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July 10, 1997

VIA HAND-DELIVERY

Michael E. Stogner
Hearing Examiner
New Mexico Oil Conservation Division
New Mexico Energy, Minerals and
Natural Resources Department
Porter Hall
2040 South Pacheco
Santa Fe, New Mexico 87504

Re: ***In Re Amended Application of Doyle Hartman***, Case No. 11792.
OXY USA INC.'S PROPOSED ORDER AND DISCOVERY SCHEDULE

Dear Mr. Stogner:

Pursuant to your requests, OXY USA Inc. hereby tenders the following documents:

1. OXY USA Inc.'s Proposed Order of the Division, which includes OXY's suggestions on the substance and scope of discovery, and;

2. A copy of a Supplemental Affidavit executed by Patrick H. Martin. The original copy of Mr. Martin's supplemental affidavit will be delivered tomorrow.

Thank you for your attention to this matter.

Very truly yours,

William F. Carr

WFC/jmg
Enclosure(s)
cc: Counsel of Record, by Hand-Delivery

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:

CASE NO. 11792
ORDER NO. R-_____

AMENDED APPLICATION OF DOYLE HARTMAN TO GIVE FULL FORCE AND EFFECT TO COMMISSION ORDER R-6447, TO REVOKE OR MODIFY ORDER R-4680-A, TO ALTERNATIVELY TERMINATE THE MYERS LANGLIE-MATTIX UNIT, LEA COUNTY, NEW MEXICO.

OXY USA INC'S PROPOSED ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing on various motions of the parties, being Applicant Doyle Hartman ("Hartman") and OXY USA, Inc. ("OXY"), at 2:00 PM on June 30, 1997, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.[1]

---

[1] The Motions at issue are: (1) Hartman's Motion to Disqualify Michael E. Stogner as the Division Hearing Examiner in this proceeding, (2) Hartman's Motion to Disqualify William F. Carr, Esq., as one of the attorneys for OXY, (3) Hartman's Motion for Hearing Before the Commission, (4) Hartman's Motion for Discovery and OXY's Motion to Stay Discovery, and (5) OXY's Motion to Dismiss Hartman's Amended Application.

NOW, on this __ day of July, 1997, the Division Director, having considered the contentions of the parties, the record and the recommendations of the Examiner and counsel for the Division, and being fully advised in the premises,

FINDS THAT:

(1) Due public notice has been given as required by law, the Division has jurisdiction of the parties and of certain of the subject matters raised in this case.

(2) Hartman has failed to demonstrate a factual or legal basis for the disqualification of Hearing Examiner Michael E. Stogner.

(3) Hartman has failed to demonstrate a factual or legal basis for the disqualification of William F. Carr, Esq. as one of the attorneys for OXY.

(4) Hartman has failed to demonstrate a sufficient factual or legal need to adopt special hearing procedures in this proceeding.

(5) Hartman's Amended Application and OXY's Motion to Dismiss raise a variety of issues concerning the meaning and effect of prior NMOCD Orders, a party's ability to collaterally attack such prior orders, and the jurisdiction of the NMOCD to prevent waste and protect correlative rights while avoiding interference with private contractual rights and obligations which do not implicate those administrative functions. Specifically, Hartman questions the validity of the following NMOCD Orders and OXY's compliance with those Orders:

Order R-4660-Case 5086	1973 approval of Myers Langlie Mattix Unit Agreement
Order R-4680-Case 5087	1973 approval of waterflood project
Order R-6447-Case 6987	1980 statutory unitization of certain royalty interests
Order R-4680-A-Case 11168	Approval of OXY's 1994 EOR Project

(6) The Myers Langlie Mattix Unit (MLMU) was a voluntary unit created by private contracting parties and approved by the NMOCD in 1973. The purpose of the unit is to conduct secondary recovery operations. Hartman's predecessors-in-interest voluntarily signed the Unit Agreement and Unit Operating Agreement in approximately 1973.

(7) The Unit Agreement and Unit Operating Agreement governing the MLMU specify the rights and obligations of the parties concerning, *inter alia*, the operator's options for collecting unpaid unit expense. As one of several options available to the Operator for collecting unpaid unit expense, the Unit Operating Agreement contains a provision for carrying a working interest owner on a limited basis.

(8) In 1980, on application of the Unit Operator, the NMOCD entered a statutory unitization order which forced joinder in the Unit of certain unsigned royalty interest owners. The Order, as required by Section 70-7-7(F) NMSA (1978), expressly found that MLMU Unit Agreement and Unit Operating Agreement included "a provision for carrying any working interest owner on a limited, carried, or net profits basis, payable out of production, upon such terms and conditions which are just and reasonable ..." The Order made no changes to the unit boundary, the unit acreage, the participation allocation of any WIO or to any of the unit documents. The Order expressly incorporated the MLMU Unit Agreement and Unit Operating Agreement. Hartman's predecessors-in-interest were not parties whose interest were forced into the Unit by the statutory unitization order. Hartman's predecessors-in-interest had voluntarily signed the Unit documents in 1973. They also expressly ratified the statutory unitization order.

(9) Hartman contends that Section 70-7-7(F) NMSA (1978) requires the NMOCD to find that as a voluntarily participant in the MLMU he is entitled to be a "carried" interest and to opt to go "non-consent" on certain unit projects, thereby limiting his liability for paying his share of unit costs only out of his share of future production. This contention, if accepted in this proceeding, would restrict the Operator's alternative options for collection of unpaid unit expenses. Those options are expressly contained in the Unit Operating Agreement, which was voluntarily signed by Hartman's predecessors-in-interest, and which was approved by Order R-6447.

(10) Hartman's contention constitutes an impermissible collateral attack on the 1980 statutory unitization order. The NMOCD's finding that the MLMU documents complied with statutory requirements became final in 1980, and may not be reconsidered now. *See*,

Armijo v. Save 'N Gain, 771 P.2d 989, 994 (N.M.Ct.App. 1989).

(11) Based on the arguments and submissions of counsel, the NMOCD takes this opportunity to clarify its interpretation of the relationship between Section 70-7-7(F) NMSA (1978) and private contractual agreements.

A. Section 70-7-7(F) provides that a unit operating agreement shall contain a provision