Commissioner Bailey's participation in the hearing. (Tr. 12-14-95, 9) Commissioner's Bailey's response was to assure all parties involved that there was no question of partiality or bias and "...that any decisions reached in this case will be based on the facts as presented during this hearing." (Tr. 12-14-95, 10) As in *Santa Fe Exploration Co.*, no member of the OCC, including Commissioner Bailey, expressed any opinion regarding the outcome of the application prior to the hearing.

II. THE OCC COMPLIED WITH THE STATUTORY UNITIZATION ACT

Premier claims that the OCC failed to comply with the Statutory Unitization Act in that the OCC did not allocate unitized hydrocarbons on a fair, reasonable and equitable basis. NMSA 1978, § 70-7-6(B) (Repl. Pamp. 1995) only requires the Oil Conservation Division to determine relative value in the event that it first makes a determination that the participation formula contained in the unitization agreement is not fair. In this case, the Division made no such determination; consequently, the Division was not required to make an independent determination of relative value.

The OCC had substantial evidence upon which to base its determination that the participation formula was fair to all parties. For example, in regard to the value of Premier's lease, Exxon's geologist testified that one of Premier's wells, the FV3, was not part of the waterflood because it was

not economic to develop; that the only time it could be expected to produce would be during a CO2 flood, a stage of recovery which may never occur; and that Premier would not be damaged by the waterflood project. (Tr. 12-14-95, 194) This same witness responded that if the FV3 was not reworked for the CO2 flood, it would not have any utility and would have to be plugged and abandoned, as required by the Oil and Gas Act, NMSA 1978, § 70-2-1 through 70-2-38 (Repl. Pamp. 1995 and Supp. 1996). (Tr. 12-14-95, 196)

III. THE OCC'S ORDER IS NOT ARBITRARY OR CAPRICIOUS; THE ORDER PROTECTS CORRELATIVE RIGHTS; AND THE ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The findings of fact in the OCC's order are supported by substantial evidence, *i.e.,* evidence that a reasonable mind might accept as adequate to support a conclusion. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 87 N.M. 286, 532 P.2d 582 (1975); *Fugere v. State*, 120 N.M. 29, 897 P.2d 216 (Ct. App. 1995). Additionally, the OCC's order is in accordance with applicable law. As set forth below, a review of the evidence in the whole record confirms that there is substantial evidence to support the OCC's order. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). Premier quotes liberally from *Santa Fe Exploration Co.*, but fails to include the following language regarding administrative appeals:

> In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. **See** NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engineering"). Where a state

> agency possesses and exercises such knowledge and expertise, we defer to their judgment.

Id. at 114, 835 P.2d at 830.

Premier takes issue with the OCC, because the OCC based its order, in part, on the evidence presented by Exxon and Yates rather than the evidence submitted on behalf of Premier.

As to Premier's first issue, the "disputed 82 feet," this is, by Premier's own expert testimony, a matter of disagreement between Premier's geologist, Stuart D. Hanson, and Exxon's geologist, David L. Cantrell, and not a "mistake" as characterized by Premier. (Tr. 12-15-95, 314 & 315) Page 26 of Premier's brief on this issue contains many statements of fact with no cites to the record whatsoever. Premiere even acknowledges that the future performance of its FV3 Well was purely speculative by using the phrase " ... how the FV3 Well **might** have performed...." (Premier's Brief, p 26; emphasis added)

As to the second issue, whether the OCC should have approved a tertiary recovery, Premier fails to cite to the record for any of its statements of alleged facts. There is no requirement in statute or rule that a secondary recovery must be completed before the OCC can approve a tertiary recovery. The OCC order contains its standard statement at the end of the order: "Jurisdiction of this cause is retained for entry of such further orders as the Commission may deem necessary." (R.P. 83) In this manner any unanticipated development, new technological advance or scientific advancement can be taken into consideration by the OCC at a later date. Again, there is substantial evidence in the record to support the OCC's approval of the tertiary recovery project.

Premier's last three points all relate to the participation formula adopted by the OCC and the inclusion of Premier's Tract 6 in the waterflood project. There is substantial evidence in the

record to support the OCC's order on both of these issues. Premier's argument is, again, based on its engineer's disagreement with Exxon's experts. As to the participation formula, the Commission accepted the testimony of Exxon's engineer over that of Premier's. (Tr. 12-14-95, 194 & 195) As to the inclusion of the Premier tract, Exxon's engineer testified that if Premier's tract were eliminated from the field, there would be a loss of reserves, *i.e.* waste would occur. (Tr. 12-14-95, 147 & 148) The OCC's primary obligation is the prevention of waste of oil and gas. *Sims*, 72 N.M. at 189, 382 P.2d at 185; NMSA 1978, § 70-2-6 (Repl. Pamp. 1995).

The case law in New Mexico illustrates that the courts of the state give great deference to the OCC's decisions on the issues of fact which necessarily involve a great deal of expertise in the areas of petroleum engineering and geology. As the Supreme Court stated in *Fasken v. Oil Conservation Commission*, 87 N.M. 292, 293, 532 P.2d 588, 589 (1975), in reference to counsels' arguments in that case: "The difficulty with them [the arguments to the court] is that they emanate from the lips and pens of counsel and are not bolstered by the expertise of the [Oil Conservation] Commission to which we give special weight and credence."

CONCLUSION

There is no evidence in the record that Commissioner Bailey should have been disqualified from participating in the OCC hearing. Premier was afforded its due process rights in the administrative adjudicatory hearing. The OCC complied with the Statutory Unitization Act. There is substantial evidence in the record to support the findings of the OCC, and the OCC's order is not arbitrary, capricious or contrary to law.

The OCC's order should be affirmed by this Court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Answer Brief was mailed to the following counsel of record this 18th day of July, 1997:

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IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,
EXXON CORPORATION AND
YATES PETROLEUM CORPORATION,

Respondents-Appellees.

No. 24311

PETITIONER-APPELLANT PREMIER OIL & GAS INC.'S BRIEF IN CHIEF

APPEAL FROM THE DISTRICT COURT FOR
THE FIFTH JUDICIAL DISTRICT
EDDY COUNTY
HONORABLE JAY W. FORBES, PRESIDING

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7/15/97
Lyn -- I hope this draft makes sense. I based these new paragraphs on a discussion with Bill Brancard and a rough outline that he did. Please let me know if you have any questions and feel free to edit or leave out some of these suggested portions.

This is a quick edit. You seem to have covered just about everything. I basically just made more obvious statements and tried to elaborate a bit on some SLO policy. Premiere's attorney is fairly blunt and argumentative, even though he's not right!!!

I was unclear about the specifics of what the decision process was at the OCC. I spelled out Jami's decision making criteria, I don't know if you need to go into more detail about the OCC decision making. I also included a mention of Jan's letter. I know you didn't really want to address it, so let me know what you think about keeping it in or taking it out.

My cites are not perfect, but I wanted to get the substance to you as soon as I could.

Let me know what else I can do [or not do!!]

Page 2 -- insert paragraph after

I. Commissioner Bailey was not disqualified from . . .

Commissioner Bailey's involvement in reviewing the unitization application as part of her duties at the State Land Office did not result in a prejudgment of the issues in the OCC case which would require her disqualification. "Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts." Las Cruces at 20 (36 Bar. Bull. 18 (May 1, 1997)), quoting 3 Kenneth Culp Davis, Administrative Law Treatise, § 19:1, at 371-72 (2d ed. 1980).

The issues before the OCC were not the same issues before the State Land Office and Ms. Bailey acted in entirely different capacities. While Ms. Bailey may have considered some of the same facts in both instances, in making her decision concerning the preliminary approval of the unitization agreement, Ms. Bailey did not make a "prior commitment" on the issues before the OCC. Id.

[continue with your discussion beginning on page 2, your first paragraph "Commissioner Bailey is the designee of the Commissioner of Public Lands . . .]

Page 3, [add to first paragraph]
The Commissioner of Public Lands has a constitutional duty to manage state trust land in a manner that serves the best interest of the beneficiary institutions over which he is trustee. Enabling Act, § 10, N.M. Const. Art. XIII, § 2. [continue with The State Land Office leases certain state lands to private

entities for oil and gas production in accord with the state statutory scheme. . . .]

Page 3, in first paragraph, make the last sentence a new paragraph

"The issue before the State Land Office was limited to Exxon's . . . . [then add:]

Once Exxon had submitted its request for unitization, Ms. Bailey acted in her capacity as Deputy Director of the Oil, Gas and Minerals Division by having her staff evaluate the application, including the geological and engineering data for unitization. In evaluating the application and analysis by her staff, Ms. Bailey considered the criteria set forth in SLO Rule 1.045. Briefly, the criteria concern whether the proposed unitization tends "to promote the conservation of oil and gas and the better utilization of reservoir energy;" that the beneficiaries and New Mexico receive "a fair and equitable share of the recoverable oil and gas;" and the final overriding criteria that it is in the best interest of the trust. SLO Rule 1.045. In her role at the State Land Office, her duty is to ensure that all decisions will benefit the trust and beneficiary institutions that rely on the income from the oil and gas leases administered by the State Land Office.

Page 4: after the first full paragraph, before "It is not unusual", add the following paragraph:

In Santa Fe Exploration, the NM Supreme Court has stated that prior involvement by an OCC member does not require disqualification from a case before the OCC. Just as the Division Director of OCD in the Santa Fe Exploration case had been involved in the facts of a case before the OCC, so too had Ms. Bailey. The Division Director in Santa Fe Exploration had expressed no opinion concerning the outcome of the OCC case prior to hearing just as there is no evidence here that Ms. Bailey had expressed an opinion concerning this case before the OCC. Any information gathered as her role of Deputy Director at the State Land Office through a meeting with Exxon or the application process did not create bias. Her capacity in granting preliminary approval at the State Land Office does not equate to an opinion or commitment concerning the outcome of the OCC case.

The legislative scheme shows that the very circumstance presented in this appeal was contemplated by the legislature in enacting NMSA 1978 § 70-2-5 (Repl. Pamp. 1995). Mr. Unna pointed this out in his letter to Mr. Kellahin. When read in context, this letter does not constitute an admission of a conflict. Mr. Unna stated that there is no conflict or bias in this particular case and that the statutory scheme created "at least a potential" conflict of interest. What is important about this legislature frame work is that the legislature made a conscious choice to put an appointee from the State Land Office on the OCC. Having a

State Land Office designee on the OCC means that the legislature intended to have issues concerning the State Land Office represented. Having a designee from the State Land Office who is knowledgeable about oil and gas issues presumes that the State Land Office designee will have knowledge of the SLO processing concerning unitization.

Then on to "It is not unusual in state administrative matters . . . "

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. **See** NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engineering"). *{*115}* Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. **Stokes v. Morgan**, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n**, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

Santa Fe ... Electronic v. Oil Conservation Comm'n, 114 N.M. 103 (S. Ct 1992) Rule

Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the *{*109}* affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. **See, e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.**, 685 F.2d 547, 564 (D.C. Cir. 1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. **Reid v. New Mexico Bd. of Examiners in Optometry**, 92 N.M. 414, 415-16, 589 P.2d 198, 199-200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. **Id.** at 416, 589 P.2d at 200. Our cases also require the appearance of fairness to be present. **Id.**

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. **Id.** Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." **Id.**

In **Reid**, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. **Id.** at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. **Id.** at 416, 589 P.2d at 200.

The instant case is distinguishable from the **Reid** case. Unlike the appellant in **Reid**, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in **Reid**, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing.

The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70-2-4 (Repl. Pamp. 1987), and has a duty to prevent waste, NMSA 1978, Sections 70-2-2, -3 (Repl. Pamp. 1987) (defining and prohibiting waste); NMSA 1978, Section 70-2-11 (Repl. Pamp. 1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which *{*110}* eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As **Reid** is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. **See Lowery v. Atterbury**, 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). **See also, Jones v. Nuclear Pharmacy, Inc.**, 741 F.2d 322, 325 (10th Cir. 1984) (procedural due process not violated where petitioner given opportunity to address issue by memorandum).

B

We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. **Reid**, 92 N.M. at 415-16, 589 P.2d at 199-200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

Citing **Jones** and **McCoy v. New Mexico Real Estate Comm'n**, 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission

violated their due process rights.

Curiously, none of the parties cited **National Council on Compensation Insurance v. New Mexico State Corporation Commission**, 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In **National Council**, the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. **Id.** at 280-82, 756 P.2d at 560-62. *{*111}* On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. **Id.** at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "the notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." **Id.** at 284, 756 P.2d at 564. In other words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

Like the notice given to NCCI in **Na**

TABLE OF AUTHORITIES

OTHER CASE AUTHORITIES:

STATUTES AND OTHER AUTHORITIES:

SUMMARY OF PROCEEDINGS

Nature of the case:

Pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA (1978), this case is before the Court on Premier's Petition for Review of Order R-10460-B entered by the New Mexico Oil Conservation Commission ("the Commission").[1] This appeal is limited to those issues raised by the Petitioner in its "Application for Rehearing" filed with the Commission on March 20, 1996 which was denied by the Commission.

This Commission order approved an application by Exxon Corporation ("Exxon") to confiscate Premier's real property rights in a State of New Mexico oil & gas lease (collectively "Unit Tract 6") so that it could be included in Exxon's Avalon-Delaware Unit Waterflood Project in Eddy County, New Mexico. Yates Petroleum Corporation ("Yates"), who voluntarily included its tracts in this unit, appeared in support of Exxon. Both Exxon and Yates appeared in this appeal in support of the Commission's order.

This Petition for Review was heard by the District Court for Eddy County, New Mexico on January 31, 1997, and the Honorable Jay W. Forbes, District Judge, has entered Judgment affirming the Commission's Order on March 12, 1997 and Appellant, Premier, filed its Notice of Appeal on March 27, 1997.

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[1] TR-I refers to the transcript of the Division Examiner hearing held on June 29, 1995.
TR-II refers to the transcript of the Commission hearing held on December 14, 1995.

Background:

In July, 1990, Premier purchased a State of New Mexico oil and gas lease covering 480 acres in Section 25, T20S, R27E, which already contained three wells, including two wells which Exxon proposed to include within its proposed Avalon-Delaware Unit boundary.[2] On May 21, 1991, Exxon commenced plans to consolidate five tracts operated by Exxon, five tracts operated by Yates and one tract operated by Premier into this unit.[3] Once Exxon commenced its unitization study in 1991, no operator including Exxon, Yates or Premier, drilled any further wells pending the outcome of this unitization plan.[4]

In November, 1991, after receiving notice from Exxon of possible unitization, Premier had postponed its development plans for its lease pending the outcome of unitization commenced by Exxon.[5]

Exxon's reason for forming the Avalon-Delaware Unit was for a Secondary Recovery Project ("waterflooding"), while the Tertiary Recovery Project ("CO2") has only some probability of happening.[6] Exxon's project[7] is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and workover reserves by adding additional perforations in existing wells and by injecting water into the reservoir to recover more oil; and CO2 oil reserves by injecting a combination of carbon

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[2] TR-I, Vol II, p. 244.
[3] TR-II, Vol-I, p. 32-36, Exxon Exhibit 7
[4] TR-II, Vol-I, p. 237-238.
[5] TR-II, Vol II, p. 273-274.
[6] TR-II, Vol-I, p. 46 lines 6-22; Exxon Exhibit 7 (10/10/94 letter)
[7] TR-II, Vol I, p. 137-140, Exxon Exhibit 10

dioxide and water into the reservoir.[8] Exxon believed that only a portion of the Delaware formation within the Avalon-Delaware Oil Pool was suitable for waterflooding operations.[9] That portion was confined to the Upper Cherry Canyon ("UCC") and the Upper Brushy Canyon ("UBC") reservoirs.[10]

Exxon's waterflood plan was to attempt to recover more oil from the Exxon and Yates's wells in part of this pool by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells all of which would be surrounded by an outer ring of 40-acre tracts "***buffer zone***" (including Premier's Tract 6 on the western unit boundary) which would not contain producing wells nor contain or be offset by water injection wells.[11]

Exxon proposed to include Premier's Tract 6 within the western boundary of the Avalon-Delaware Unit **but did not** intend to attempt to recover from Tract 6 any remaining primary oil, any workover oil or any secondary oil by waterflooding.[12] Instead, Exxon and Yates wanted Premier's Tract 6 as a "buffer zone" so that if CO2 flooding was ever determined to be feasible, then they would use part of Premier's Tract 6 for CO2 injection wells to improve recovery from the Yates' tracts.[13] Oddly, while Premier has two wells in Tract 6, Exxon only wanted one well and excluded the other.[14]

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[8] TR-II, Vol I, p. 39.
[9] TR-II, Vol-I, p. 28, 135
[10] TR-II, Vol-I, p. 28 and Exxon's Exhibit 10(A-1)
[11] TR-II, Vol-I, p. 70, 226-228, Exxon Exhibits 20, 27a
[12] TR-II, Vol-II, p. 374-376.
[13] TR-II, Vol-I, p. 224-229, Exxon Exhibit 28
[14] TR-II, Vol-I p. 29, Exxon Exhibit 3-H

Exxon was also required to determine each tract's share of the Upper Cherry Canyon ("UCC") and Upper Brushy Canyon ("UBC") reservoir in the Avalon-Delaware Oil Pool.[15] Dr. Boneau testifying for Yates stated, "It was only late in the negotiation process that I realized that if Premier was removed that Exxon would reduce our [Yates'] CO2 reserves and it would hurt us [Yates] in the unit."[16] Thus, by January 18, 1995, Yates had convinced Exxon to put Premier's Tract 6 into the unit.[17] On January 18, 1995, Exxon and Yates finally agreed to a final **participation formula** which was supposed to allow each unit tract to receive 25% of its share of primary oil, 50% of its share of secondary/workover oil and 25% of its share of CO2 oil.[18] This revised participation formula resulted in Exxon receiving 64.79% of unit production Yates receiving 34.07% of unit production and Premier receiving 1.02% of unit production.[19]

On May 18, 1994, Premier notified Exxon that Premier did not want to participate in this unit because it disagreed with Exxon's geology and proposed unit boundary contained in the Exxon Technical Report which Exxon refused to change.[20] On June 17, 1994, in Premier's absence, all other working interest owners agreed to consider excluding Premier's Tract 6 from the unit.[21]

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[15] TR-II, Vol-I, p. 143-144.
[16] TR-II, Vol-I, p. 239.
[17] TR-II, Vol-I, p. 218, Yates Exhibit 7, Tab 3H. attachments 1 and 2.
[18] TR-II, Vol-I, p. 34, 49.
[19] TR-II, Vol-II, Premier Exhibit 9 page 32.
[20] TR-II, Vol-II, p 278, lines 13-18. Exxon Exhibit 7 (Premier letter dtd May 18, 1994).
[21] TR-II, Vol-I, p. 44-46, Yates Exhibit 7, Tab 3G

On May 5, 1995, Exxon's attorney and technical witnesses met with Commissioner Jami Bailey in her capacity as the Deputy Director of the oil and gas mineral division of the office of the Commissioner of Public Lands.[22] Exxon presented a summary of its case, including ten detailed exhibits, to Ms. Bailey and requested her approval for including Premier's Tract 6 in the unit along with other State of New Mexico oil & gas leases. [23]

On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division seeking to confiscate Premier's property (Tract 6) for both the waterflood project and the CO2 project by resorting to statutory unitization, pursuant to the "Statutory Unitization Act". Sections 70-7-1 through 70-7-21, N.M.S.A. (1978).[24]

On May 15, 1995, Commissioner Bailey approved the inclusion of Premier's Tract 6 and the other State of New Mexico oil & gas leases into Exxon's Avalon-Delaware Unit. [25]

On June 29 and 30, 1995, the Division held a hearing on Exxon's application and on September 18, 1995, entered its order approving Exxon's request to include Premier's Tract 6 in both projects.[26] On October 13, 1995, Premier filed an application for a DeNovo hearing before the New Mexico Oil Conservation Commission ("Commission").[27]

In late September, 1995, ("the October 1995 test") Premier attempted to test for oil production in its FV-3 Well in zones **other than** the UCC reservoir until the test was prematurely terminated when Exxon disputed Premier's right to operate.[28]

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[22] TR-II, Vol-I, p. 32, Exxon Exhibit 7.
[23] TR-II, Vol-I, p. 32, Exxon Exhibit 7.
[24] See Commission Case file 11298
[25] TR-II, Vol-I, p. 32, Exxon Exhibit 7.
[26] See Order R-10460-B
[27] See Commission Case file 11298.
[28] TR-II, Vol-II, p. 291, 297.

On December 11, 1995, Premier wrote to Commissioner Bailey to express its concern that her past involvement prevented her from being an unbiased member of the Commission.[29] On December 13, 1995, counsel for the Commissioner of Public Lands wrote Premier and admitted that there was a conflict of interest for Commissioner Bailey to participate on the Commission at the hearing of this case but "excused" it as a legislative problem over which they had no control.[30] Counsel promised that the Commissioner of Public Lands would avoid such conflicts in the future by not having Commissioner Bailey review and decide this type of case prior to hearing.[31]

On December 14, 1995, and over the objection of Premier, Commissioner Bailey participated as a member of the Commission and decided this case against Premier.[32]

On March 12, 1996, the Commission entered Order R-10460-B which accepted Premier's geologic interpretation but then "affirmed" the Division's decision to include Premier's Tract 6 in the unit and denied all of Premier's arguments.[33]

On March 20, 1996, Premier filed its Application for Rehearing before the Commission which failed to act within the ten (10) day period and was therefore deemed denied.[34] On April 12, 1996, Premier timely filed its appeal with the District Court.

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[29] TR-II, Vol-I, p. 8-15, Premier Exhibit A.
[30] TR-II, Vol-I, p. 8-15, Premier's Exhibit B.
[31] TR-II, Vol-I, P. 8-15, Premier's Exhibit B.
[32] TR-II, Vol-I, p 8-14.
[33] See Order R-10460-B.
[34] Cause CV-96-121-JWF, Premier's Application for Rehearing attached to Petition for Review.

Premier's contentions before the Commission:

Premier[35] contended before the Commission that Exxon's own analysis demonstrated that Premier's Tract 6 **must be excluded** from the unit because under Exxon's analysis:

(1) there is **no increase** in ultimate recovery of primary oil from the unit by including the Premier Tract 6;

(2) there is **no increase** in ultimate recovery of waterflood oil or workover oil from the unit by including the Premier Tract 6;

(3) as the working interest owner of all of Section 25, T20S, R27E, Premier was not going to receive any "contributing value" for primary, waterflood oil or workover oil;

(4) that Exxon's proposed unit shape, determination of the distribution of hydrocarbon pore volume and the primary and secondary production estimates was arbitrary and failed to provide "relative value" to Tract 6 as required by Section 70-7-4(J) NMSA (1978), as amended and, unless corrected by the Commission, Premier's correlative rights would be violated;

(5) that Premier's Tract 6 was included in order to shift the risk of being an edge CO2 flood tract from Yates to Premier and thereby failed to provide any means for the recovery of any oil west of the existing Yates' wells;

(6) since recovery of oil from under Tract 6 is deferred to a CO2 recovery phase for which no commitment had been made, there was no merit to Exxon's claim that correlative rights would be impaired and that waste would occur if the Premier acreage were deleted from the proposed unit;

(7) since Exxon's proposed CO2 project was not supported by substantial scientific evidence and had not yet been adequately studied, it was **premature** to approve that project; and

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[35] See Premier's proposed Finding 10 of its proposed Commission Order contained in Premier's Application for Rehearing attached to its Petition for Review filed in Cause CV-96-121-JWF

(8) at such time as firm plans are formulated for a CO2 recovery project, then the Commission could approve either (a) a lease line injection agreement with Premier and/or (b) include the Premier acreage in that CO2 project.

In the alternative, Premier argued before the Commission[36] that if the Commission was to confiscate Premier's Tract 6 for the Exxon unit, then in order to comply with the Statutory Unitization Act and in order to protect Premier's correlative rights, then it was essential for the Commission to correct the following flaws in the Exxon proposal which:

(a) failed to establish a reasonable unit boundary;

(b) failed to appropriately distribute hydrocarbon pore volume with accurate corresponding reservoir parameters and did not establish the appropriate relative value to be attributed to each tract including Tract 6;

(c) incorrectly correlated the top and base of the Upper Cherry Canyon Reservoir which resulted in Exxon assigning only 55 feet of net thickness to this well (instead of 137 feet) which it used to contour the various geologic maps and estimates of the ultimate hydrocarbon pore volume map to argue that Premier Tract 6 had no remaining primary oil potential;

(d) these mistakes in well log correlations reduced the net UCC reservoir for Premier's FV-3 Well;

(e) it determined that there are 2,320,000 barrels of waterflood target oil under Premier's Tract 6 **but** then arbitrarily eliminated all of that incremental oil in Premier's FV3 Well by increasing the water saturation to 60% based upon water production volumes reported by Gulf which came from a source other than the UCC reservoir;

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[36] See Premier's proposed finding 11 of its proposed Commission order contained in its Application for Rehearing attached to its Petition for Review filed in Case No. CV-96-121-JWF.

(f) failed to assign "relative value" to certain tracts because decline curve analysis concluded that an excessive amount of remaining primary oil was credited by Exxon to certain Yates operated tracts; and

(g) failed to submit an appropriate participation formula to allow the owners of Tract 6 to recover their proportionate share of the total remaining recoverable hydrocarbons underlying the unit.

Issues for Commission to resolve:

The first issue in dispute was the geological pick of the base of the UCC reservoir in Premier's FV3 Well.[37] By mis-locating the base of the UCC reservoir and deleting some 82 feet of net UCC reservoir from Premier's FV3 Well, Exxon reduced the net UCC reservoir thickness credited to Premier's FV3 Well and thereby reduced Premier's share of recoverable oil.[38]

The second issue in dispute was the proposed unit boundary which also stems from the "mispick" of the reservoir thickness in Premier's FV3 Well.[39] Exxon believed that the UCC reservoir was ending on Premier's Tract 6 and that the reservoir did not extend further into Premier's Section 25.[40] Premier's geologic model showed the reservoir continuing farther westward beyond Premier's Tract 6 and therefore was significantly larger than shown by Exxon.[41]

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[37] TR-II, Vol-II, p. 313-314, Premier's Exhibits 1 and 2.
[38] TR-II, Vol-II, p. 314-316, 326, 331-333, 369-372.
[39] TR-II, Vol-II, p. 328-382, Premier's Exhibits 1-8
[40] TR-II, Vol-I, p. 227, lines 23-25
[41] TR-II, Vol-II, p. 345-350, 371, Premier Exhibits 7, 8 and 9.

The third issue in dispute was the amount of water contained in the reservoir ("water saturation") underlying Premier Tract 6.[42] By exaggerating the amount of water contained in the reservoir at the FV3 Well so that it was greater than 60%, Exxon was able to argue that the productive limits of the UCC reservoir "ended" at Premier's Tract 6 and that Premier's Tract 6 had no waterflood target oil instead of having the 2,950,000 barrels of waterflood target oil originally calculated by Exxon.[43]

The fourth issue in dispute was Premier's contention that Exxon's Report discriminated against Premier by not giving the same primary, workover, waterflood or CO2 flood reserve credits to the Premier acreage as it did to the equivalent Yates' tracts.[44]

Affect of statutory unitization upon Premier:

On January 18, 1995, Exxon and Yates finally agreed to a revised **participation formula** which resulted in Exxon receiving 64.79% of unit production, Yates receiving 34.07% of unit production and **Premier receiving 1.0192%** of unit production.[45]

Premier sought to be **credit with 4.52%** of all unit production, because its Tract 6 had 7.6% of the unit acreage, 6.14% of the original oil in place, 6.19% of the CO2 reserves and 5.17% of the total remaining reserves as established by Premier's petroleum engineering report.[46]

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[42] TR-II, Vol-II, p. 375-382.

[43] Tr-II, Vol-II, p. 375-382, 406-407, 415-433, Exxon Exhibit 10 (G-19) and (G-24); Premier Exhibit 9, pages 41-44.

[44] TR-II, Vol-II, p. 401-406, 436-441.

[45] TR-II, Vol-II, p. 387-393, 410-418, Premier's Exhibit 9 page 41.

[46] Tr-II, Vol-II, p. 436-441, Premier Exhibit 9 page 49.

Exxon conceded that Premier's Tract 6 had 13,730,000 barrels of oil under its tract of which 10,070,000, barrels of oil could be targeted for recovery by CO2 flooding.[47] However, in order to minimize the unit's compensation to Premier, Exxon chose to construct a pattern for its waterflood injection wells so that none of Premier's waterflood oil would be recovered and if CO2 flooding ever occurred then only 1,626,00 barrels of Premier's oil would be recovered.[48] Exxon's calculations finally resulted in crediting Premier with only **1.0192%** of unit equity despite the fact that Premier's Tract 6 had 7.6% of the unit acreage and **4.16%** of the total remaining reserves.[49]

Decision by Commission and District Court:

On March 12, 1996, the Commission entered Order R-10460-B which accepted Premier's geologic interpretation but then "affirmed" the Division's decision to include Premier's Tract 6 in the unit and denied all of Premier's arguments. On March 20, 1996, Premier filed its Application for Rehearing before the Commission which failed to act within the ten (10) day period and was therefore deemed denied.[50] On April 12, 1996, Premier timely filed its appeal with the District Court. Following a hearing, the District Court entered Final Judgment affirming the Commission's Order and the case was timely appeal to the New Mexico Supreme Court.

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[47] TR-II, Vol-II, p. 415-433, Premier's Exhibit 9, page 41.
[48] TR-II, Vol-II, p. 388-389, Premier's Exhibit 9 page 41
[49] TR-II, Vol-I, p. 388, Exxon's Exhibit 10 Table G-19 and Premier's Exhibit 9 page 41.
[50] Case No. CV-96-121-JWF, Petition for Review with Application for Rehearing attached.

ARGUMENT

POINT I:

COMMISSIONER BAILEY WAS DISQUALIFIED TO PARTICIPATE IN THIS CASE BY PRIOR EXPARTE DISCUSSION AND PREJUDGMENT BIAS[51]

Mrs. Jami Bailey is one of the members of the New Mexico Oil Conservation Commission and also is the Deputy Director to the Commissioner of Public Lands responsible for recommending approval or disapproval of the inclusion of State of New Mexico oil and gas leases into units including Premier's lease in Exxon's Avalon-Delaware Unit.

At a bare minimum, in order to protect Premier's constitutionally-protected property rights and to afford Premier due process of law, the members of the Commission must be unbiased and may not have a predisposition regarding the outcome of the case. In ***Santa Fe Exploration Company v. Oil Conservation Commission,*** 114 N.M. 103 (1992), the New Mexico Supreme Court applied this standard for administrative adjudications to the New Mexico Oil Conservation Commission and quoting ***Reid v. New Mexico Bd of Examiners of Optometry,*** 92 N.M. 414 (1979) stated:

> "The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him."

Premier was entitled to present its case to a Commission composed of fact finders who had not already decided to approve the inclusion of Premier's Tract into Exxon's unit. The Unfortunately for Premier, there was prejudgment bias in this case. Seven months earlier,

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[51] Point V of Application for Rehearing

Commissioner Bailey met with Exxon's attorney and certain of its witnesses and reviewed Exxon's evidence and thereafter approved Exxon's request to include the Premier tract in the unit. Despite her previous review and approval of Exxon's request to include Premier's Tract in this unit, Commissioner Bailey decided to participate in the Commission's decision of this same issue.

On May 5, 1995, Exxon's attorney and certain Exxon and Yates' technical witnesses met with Commissioner Jami Bailey in her capacity as a Deputy Director to the Commissioner of Public Lands. The purpose of this meeting was to obtain preliminary approval from Commissioner Bailey for the inclusion of all State of New Mexico Oil & Gas Leases, including Premier's tract, into the Exxon Unit.[52] Exxon presented to Ms. Bailey a summary of its case including ten of the actual exhibits used later at the Commission hearing. One of these exhibits showed that by including Premier's Tract in the unit, it would increase the economic share of royalty paid to the Commissioner of Public Lands.[53] On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division.

On May 15, 1995, in response to Exxon's request, Commissioner Bailey concluded that the Exxon proposal "meets the general requirements of the Commissioner of Public Lands" and in his behalf approved the Exxon request including Premier's Tract 6 and the other New Mexico oil & gas leases into Exxon's Avalon-Delaware Unit.[54] By her actions, Commissioner Bailey

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[52] TR-II, Vol-I, p. 31-34, Premier's Exhibits A and B.
[53] TR-II, Vol-I, p. 31-34, Exxon's Exhibit 7
[54] TR-II, Vol-I, p. 33-34, Exxon Exhibit 7

engaged in precisely the activity prohibited by the New Mexico Supreme Court (see **Reid**, supra.), when she made the decision to approve including Premier's Tract 6 in this unit.

On December 11, 1995, Premier wrote to Commissioner Bailey to express its concern that her past involvement prevented her from being an unbiased member of the Commission.[55] On December 13, 1995, counsel for the Commissioner of Public Lands wrote Premier and admitted that there was a conflict of interest for Commissioner Bailey to participate on the Commission at the hearing of this case but "excused" it as a legislative problem over which they had no control.[56] Counsel promised that the Commissioner of Public Lands would avoid such conflicts in the future by not having Commissioner Bailey review and decide this type of case prior to hearing.[57]

On December 14, 1995, the Commission held its hearing in this matter and over the objection of Premier, Commissioner Bailey participated as a member of the Commission and decided this case against Premier.

Any doubt about the impropriety of her actions was removed when counsel for the Commissioner of Public Lands confirmed that, "we do recognize that parties litigating before the Oil Conservation Commission are entitled to have their constitutional rights including procedural due process, respected. As a transactional matter, this means that the Commissioner's designee should be free from bias and prejudgment." Further, "we will try to make sure that the Commissioner's designee has not participated in the Land Office decision or transaction that is the subject of the Oil Conservation Commission hearing."[58]

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[55] TR-II, Vol-I, p. 8-15, Premier's Exhibit A.
[56] TR-II, Vol-I,p. 8-14, Premier's Exhibit B
[57] TR-II, Vol-I, p. 8-14, Premier's Exhibit B
[58] TR-II, Vol-I, p. 8-14, Premier's Exhibit B

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[55] TR-II, Vol-I, p. 8-15, Premier's Exhibit A.
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[57] TR-II, Vol-I, p. 8-14, Premier's Exhibit B
[58] TR-II, Vol-I, p. 8-14, Premier's Exhibit B

It is of no comfort to Premier that the State Land Office plans to change its practices after this case. Premier was entitled to present its objections to the Exxon application to a fact finder who had not already decided to approve Exxon's application. ***Santa Fe Exploration Company,*** 114 N.M. 109., supra, **Reid**, supra. Commissioner Bailey should not have participated in this case. Commission's order is tainted by the participation of a Commissioner who was biased. By that participation, Premier was denied its opportunity to have this matter heard by an impartial Commission.

Commissioner Bailey chose to participate in this Commission case over the objection of Premier. A fair and impartial hearing officers is as much an essential ingredient of due process in an administrative adjudication proceedings as it is in the judicial context. **Gibson v. Berryhill**, 411 U.S. 564 (1973). In **Jones v. New Mexico State Racing Commission**, 100 N.M. 434, 671 P.2d 1145 (1983), the New Mexico Supreme Court accepted the principle that prejudgment invalidates administrative decisions and quoted **Reid**, supra:

> "At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterest and free from any form of bias or predisposition regarding the outcome of the case."

Because Commissioner Bailey' participation on this panel "taints" the ability of the remaining two Commissioners to again act in this case, Premier requests the Court to set aside the Commission order and to designate a special master to rehear this case.

POINT II:

THE COMMISSION VIOLATED PREMIER'S CORRELATIVE RIGHTS BY FAILING TO COMPLY WITH THE STATUTORY UNITIZATION ACT[59]

The Commission violated the Statutory Unitization Act. The Commission avoided its responsibility to determine relative value as defined in the Statutory Unitization Act and failed to comply with the Statutory Unitization Act by adopting Exxon's participation formula which did not allocate unitized hydrocarbons on a fair, reasonable and equitable basis.

The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the laws creating it. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962) The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights [Sec. 70-2-2 NMSA (1978), as amended], and also charges it with responsibility for administering the Statutory Unitization Act. Section 70-7-1 through 21 NMSA (1978).

The Commission has failed to, "determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area." (emphasis added). Section 70-7-6.B NMSA 1978).

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[59] See Point VIII of Rehearing Application

Section 70-7-6.B NMSA (1978) of the Statutory Unitization Act states:

> "If the Division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis, the Division shall determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.(emphasis added).

Section 70-7-4.J NMSA (1978) of the Statutory Unitization Act says

> "relative value" means the value of each separately owned tract for oil and gas 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 likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating or pricing facts, as may be reasonably susceptible of determination.

Section 70-7-7 NMSA (1978) of the Statutory Unitization Act provides that the Division has the authority and obligation to approve or prescribe a plan or unit agreement for unit operation which **shall include**: "C. an allocation to the separately owned tracts in the unit area of all the oil and gas that is produced from the unit area..."(emphasis added).

The Commission ignored the statutory definition of "fairness" set forth in Section 70-2-33(H) NMSA of the Oil and Gas Act which defines Correlative Rights

> as "...the opportunity afforded, as far as it is practicable to do so, to the owners 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, 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 or gas or both under the property bears to the total recoverable oil or gas or both in the pool and for such purpose, to use his just and equitable share of the reservoir energy;"(emphasis added).

Correlative rights are measured in terms of recoverable reserves.[60] The Commission's misapplication of the Statutory Unitization Act violated Premier's correlative rights because the Commission approved Exxon proposal to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary the Avalon-Delaware Unit despite the fact that Exxon did not intend to attempt to recover from those tracts any remaining primary oil or any secondary oil by waterflooding. Exxon sought to combine two separate projects into one statutory unitization effort rather than initially establishing a waterflood unit and later, if appropriate, expanding that unit to include Tract 6 when CO2 flooding was demonstrated to be practicable.

Exxon's geologic interpretation along with Exxon's volumetric calculations of original oil in place established the "relative value" of Premier's Tract 6 on the western boundary of the reservoir as follows:

Original oil in place:	13,730,000 BO
Remaining Primary Oil in place:	-0-
Waterflood Target Oil in place:	2,950,000 BO
Workover Target Oil in place:	-0-
CO2 Target Oil in place:	10,070,000 BO

See Exxon Exhibit 10 Vol 1 Exhibit E-6 (G-19).

Based upon its analysis of Premier's FV #3 Well, Exxon further argued that Premier's Tract 6 had no potential for waterflood target oil and only 1.626 million barrels of CO2 target oil by applying a weighted factor of 50% and 25% to Tract 6.[61]

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[60] See Section 70-2-33(H) NMSA 1978.

[61] TR-II, Vol-I, Exxon's Exhibit 10, E-6 and E-7

The Commission adopted Exxon's unit participation formula predicated upon the intention to allow each tract to recover its percentage of remaining primary oil, its percentage of secondary oil and workover oil potential and its percentage of tertiary oil potential by a weighted formula of 25% primary, 50% secondary/ workover and 25% tertiary. The result, however, is to give 1.0192% of all unit production to Premier's Tract 6 despite the fact that Exxon said Tract 6 has 7.6% of the unit acreage and 4.16% of the total remaining reserves[62]. Such a participation formula does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis. Such a result violates the Statutory Unitization Act.

The Commission in Finding (20)(f) refused Premier's request that the Commission determine "relative value" from the evidence introduced at the hearing and instead has approved the Exxon participation formula as "fair" despite the following evidence:

> (a) Reserves are established for the unit by utilizing Exhibit G-19 of the Exxon's August 1992 Technical Report (as amended by G-24) in which Premier's Tract 6 is assigned "0" remaining primary recovery, "0" workover reserves, "0" waterflood reserves and 1,626.0 MSTBO CO2 reserves; and
>
> (b) Exxon proposes to include a column of 40-acre tracts including four 40-acre tracts (Tract 6) operated by Premier within the western boundary of the Avalon Unit but does not intend to attempt to recover from those tracts any remaining primary oil, any workover oil or any secondary oil by waterflooding.[63]

As much as the Commission may have wanted to avoid the difficult task of determining relative value, it is no excuse to accept the Exxon participation formula when it is based upon an albeit expensive and time consuming but still fatally flawed technical report. Mr.

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[62] TR-II, Vol-I, Exxon's Exhibit 10, G-19.
[63] TR-II, Vol-II, p. 138, Exxon's Exhibit 27a

Terry Payne, Premier's expert petroleum engineering witness, based upon Exxon's Technical Report dated August 1992, concluded[64] that:

> 1. Exxon failed to use traditional participation parameters including original oil in place which were adopted by the Division for use in the Parkway Delaware Unit (NMOCD Case 10619).
>
> 2. The Exxon-Yates participation formula was flawed because it assigns waterflood percentages based upon numbers assigned to tracts which are not adjusted for geological changes.
>
> 3. The Exxon-Yates participation formula was flawed because it failed to allocate the total unit waterflood reserves equitably among the tracts:

Operator	Waterflood percent	assigned percentage
Premier	8.29%	-0-%
Exxon	41.09%	59.71%
Yates	49.63%	40.29%
MWJ	1.07%	-0-%

(See Premier Exhibit 9 page 4)

> 4. The Exxon-Yates participation formula was flawed because it failed to allocate the total unit CO2 flood reserves equitably among the tracts:

Operator	CO2 flood percent	assigned percentage
Premier	5.88%	4.08%
Exxon	56.49%	60.26%
Yates	36.01%	35.25%
MWJ	1.62%	0.42%

(See Premier Exhibit 9 page 6)

The Commission attempted to excuse this inequity by arguing that the Exxon participation formula is "fair" because Premier will receive income from the start of the unit

[64] TR-II, Vol-II, p. 366-425, Premier's Exhibit 9.

even though Premier's acreage will provide no benefit to the unit until the CO2 project. The Commission ignored the statutory definition of "fairness".[65]

The Commission has allowed Exxon to confiscate Premier's property rights in this oil & gas lease when it failed to, "determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area." (emphasis added). Section 70-7-6.B NMSA 1978.

The failure of the Commission to comply with the Statutory Unitization Act is illustrated by Mr. Terry Payne's comparison[66] of the following three options:

USING THE EXXON GEOLOGIC AND EXXON FORMULA
the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage
Premier	3.30%	1.02%
Exxon	60.63%	64.79%
Yates	35.74%	34.07%
MWJ	0.34%	0.12%

(See Premier Exhibit 9 pages 32-35)

[65] Section 70-2-33(H) NMSA (1978).
[66] TR-II, Vol-II, p 408-412, Premier's Exhibit 9, pages 32-35, 41, 49.

USING THE EXXON GEOLOGY but SUBSTITUTING PREMIER'S PROPOSED FORMULA, the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage of future production
Premier	3.03%	3.42%
Exxon	60.63%	59.28%
Yates	35.74%	36.20%
MWJ	0.34%	1.09%

(See Premier Exhibit 9 page 41)

USING PREMIER'S GEOLOGY and SUBSTITUTING PREMIER'S PROPOSED FORMULA, the total remaining future production is allocated as follows:

Operator	percent of future production	assigned percentage of future production
Premier	5.17%	4.52%
Exxon	57.80%	58.29%
Yates	36.70%	36.10%
MWJ	0.32%	1.08%

(See Premier Exhibit 9 page 49)

Mr. Terry Payne concluded[67] that of the above three options, the Premier geology and participation formula is fair because:

> (i) it uses more traditional parameters like those adopted for Parkway Delaware Unit while the Exxon proposal does not;
>
> (ii) it allocates the total unit future oil production equitable among the tracts while the Exxon participation formula is flawed because it fails to do so.

[67] TR-II, Vol-II, p. 438-441.

The Commission should have approved the waterflood unit **but excluded** the Premier Tract from the waterflood project because under Exxon's proposal the Premier Tract will make no contributing value to the waterflood and should not receive any compensating value.

Although reviewing courts generally may not substitute its judgment for that of the administrative decision maker, it may correct the decision maker's misapplication of law. **Wolfly v. Real Estate Commission,** 100 N.M. 187, 668 P.2d 303 (1981). Such is the case with the Commission's decision in Order R-10460-B.

POINT III: COMMISSION ORDER R-10460-B IS ARBITRARY, CAPRICIOUS, FAILED TO PROTECT CORRELATIVE RIGHTS AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. **Fasken v. Oil Conservation Commission**, 87 N.M. 292, 532 P.2d 588 (1975). **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). Likewise, in **Viking Petroleum v. Oil Conservation Commission** 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in **Continental** and **Fasken**, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions. The task before this Court is to determine if the Commission's decision is

reasonable, lawful and based upon substantial evidence in the record as a whole. In particular, the Court must conclude that the numbered findings of fact set forth in the Commission's order are logical and consistent with the Commission's ultimate ordering paragraphs ("conclusions") which must be reasonable and supported by substantial evidence.

The substantial evidence requirements has changed from a review of the evidence most favorable to the agency decision to a review of the evidence in the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). **Trujillo v. Employment Sec. Dept.**, 734 P.2d 245 (N.M. App. 1987).

The New Mexico Supreme Court in **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 835 P.2d 819 (1992) provided the following summary:

> "Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Commission**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**
>
> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.
>
> An abuse of discretion will also be found when the decision is contrary to logic and reason."

(1) **The Commission's ultimate decision is based upon erroneous findings of fact set forth in Findings (20)(a) and (20)(c). See Point I of Application for Rehearing.**

The Commission failed to understand that Premier's October 1995 test of the FV3 Well was not conducted within the disputed 82 feet interval in UCC reservoir. As a result of that failure, the Commission's ultimate decision is based upon erroneous findings of fact set forth in Findings (20)(a) and (20)(c).

The first issue in dispute between Premier and Exxon is the geological pick of the base of the Upper Cherry Canyon ("UCC") reservoir in the Premier FV3 Well.

In Finding (20)(c) of Order R-10460-B, the Commission concluded that "the geological interpretation of Premier's was a more believable and scientifically sound interpretation." Mr. Stuart Hanson, Premier's expert geologic consultant, concluded that Exxon's geological interpretation **mistakenly excluded** some 82 feet of net UCC pay from Premier's FV Well by picking the base of the UCC reservoir (at 2768 feet instead of at 2852 feet) some 82 feet too high. As a result of this mistake, Exxon had failed to properly credit the Premier Well with sufficient reservoir thickness[68]. In addition, Mr. Hanson demonstrated the geologic similarity and common depositional environment between Premier's FV3 Well and Yates' EP7 Well so that the FV3 Well should be compared to Yates' EP7 Well **and not** with Yates' ZG1 Well.[69]

Then, the Commission rejected Mr. Hanson's geology and explained that "Unfortunately, for Premier, the production results shows the additional potential pay to be uneconomic;" but

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[68] TR-II, Vol II, p 315, lines 14-19.

[69] TR-II, Vol II, pages 311-346, Premier Exhibits 2, 6, and 7.

in Finding (20)(a) of Order R-10460-B, the Commission inconsistently finds that a workover attempt in October, 1995 "overlies the disputed 82 feet" and that it "correlatives with uneconomic production" from the Yates ZG1 Well. Unfortunately for Primer, the Commission forgot that in late September, 1995, ("the October 1995 test") Premier attempted to test for oil production in its FV-3 Well in zones **other than** the UCC reservoir and did not have sufficient time to test either the overlying or the disputed 82 foot interval before the test was terminated when Exxon disputed Premier's right to operate.[70]

Despite this inconsistency, the Commission ultimately discounted the Premier geologic interpretation because the Commission mistakenly believed that the October 1995 test was a "workover" test of the disputed 82 feet of additional pay in the UCC reservoir.

The Commission compounds its mistakes of fact by concluding that the Premier FV3 Well is going to be uneconomic because the disputed 82 feet of pay correlates to the Yates ZG1 Well to the south which is "uneconomic". The Commission forgot that the Yates ZG1 Well is only perforated in the top 3 feet of the "disputed 82 feet interval" and therefore is not relevant to how the FV3 Well might have performed had it been properly drilled and cemented by Gulf.

The Commission has an **incorrect** understanding of the FV3 Well's history. The work conducted in October 1995 does not overlay the dispute 82 feet.[71] In October, 1995, Premier attempted to test its FV3 Well for oil production in Delaware intervals **other than in the disputed 82 feet in the lower UCC reservoir** in order to support its contention that it had other

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[70] TR-II, Vol. II, p. 291, 297.
[71] TR-II, Vol II, p. 302, lines 13-18.

Delaware pay below Exxon's base of the Upper Brushy Canyon which was not accounted for in the Unit participation formula proposed by Exxon.[72]

Gulf originally completed the FV3 Well in only three zones:

Zone #1:
Location: some 900 feet below the disputed 82 feet interval
Zone #2:
Location: some 58 feet above the disputed 82 feet interval
Zone #3:
Location: some 269 feet above the disputed 82 feet interval

In October, 1995, Premier did not add additional perforations nor did it stimulate any zone. Premier removed both bridge plugs uncovering both Zones #1 and #2. Zone #2 had no pressure while Zone #1 had fluid flow up the casing due to the incomplete testing by Gulf. This Zone #1 is the "pay not accounted for in the unit production formula" because it is **below** Exxon's Upper **Brushy Canyon** base located some 900 feet below the disputed 82 feet interval in the UCC reservoir.[73] Mr. Terry Payne, a petroleum engineer, testified for Premier that the acid treatment log of Zone #2 of the Premier FV-3 Well shows that some of the water produced from the well was channeling down from an upper zone and should not be attributed to the UCC reservoir.[74] When evaluating the treatment of Zone #2, the Cement Bond Log for the Premier FV3 Well confirms that the disputed 82 feet interval is protected with cement and along with the acid treatment log demonstrates that the disputed 82 feet interval remains "virgin reservoir" before and after the October 1995 test.

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[72] TR-II, Vol II, p. 291, lines 14-23.
[73] See Rehearing Application, Exhibits 1-A, 1-B and 1-C.
[74] TR-II, Premier Exhibit 10.

In terms of reservoir thickness, porosity, water saturations and therefore original oil in place, waterflood target oil and CO2 target oil, Premier's numbered tracts compare favorably to the Yates tracts (EP 5,7,8, & WM 5& 6) which Exxon credits with substantial waterflood reserves. Yet when Exxon imputes this data into its reservoir simulation program (computer model), it chose to increase the water saturation for the Premier FV3 Well from 38% to 60% and in doing so made the Premier tracts appear to have less value than comparable Yates' tracts. Exxon did this prior to receiving information from Premier concerning the water saturation data for Premier's FV3 Well and then when Exxon received the data, it refused to "redo" its report.

Three of these Yates' wells border the Premier Tract 6 (EP7,5 & WM6). Exxon's report shows UCC waterflood target oil for Premier's Tract 6 is 2,320,000 barrels while Yates adjoining tracts are credited with 2,680,00 barrels of oil.

By Exxon mislocating the UCC base, by incorrectly concluding the reservoir is ending on Premier's Tract 6, and by exaggerating the water saturation in the Premier FV3 Well, Exxon discriminates in its Report against Premier by not giving the same waterflood reserve credits to the Premier acreage as it does for the Yates' tracts.

Because the Commission agreed with but then discounted the net 82 feet disputed interval and failed to draw comparisons of the Premier acreage with the Yates acreage, the Commission made substantial errors of fact in Findings (20)(a) and (20)(c) which affected its ultimate decision in this case. Thus, the Court needs to vacate Order R-10460-B and require the Commission to correct its mistakes.

(2) **Commission prematurely approved a CO2 project which is speculative and not supported by substantial evidence. Point VI of Application for Rehearing**

The Commission has prematurely approved a Tertiary CO2 Project. Exxon testified that "waterflooding" is the reason for the Unit. while the Tertiary Recovery Project ("CO2") had only some probability of happening/not happening.

It is undisputed that Exxon intended to institute a Secondary Recovery Project for recovery of oil by waterflooding only an interior portion of the unit which would be surrounded by an outer ring of 40-acre tracts which will not contain producing wells nor contain or be offset by injection wells.

Exxon proposed possibly at an undetermined time in the future to convert the Secondary Recovery Project to a Tertiary Recovery Project by expanding the original waterflood project area by drilling 18 CO2 injection wells, 18 new producing wells, and commencing the injection of carbon dioxide ("CO2") at which point the outer ring tracts (including Tract 6) will contain producing and adjacent injection wells. But Exxon proposed to extend the CO2 injection in such a pattern so as to flood only 25% of Tract 1109 and 50% of the balance of Premier's tracts thereby reducing Premier's share of tertiary ("CO2 target") oil recovery by a factor of 25% to 50%.

It is of particular concern to Premier that Exxon's uses the same reservoir simulation model for both the waterflood project and the CO2 project which results in "equal value" for both projects, yet chose in its participation formula to credit 50% to waterflood target oil and only 25% to CO2 target oil. The Commission criticized Premier for giving equal value to the

waterflood and the CO2 projects yet overlooked the fact that Exxon's own technical report did exactly the same thing. The Commission's approval of the CO2 project is **premature**. Exxon's analysis of the CO2 potential is based solely on a waterflood model and therefore is speculative and has not been the subject of any scientific study to determine its feasibility and therefore any forecasted increase in ultimate recovery of tertiary oil from the unit by including the Premier Tract 6 is speculative.

At such time as firm plans are formulated for a tertiary recovery project, then Exxon should return to the Commission for either (a) a lease line injection agreement with Premier and/or (b) including the Premier acreage in the CO2 project.

(3) **There is no substantial evidence to support including Premier's Tract 6 in the Waterflood Project. See Rehearing Application Point VII.**

Exxon argues that there is **no increase** in ultimate recovery of secondary oil from the unit by including the Premier Tract 6. Exxon argues that Premier "failed to prove additional recoverable reserves, leaving only the risky potential of CO2 flooding."[75] Contrary to its arguments, Exxon's own engineer analysis shows that numbered tract 1309 of Premier's Tract 6 should have been credited with 176,511 barrels of recoverable waterflood reserves. Yet, Exxon chose to mislead the Commission by placing all of those waterflood reserves for that tract into the CO2 reserves. If Premier's acreage had properly been credited with waterflood reserves, then Premier had over 7.25% of the remaining recoverable oil.[76]

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[75] TR-II, Vol-II, p 522.

[76] TR-II, Vol-I, p. 32. Exxon Exhibit 7, see table attached to Exxon letter dated October 28, 1992

Under the Exxon analysis the inclusion of the Premier Tract 6 is **not necessary** in order to effectively carry on the Secondary Recovery Project. Exxon's Secondary Recovery Plan provides no means for the recovery of any oil west of the existing Yates' wells.

Exxon, who operates or owns working interests in all tracts (except Tracts 6, 7, and 8), seeks to include the Premier Tract 6 only as a "protection buffer" and contrary to the Statutory Unitization Act, assigned no "contributing value" for secondary oil recovery. (See Section 70-7-4(J) NMSA 1978).

Since recovery of any such oil is thereby deferred to a tertiary recovery phase for which no commitment has been made, the implication that correlative rights would be impaired and that waste would occur if the Premier acreage were deleted from the proposed unit is groundless.

(4) **The Commission's ultimate decision is based upon Findings (17)(h), (19) (a) and (20)(b) which are wrong, not supported by substantial evidence, are contrary to undisputed testimony and adopt arbitrary and capricious reasons to support its rejection of Premier's engineering evidence. See Rehearing Point II and Point IV.**

Exxon intentionally mischaracterized the testimony of Mr. Terry Payne on behalf of Premier to induce the Commission to mistakenly conclude that Premier's claim was based only upon oil in place. At the Commission hearing, Mr. Terry Payne, a consulting petroleum engineer, presented his compilation of Exxon's oil in place analysis taken from the Exxon Technical Report Exhibit 10. His compilations of Exxon's data[77] contained a typographical error in the caption when it referred to "waterflood target oil in place" and "CO2 target oil-in-place"

[77] TR-II, Vol-II, p. 443, Premier's Exhibit 9, pages 4 and 6.

as "target reserves." Despite the fact that he corrected that typographical error on the record,[78] Exxon wrongly contended and the Commission incorrectly concluded that Mr. Payne was equating waterflood target oil-in-place with incremental recoverable waterflood oil reserves. To the contrary, both Mr. Payne testifying for Premier and Mr. Gilbert Beuhler testifying for Exxon agreed on the engineering method by which to calculate recoverable reserves based upon volumetric calculations of original oil in place and by incorporating recovery factors and sweep efficiencies.[79]

However, in Findings (17)(h) and (19)(a), the Commission erroneously mis-characterized Premier's petroleum engineering testimony when it described his testimony as equating waterflood target reserves with waterflood target oil in place and then unfairly dismissed Premier's claim because it "excluded recovery efficiency."

In Finding (19)(g), the Commission finds that Premier's proposed participation formula was based upon 50% on original oil in place with the remaining 50% attributed to actual recoveries. Then in Finding (20)(b), the Commission finds that Premier's arguments and proposed participation formula is limited to oil-in-place calculations. These two findings are inconsistence and mutually exclusive. Finding (20)(b) is factually wrong. Premier's arguments and proposed participation formula is not "limited to oil-in-place calculations." **BOTH Exxon and Premier arguments** are founded in original oil in place calculations.

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[78] TR-II, Vol II, p 443.
[79] TR-II, Vol-II, p. 397-398, 402, 406, 443-444.

The mistakes in Findings (17)(h) and (19)(a) formed the basis for the Commission to reach the wrong conclusion in Finding (20)(b) when it incorrectly finds that "Premier's arguments and proposed participation formula is limited to oil-in-place calculations. In fact **both** Exxon and Premier's proposed formula are based **in part** on oil-in place calculation **while neither** is limited only to oil in place calculation. The Commission has made mistakes of fact which have affected its ultimate decision in this case.

(5) Finding (20)(f) is not supported by substantial evidence and does not protect correlative rights because Exxon's participation formula failed to allocate total waterflood reserves so that Premier received its proportionate share

Exxon's participation formula adopted Finding (20) (f) is not supported by substantial evidence and does not protect correlative rights. See Rehearing Application Point III. Contrary to Finding (20)(f) of Order R-10460-B, Exxon's Unit participation formula does not protect correlative rights. The Commission should have remembered that Mr. Payne used Exxon's own Technical Report and demonstrated that the Exxon-Yates participation formula is flawed because it failed to allocate the total unit waterflood reserves equitably among the tracts[80]:

Operator	Waterflood target	Assigned percentage
Premier	8.29%	-0-%
Exxon	41.09%	59.71%
Yates	49.63%	40.29%
MWJ	1.07%	-0-%

(See Premier Exhibit 9 page 4)

[80] TR-II. Vol II, p 414. - direct exam of P's wtg., Payne

Exxon's proposed 50% flood factors for Tract 6[81] are arbitrary because they assume that the outer ring tract's producing wells will be located in the center of each 40-acre tract when in fact those wells could be located 330 feet from the outer boundary and be assigned a 75% flood factor without adversely affecting flood efficiency.

Premier's Tract 6 can be excluded from the unit without any reduction in ultimate recovery if the four lease line CO2 flood injection wells are drilled between Premier Tract 6 and the Yates' Tracts #3, 3b, 5a,and 5b.[82] Furthermore, Premier will have the ability to flood part of its lease that is being excluded from the Exxon Avalon (Delaware) Unit.

CONCLUSION

The confiscation of Premier's property by the State of New Mexico is permitted in very limited circumstances and upon very specific terms and conditions set forth in New Mexico's Statutory Unitization Act. Premier's property cannot be confiscate simply because Exxon spent a lot of time and money on that effort. It cannot be confiscated by Exxon simply because Premier is not yet currently producing oil from the UCC reservoir. The flaws in Exxon's technical report where brought to Exxon's attention by both Yates and Premier. Exxon changed its formula to accommodate Yates but chose to reject Premier's evidence and argued that it was now too late and too expensive to change either the technical report or the formula.

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[81] TR-II, Vol-I, p. 58, Exxon's Exhibit 10(E-7).
[82] TR-II, Vol-II, p. 392-395, Premier's Exhibit 9 pages 9-12.

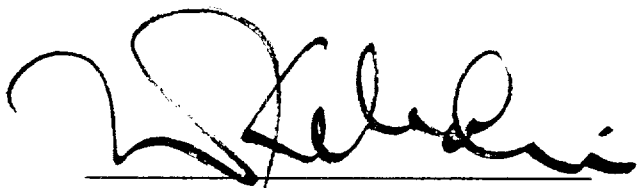
Exxon has admitted that it does not need Premier's tract for the waterflood project. Yet, the Commission has authorized Exxon to take Premier's Tract 6 for the waterflood project.

The Commission's excuse for taking Premier's tract is that the tract is necessary in order to maximize the recovery from the Yates' tracts **if and when** the waterflood project is expanded and converted to a CO2 recovery project. In doing so Premier has not been adequately compensated but has had a portion of its property taken for the benefit of Exxon and Yates. The Commission has failed to comply with the Statutory Unitization Act.

The Commission's order is tainted by the participation of a Commissioner who was biased. By that participation, Premier was denied its opportunity to have this matter heard by an impartial Commission.

Premier request's that the Court set aside this Commission decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of June, 1997, I have caused to be mailed by first-class mail a true and correct copy of Petitioner's Brief in Chief to the following counsel of record:

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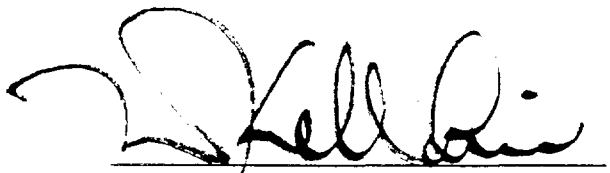


W. Thomas Kellahin

IN THE SUPREME COURT
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner,

24311

vs. No._____

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION AND YATES PETROLEUM CORPORATION,

Respondents.

DOCKETING STATEMENT

Petitioner-Premier Oil & Gas, Inc. ("Premier"), pursuant to the provisions of Rule 12-208 of the New Mexico Rules of Appellate Procedure, hereby submits its Docketing Statement:

1. STATEMENT OF THE NATURE OF PROCEEDINGS:

This case is before the Court on Premier's Petition for Review of New Mexico Oil Conservation Commission Order No. R-10460-B pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA (1978). In its Petition, Premier asserts that the Commission violated Premier's constitutionally guaranteed due process rights and that Order No. R-10460 is contrary to law, is arbitrary,

capricious, contrary to the Commission's statutory authority and is not supported by substantial evidence. Premier asks the Court to declare Order No. R-10460-B void, for in entering this order, the Commission violated Premier's rights to procedural and substantive due process.

This Commission order approved an application by Exxon Corporation ("Exxon") to confiscate Premier's real property rights in a State of New Mexico oil & gas lease (collectively "Unit Tract 6") so that it could be included in Exxon's Avalon-Delaware Unit Waterflood Project in Eddy County, New Mexico. Yates Petroleum Corporation ("Yates"), who voluntarily included its tracts in this unit, appeared in support of Exxon. Both Exxon and Yates appeared in this appeal in support of the Commission's order.

This Petition for Review was heard by the District Court for Eddy County, New Mexico on January 31, 1997, and the Honorable Jay W. Forbes, District Judge, has entered Judgment affirming the Commission's Order.

2. DATE OF JUDGMENT AND TIMELINESS OF APPEAL:

Final Judgment was entered by the District Court on March 12, 1997 and Appellant, Premier, filed its Notice of Appeal of March 27, 1997. Copies of the Judgment and Notice of Appeal are attached hereto as Exhibit "A" and "B" to this Docketing Statement.

3. STATEMENT OF THE CASE:

Background:

Exxon's project is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and workover reserves by adding additional perforations in existing wells and by injecting water into the reservoir to recover more oil; and CO2 oil reserves by injecting a combination of carbon dioxide and water into the reservoir. Exxon believed that only a portion of the Delaware formation within the Avalon-Delaware Oil Pool was suitable for waterflooding operations. That portion was confined to the Upper Cherry Canyon ("UCC") and the Upper Brushy Canyon ("UBC") reservoirs. Exxon's reason for forming the Avalon-Delaware Unit was for a Secondary Recovery Project ("waterflooding"), while the Tertiary Recovery Project ("CO2") has only some probability of happening.

Exxon's plan was to attempt to recover more oil from the Exxon and Yates's wells in part of this pool by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells all of which would be surrounded by an outer ring of 40-acre tracts "***buffer zone***" (including Premier's Tract 6 on the western unit boundary) which would not contain producing wells nor contain or be offset by water injection wells.

Exxon proposed to include Premier's Tract 6 within the western boundary of the Avalon-Delaware Unit **but did not** intend to attempt to recover from Tract 6 any remaining primary oil, any workover oil or any secondary oil by waterflooding. Instead, Exxon and Yates wanted Premier's Tract 6 as a "buffer zone" so that if CO2 flooding was ever determined to be feasible, then they would use part of Premier's Tract 6 for CO2 injection wells to improve recovery from the Yates' tracts.

Exxon's final **participation formula** was supposed to allow each unit tract to receive 25% of its share of primary oil, 50% of its share of secondary/workover oil and 25% of its share of CO2 oil. Exxon's plan was to determine each tract's share of the Upper Cherry Canyon ("UCC") and Upper Brushy Canyon ("UBC") reservoir in the Avalon-Delaware Oil Pool.

In July, 1990, Premier purchased a State of New Mexico oil and gas lease covering 480 acres in Section 25, T20S, R27E, which already contained three wells, including two wells which Exxon proposed to include within its proposed Avalon-Delaware Unit boundary. On May 21, 1991, Exxon commenced plans to consolidate five tracts operated by Exxon, five tracts operated by Yates and one tract operated by Premier into this unit. Once Exxon commenced its unitization study in 1991, no operator including Exxon, Yates or Premier, drilled any further wells pending the outcome of this unitization plan.

In November, 1991, after receiving notice from Exxon of possible unitization, Premier had postponed its development plans for its lease pending the outcome of unitization commenced by Exxon.

On May 18, 1994, Premier withdrew its tracts from unit consideration and did not enter into further negotiations because it disagreed with the geology and the proposed unit boundary in the Exxon Technical Report which Exxon refused to change. On June 17, 1994, in Premier's absence, all other working interest owners agreed to consider excluding Premier's Tract 6 from the unit.

On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division seeking to confiscate Premier's property (Tract 6) for both the waterflood project and the CO2 project by resorting to statutory unitization, pursuant to the "Statutory Unitization Act".

Premier's contentions before the Commission:

Premier contended that Exxon's own analysis demonstrated that Premier's Tract 6 **must be excluded** from the unit because under Exxon's analysis:

> (1) there is **no increase** in ultimate recovery of primary oil from the unit by including the Premier Tract 6;
>
> (2) there is **no increase** in ultimate recovery of waterflood oil or workover oil from the unit by including the Premier Tract 6;
>
> (3) as owner of all of Section 25, T20S, R27E, Premier was not going to receive any "contributing value" for primary, waterflood oil or workover oil;

(4) that Exxon's proposed unit shape, determination of the distribution of hydrocarbon pore volume and the primary and secondary production estimates was arbitrary and failed to provide "relative value" to Tract 6 as required by Section 70-7-4(J) NMSA (1978), as amended and, unless corrected by the Commission, Premier's correlative rights would be violated;

(5) that Premier's Tract 6 was included in order to shift the risk of being an edge CO2 flood tract from Yates to Premier and thereby failed to provide any means for the recovery of any oil west of the existing Yates' wells;

(6) since recovery of oil from under Tract 6 is deferred to a CO2 recovery phase for which no commitment had been made, there was no merit to Exxon's claim that correlative rights would be impaired and that waste would occur if the Premier acreage were deleted from the proposed unit;

(7) since Exxon's proposed CO2 project was not supported by substantial scientific evidence and had not yet been adequately studied, it was **premature** to approve that project; and

(8) at such time as firm plans are formulated for a CO2 recovery project, then the Commission could approve either (a) a lease line injection agreement with Premier and/or (b) include the Premier acreage in that CO2 project.

In the alternative, Premier argued that if the Commission was to confiscate Premier's Tract 6 for the Exxon unit, then in order to comply with the Statutory Unitization Act and in order to protect Premier's correlative rights, then it was essential for the Commission to correct the following flaws in the Exxon proposal which:

(a) failed to establish a reasonable unit boundary;

(b) failed to appropriately distribute hydrocarbon pore volume with accurate corresponding reservoir parameters and did not establish the appropriate relative value to be attributed to each tract including Tract 6;

(c) incorrectly correlated the top and base of the Upper Cherry Canyon Reservoir which resulted in Exxon assigning only 55 feet of net thickness to this well (instead of 137 feet) which it used to contour the various geologic maps and estimates of the ultimate hydrocarbon pore volume map to argue that Premier Tract 6 had no remaining primary oil potential;

(d) these mistakes in well log correlations reduced the net UCC reservoir for Premier's FV-3 Well;

(e) it determined that there are 2,320,000 barrels of waterflood target oil under Premier's Tract 6 **but** then arbitrarily eliminated all of that incremental oil in Premier's FV3 Well by increasing the water saturation to 60% based upon water production volumes reported by Gulf which came from a source **other than the UCC reservoir;**

(f) failed to assign "relative value" to certain tracts because decline curve analysis concluded that an excessive amount of remaining primary oil was credited by Exxon to certain Yates operated tracts; and

(g) failed to submit an appropriate participation formula to allow the owners of Tract 6 to recover their proportionate share of the total remaining recoverable hydrocarbons underlying the unit.

Issues for Commission to resolve:

The first issue in dispute was the geological pick of the base of the UCC reservoir in Premier's FV3 Well. By mis-locating the base of the UCC reservoir and deleting some 82 feet of net UCC reservoir from Premier's FV3 Well, Exxon reduced the net UCC reservoir thickness credited to Premier's FV3 Well and thereby reduced Premier's share of recoverable oil.

The second issue in dispute was the proposed unit boundary which also stems from the "mispick" of the reservoir thickness in Premier's FV3 Well. Exxon believed that the UCC reservoir was ending on Premier's Tract 6 and that the reservoir did not extend further into Premier's Section 25. Premier's geologic model showed the reservoir continuing farther westward beyond Premier's Tract 6 and therefore was significantly larger than shown by Exxon.

The third issue in dispute was the amount of water contained in the reservoir ("water saturation") underlying Premier Tract 6. By exaggerating the amount of water contained in the reservoir at the FV3 Well so that it was greater than 60%, Exxon was able to argue that the productive limits of the UCC reservoir "ended" at Premier's Tract 6 and that Premier's Tract 6 had no waterflood target oil instead of having the 2,950,000 barrels of waterflood target oil originally calculated by Exxon.

The fourth issue in dispute was Premier's contention that Exxon's Report discriminated against Premier by not giving the same primary, workover, waterflood or CO2 flood reserve credits to the Premier acreage as it did to the Yates' tracts.

Affect of statutory unitization on Premier:

On January 18, 1995, Exxon and Yates finally agreed to a revised **participation formula** which resulted in Exxon receiving 64.79% of unit production, Yates receiving 34.07% of unit production and **Premier receiving 1.0192%** of unit production.

Premier sought to be **credit with 4.52%** of all unit production, because its Tract 6 had 7.6% of the unit acreage, 6.14% of the original oil in place, 6.19% of the CO2 reserves and 5.17% of the total remaining reserves as established by Premier's petroleum engineering report.

Exxon conceded that Premier's Tract 6 had 13,730,000 barrels of oil under its tract of which 10,070,000, barrels of oil could be targeted for recovery by CO2 flooding. However, in order to minimize the unit's compensation to Premier, Exxon chose to construct a pattern for its waterflood injection wells so that none of Premier's waterflood oil would be recovered and if CO2 flooding ever occurred then only 1,626,00 barrels of Premier's oil would be recovered. Exxon's calculations finally resulted in crediting Premier with only **1.0192%** of unit equity despite the fact that Premier's Tract 6 had 7.6% of the unit acreage and **4.16%** of the total remaining reserves as set forth in Table G-19 of Exxon's Exhibit 10.

Disqualification of Commissioner Bailey:

Mrs. Jami Bailey is one of the members of the New Mexico Oil Conservation Commission and also is the Deputy Director to the Commissioner of Public Lands responsible for recommending approval or disapproval of the inclusion of State of New Mexico oil and gas leases into units including Exxon's Avalon-Delaware Unit.

On May 5, 1995, Exxon's attorney and certain Exxon and Yates' technical witnesses met with Commissioner Jami Bailey in her capacity as a Deputy Director to the Commissioner of Public Lands. Exxon presented to Ms. Bailey a summary of its case including actual exhibits used later at the Commission hearing and requested her approval for including Premier's Tract 6 in the unit along with other State of New Mexico oil & gas leases.

On May 9, 1995, Exxon filed its application before the New Mexico Oil Conservation Division.

On May 15, 1995, Commissioner Bailey approved including Premier's Tract 6 and the other New Mexico oil & gas leases into Exxon's Avalon-Delaware Unit.

On June 29 and 30, 1995, the Division held a hearing on Exxon's application and on September 18, 1995, entered its order approving Exxon's request to include Premier's Tract 6 in both projects. On October 13, 1995, Premier filed an application for a DeNovo hearing before the New Mexico Oil Conservation Commission ("Commission").

On December 11, 1995, Premier wrote to Commissioner Bailey to express its concern that her past involvement prevented her from being an unbiased member of the Commission. On December 13, 1995, counsel for the Commissioner of Public Lands wrote Premier and admitted that there was a conflict of interest for Commissioner Bailey to participate on the Commission at the hearing of this case but "excused" it as a legislative problem over which they had no control. Counsel promised that the Commissioner of Public Lands would avoid such conflicts in the future by not having Commissioner Bailey review and decide this type of case prior to hearing.

On December 14, 1995,the Commission held its hearing in this matter and over the objection of Premier, Commissioner Bailey participated as a member of the Commission and decided this case against Premier.

Decision by Commission and District Court:

On March 12, 1996, the Commission entered Order R-10460-B which accepted Premier's geologic interpretation but then "affirmed" the Division's decision to include Premier's Tract 6 in the unit and denied all of Premier's arguments. On March 20, 1996, Premier filed its Application for Rehearing before the Commission which failed to act within the ten (10) day period and was therefore deemed denied. On April 12, 1996, Premier timely filed its appeal with the District Court.

Following a hearing, the District Court entered Final Judgment affirming the Commission's Order and the case was timely appeal to the New Mexico Supreme Court.

4. STATEMENT OF ISSUES:

A. Commissioner Bailey should not have participated in this case: Premier was entitled to present its case to a Commission composed of fact finders who had not already decided to approve the inclusion of Premier's Tract into Exxon's unit. The Commission's order is tainted by the participation of a Commissioner who was biased. By that participation, Premier was denied its opportunity to have this matter heard by an impartial Commission. Commissioner Bailey chose to participate in this Commission case over the objection of Premier. Commissioner Bailey is also the Deputy Director of the Oil & Gas Mineral Division for the Commissioner of Public Lands. Seven months earlier, she met with Exxon's attorney and certain of its witnesses and reviewed Exxon's evidence and thereafter approved Exxon's request to include the Premier tract in the unit. Despite her previous review and approval of Exxon's request to include Premier's Tract in this unit, Commissioner Bailey decided to participate in the Commission's decision of this same issue.

B. Commission violated the Statutory Unitization Act: The Commission avoid its responsibility to determine relative value as defined in the Statutory Unitization Act and failed to comply with the Statutory Unitization Act by adopting Exxon's participation formula which did not allocate unitized hydrocarbons on a fair, reasonable and equitable basis.

C. Commission Order R-10460-B is arbitrary, capricious failed to protect correlative rights and is not supported by substantial evidence because:

(1) **Commission failed to understand that the October 1995 test of FV3 Well was not conducted within the disputed 82 feet interval in Upper Cherry Canyon ("UCC") reservoir:** The Commission's ultimate decision is based upon erroneous findings of fact set forth in Findings (20)(a) and (20)(c).

(2) **Commission prematurely approved a CO2 project which is speculative:** The Commission's approval of the C02 project is premature.

(3) **Premier tract not necessary for waterflood:** There is no substantial evidence to support including Premier's Tract 6 in the Waterflood Project.

(4) **Commission mistakenly thought Premier's claim was based only upon oil in place:** The Commission's ultimate decision is based upon Findings (17) (h) and (19) (a) which are wrong and are contrary to undisputed testimony. The Commission's ultimate decision is based upon Findings (17) (h) and (20)(b) which are wrong and are contrary to undisputed testimony.

(5) **Participation formula:** Finding (20) (f) is not supported by substantial evidence and does not protect correlative rights.

5. LIST OF AUTHORITIES BELIEVED TO SUPPORT THE CONTENTIONS OF APPELLANT:

A. In order to protect Premier's constitutionally-protected property rights and to afford Premier due process of law, the members of the Commission must be unbiased and may not have a predisposition regarding the outcome of the case. In ***Santa Fe Exploration Company v. Oil Conservation Commission,*** 114 N.M. 103 (1992) the New Mexico Supreme Court applied this standard for administrative adjudications to the New Mexico Oil Conservation Commission citing **Reid v. New Mexico Bd of Examiners of Optometry,** 92 N.M. 414, 589 P.2d 189 (1979). Also see **Jones v. Nuclear Pharmacy Inc.** 714 F.2d 322 (10th Cir. 1984), **McCoy v. N.M. Real Estate Comm'n.**, 94 N.M. 602, 614 P.2d 14 (1980).

B. The New Mexico Supreme Court has stated that the Oil Conservation Commission "is a creature of statute" whose powers are expressly defined and limited by the laws creating it. **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). The New Mexico Oil and Gas Act empowers the Commission to prevent waste and protect correlative rights (Sec. 70-2-2 NMSA (1978), as amended, and also charges it with responsibility for administering the Statutory Unitization Act. (Section 70-7-1 through 21 NMSA (1978).

The Commission ignored the statutory definition of "fairness" set forth in Section 70-2-33(H) NMSA of the Oil and Gas Act which defines Correlative Rights as

> "...the opportunity afforded, as far as it is practicable to do so, to the owners 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, 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 or gas or both under the property bears to the total recoverable oil or gas or both in the pool and for such purpose, to use his just and equitable share of the reservoir energy;"

The Commission has failed to, "determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area." (emphasis added--See Section 70-7-6(B) NMSA 1978). Section 70-7-6(B) NMSA of the Statutory Unitization Act states:

> "If the Division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable and equitable basis, the Division shall determine relative value, from the evidence introduced at the hearing taking into account the separately owned tracts in the unit area, exclusive of physical equipment for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.Section 70-7-4 (J) NMSA of the Statutory Unitization Act says "relative value" means the value of each separately owned tract for oil and gas 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 likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating or pricing facts, as may be reasonably susceptible of determination.

Section 70-7-7 NMSA of the Statutory Unitization Act provides that the Division has the authority and obligation to approve or prescribe a plan or unit agreement for unit operation which **shall include**: "C. an allocation to the separately owned tracts in the unit area of all the oil and gas that is produced from the unit area..."

C. The Commission is required to make findings of ultimate facts which are material to the issues and to make sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings with substantial support in the record for such findings. **Fasken v. Oil Conservation Commission**, 87 N.M. 292, 532

P.2d 588 (1975). **Continental Oil Co. v. Oil Conservation Commission**, 70 N.M. 310, 373 P.2d 809 (1962). Likewise, in **Viking Petroleum v. Oil Conservation Commission** 100 N.M. 451, 453, 672 P.2d 280 (1983), the New Mexico Supreme Court reiterated its opinions in **Continental** and **Fasken**, that administrative findings by the Commission should be sufficiently extensive to show the basis of the order and that findings must disclose the reasoning of the Commission in reaching its conclusions. The task before this Court is to determine if the Commission's decision is reasonable, lawful and based upon substantial evidence in the record as a whole. In particular, the Court must conclude that the numbered findings of fact set forth in the Commission's order are logical and consistent with the Commission's ultimate ordering paragraphs ("conclusions") which must be reasonable and supported by substantial evidence.

The substantial evidence requirements has changed from a review of the evidence most favorable to the agency decision to a review of the evidence in the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). **Trujillo v. Employment Sec. Dept.**, 734 P.2d 245 (N.M. App. 1987).

The New Mexico Supreme Court in **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 835 P.2d 819 (1992) provided the following summary:

> "Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Commission**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.
>
> An abuse of discretion will also be found when the decision is contrary to logic and reason."

The Commission's ultimate decision in Order No. R-10460-B is based upon erroneous findings of fact set forth in Findings (17)(h), (19)(a), (20)(a), (20)(b), (20)(c) which are wrong and are contrary to undisputed testimony.

Findings (20)(a), (20)(c) and Finding (20)(f) are not supported by substantial evidence and do not protect corrective rights. Section 70-2-33(H) NMSA (1978): correlative rights are measured in terms of recoverable reserves.

6. RECORDINGS OF PROCEEDINGS:

Accordingly to the Appellant's best information and belief, the transcript of proceedings before the Oil Conservation Commission were transcribed and the proceeding before the District Court were recorded.

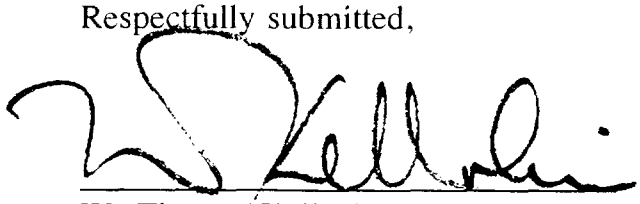
7. PRIOR APPEALS:

None

8. APPOINTMENT OF APPELLATE COUNSEL:

Not applicable.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Docketing Statement was mailed to the following this 23rd day of April, 1997 to the following:

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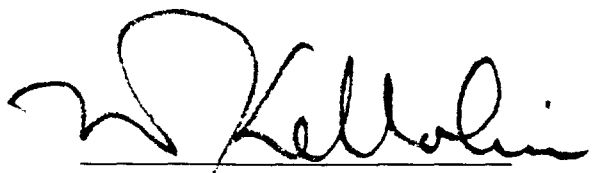
Santa Fe, New Mexico 87504
Attorney for Yates Petroleum Corporation



W. Thomas Kellahin

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY

PREMIER OIL & GAS, INC.,
Petitioner,

vs. **No. CIV 96-121-JWF**

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION AND YATES PETROLEUM CORPORATION,
Respondents.

NOTICE OF APPEAL

COMES NOW, PREMIER OIL & GAS, INC. ("Premier"), pursuant to Rule 12-201 of New Mexico Rule of Appellate Procedure and files its Notice of Appeal to the New Mexico Supreme Court of the District Court "Order Affirming Commission Decision" entered herein on March 12, 1997 which is attached hereto as Exhibit A.

Respectfully submitted,

W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
Attorney for Premier Oil & Gas, Inc.

EXHIBIT
A

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was mailed to the following this 26 day of March, 1997.

Clerk of the Supreme Court
Supreme Court Building
P. O. Box 848
Santa Fe, New Mexico 87504

Honorable Jay W. Forbes
District Judge
P. O. Box 1838
Carlsbad, New Mexico 88220

Marilyn S. Hebert, Esq.
Special Assistance Attorney General
Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505
Attorney for the Oil Conservation Commission

James Bruce, Esq.
P. O. Box 1056
Santa Fe, New Mexico 87504
Attorney for Exxon Corporation

William F. Carr, Esq.
P. O. Box ~~2088~~ 2208
Santa Fe, New Mexico 87504
Attorney for Yates Petroleum Corporation

Dewetta Sharene Brown
P. O. Box 1838
Carlsbad, New Mexico 88220
Court Monitor

W. Thomas Kellahin

FIFTH JUDICIAL DIS .ICT
STATE OF NEW MEXICO
COUNTY OF EDDY

PREMIER OIL & GAS, INC.,

Petitioner,

vs.

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
EXXON CORPORATION, and
YATES PETROLEUM CORPORATION,

Respondents.

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY
FILED MAR 12 1997 IN MY OFFICE
ELEANOR JARNAGIN
Clerk of the District Court

No. CV 96-121-JWF

COPY

ORDER AFFIRMING COMMISSION DECISION

This matter having come before the Court upon the Petition for Review of a Decision of the Oil Conservation Commission of New Mexico ("the Petition") filed herein by Premier Oil & Gas, Inc., and the Court, having reviewed the transcript of proceedings before the Oil Conservation Commission ("the Commission"), the evidence taken in hearings by the Commission, and the briefs of the parties, and having heard and considered the oral arguments of the parties,

FINDS THAT the Petition is not well taken and should be dismissed.

IT IS THEREFORE ORDERED THAT the Petition is dismissed with prejudice and Commission Order No. R-10460-B is hereby affirmed.

S/ [illegible]
District Court Judge

EXHIBIT
B

Approved by:

Marilyn S. Hebert
Special Assistant Attorney General
2040 South Pacheco Street
Santa Fe, New Mexico 87505
(505) 827-7147

Attorney for the Oil Conservation Commission

James Bruce
Post Office Box 1056
Santa Fe, New Mexico 87504
(505) 982-2043

Attorney for Exxon Corporation

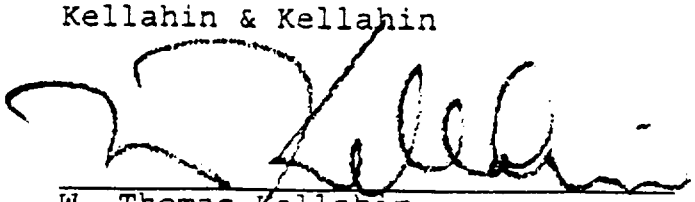
Campbell, Carr, Berge
& Sheridan, P.A.

William F. Carr
Post Office Box 2088
Santa Fe, New Mexico 87504-2088
(505) 988-4421

Attorneys for Yates Petroleum Corporation

Approved as to form:

Kellahin & Kellahin



W. Thomas Kellahin
Post Office Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

Attorneys for Premier Oil & Gas, Inc.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOTICE

CAUSE NO. **24,311**

DISTRICT COURT COUNTY/NO.
Eddy
(CV-96-121-JWF)

PREMIER OIL & GASS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

You are hereby notified that the **(Exhibit 1 large box)** was filed in the above-entitled cause on June 5, 1997.

cc: W. Thomas Kellahin

Marilyn S. Herbert

James Bruce

William F. Carr

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOTICE

CAUSE NO. 24,311

DISTRICT COURT
Eddy
(CV 96-121-JWF)

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

You are hereby notified that the **cassette tapes and exhibits (1 env)** were filed in the above-entitled cause on **May 27, 1997.**

c: W. Thomas Kellahin

Marilyn S. Hebert, Assistant Attorney General

James Bruce

William F. Carr

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CALENDAR NOTICE

CAUSE NO. 24,311

DISTRICT COURT NO.

Eddy
(CR 96-121-JWF)

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO. EXXON CORPORATION and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

You are hereby notified that the RECORD PROPER was filed in the above entitled cause on **May 14, 1997,** and assigned to the **GENERAL CALENDAR on May 14, 1997.**

cc: Counsel of Record

TO: Lyn Hebert OCC
FAX #: 505-827-8177
FROM: Kellahin
FAX #:
PHONE #:
DATE: 5/20/97
PAGES INCLUDING THIS PAGE: 4

KELLAHIN AND KELLAHIN
ATTORNEYS AT LAW
EL PATIO BUILDING
117 NORTH GUADALUPE
POST OFFICE BOX 2265
SANTA FE, NEW MEXICO 87504-2265

TELEPHONE (505) 982-4285
TELEFAX (505) 982-2047

W. THOMAS KELLAHIN*

*NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

JASON KELLAHIN (RETIRED 1991)

May 20, 1997

VIA FACSIMILE
(505) 887-7095

District Court Clerk
Eddy County Courthouse
100 N. Canal Room 305
Carlsbad, NM 88220
Attn: Joyce Hatfield

COPY

Re: CIV 96-CV-121-JWF
Premier v. Oil Conservation Commission

Dear Ms. Hatfield:

In accordance with our telephone conversation this morning, please find enclosed my request for items to be transmitted to the Supreme Court as part of the official record of proceedings in the referenced matter.

Please call me if you have any questions.

Very truly yours,

W. Thomas Kellahin

cfx: James Bruce, Esq.
cfx: William F. Carr, Esq.
cfx: Lyn Hebert, Esq.

FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO

PREMIER OIL & GAS, INC.,

Petitioner,

vs. **No. CIV 96-CV-121-JWF**

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION AND YATES PETROLEUM CORPORATION

Respondents.

REQUEST FOR INCLUSION OF MATERIAL IN THE RECORD PROPER

Petitioner hereby requests the Clerk of the District Court to include in the Record Proper for submittal to the New Mexico Supreme Court those materials set forth on Exhibit "A" attached hereto and in support states that all said items are material and relevant to these proceedings.

Respectfully submitted,

KELLAHIN & KELLAHIN

BY _____

W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504
telephone (505) 982-4285

EXHIBIT "A"

(1) Examiner Hearing held on June 29 and 30, 1995:
Transcript consisting of Volumes Pages 1 through 311.
Exxon Exhibits 1-42:
Note: these same exhibits were submitted to the Commission and therefore only the Exxon Exhibits submitted to the Commission are enclosed.
Yates Exhibits 1-7:
Note: these same exhibits were submitted to the Commission and therefore only the Yates Exhibits submitted to the Commission are enclosed.
Premier Exhibits 1 through 10:
Note: the Premier exhibits submitted to the Division are different from those submitted to the Commission and therefore the Premier Exhibits submitted to the Division are enclosed.

(2) Commission hearing held on December 14, 1995:
Transcript consisting Volumes One and Two
numbered Pages 1 through 524.
Exxon Exhibits 1 through 42.
Yates Exhibits 1 through 8
Premier Exhibits A and B and numbered Exhibits 1 through 11.
Commission Order No. R-10460-B (De Novo) dated
March 12, 1996.

(3) Application for Rehearing submitted to the Commission on March 20, 1996 by Premier Oil & Gas, Inc.

(4) All Pleadings contained in District Court Case file 96-121-JWF

(5) Premier's Exhibits presented to the District Court at the hearing of this matter held on January 31, 1997, being exhibits duplicated from the record made in this case before the Commission.

(6) copies of the Briefs of all parties.

(7) the taped judicial proceedings for the hearing held on January 31, 1997.

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing pleading was transmitted by facsimile on May 20 1997, to the following:

Lyn Hebert, Esq.
Special Assistant Attorney General
Attorney for Oil Conservation Commission,
State of New Mexico
Energy, Minerals and Natural Resources Department
2040 S. Pacheco St.
Santa Fe, New Mexico 87505
fx: 505- 827-8177

James Bruce, Esq.
Hinkle Law Firm
P. O. Box 2068
Santa Fe, New Mexico 87504
fx 505-982-8623
Attorney for Exxon Corporation

William F. Carr, Esq.
P. O. Box 2208
Santa Fe, New Mexico 87504
fx 505-983-6043
Attorney for Yates Petroleum Corporation

W. Thomas Kellahin

SUPREME COURT OF NEW MEXICO

DOCKET NO. 24311

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

Kellahin & Kellahin
W. Thomas Kellahin
P.O. Box 2265
Santa Fe, NM 87504-2265 982-4285

Marilyn S. Hebert
Assistant Attorney General
Oil Conservation Division
2040 South Pacheco
Santa Fe, NM 87505 827-7147
(for Oil Conservation)

James Bruce
P.O. Box 1056
Santa Fe, NM 87504-1056 982-2043
(for Exxon Corp.)

Campbell, Carr, Berge & Sheridan, P.A.
William F. Carr
P.o. Box 2088
Santa Fe, NM 87504-2088 988-4421
(for Yates Petroleum)

COUNTY)

JUDGE

CASH ACCOUNT FOR COST

1997 DATE		RECEIVED FROM OR PAID TO	RECEIVED	DISBURSED
April	23	Kellahin & Kellahin (REC# 7935)	125.00	
		State Treasurer		96.00
		Suspense Fund		4.00
		Court Automation		25.00

N MEX

PAC 2ND

1997 DATE		PROCEEDINGS
April	23	Docketing Statement; c/m

FIFTH JUDICIAL DISTRICT
COUNTY OF EDDY
STATE OF NEW MEXICO

PREMIER OIL AND GAS, INC.,

Petitioner,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORP. & YATES PETROLEUM CORP.,

Respondents.

CV 96-121-JWF

CERTIFICATE OF SERVICE

I, Eleanor Jarnagin, Clerk of the District Court of Eddy County, State of New Mexico, do hereby certify that I mailed a copy of the Index for the Transcript of Record Proper on the above-entitled cause, to the following attorneys on the 12th day of May, 1997. I further certify that I have mailed a copy of the Certificate of Service to the Clerk of the Court of Appeals at the time of transmittal of the Record Proper on the 12th day of May, 1997.

Ms. Marilyn S. Hebert
Special Assistant Attorney General
2040 South Pacheco
Santa Fe, New Mexico 87505

Mr. W. Thomas Kellahin
Attorney at Law
P.O. Box 22651
Santa Fe, New Mexico 87504

Mr. James Bruce
Attorney at Law
P.O. Box 1056
Santa Fe, New Mexico 87504

Mr. William F. Carr
Attorney at Law
P.O. Box 2088
Santa Fe, New Mexico 87504

ELEANOR JARNAGIN
CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

I N D E X

A CVCV

CASE PROCEEDINGS SCREEN MODE: PF1 QUIT

CASE: 05-03-CV-CV-96-00121

PREMIER OIL & GAS, INC. Vs. OIL etal

PF2 CLEAR SCREEN FOR NEW ENTRY PF5 DELETE CURRENT LINE BWD BACKWARD 1 SCREEN
PF3 DISPLAY LAST SCREEN PF10 WARRANTS PF11 BONDS FWD FORWARD 1 SCREEN
PF4 INSERT AFTER CURRENT LINE PF14 DISPOSITION DOWN ARROW-DOWN 1 LINE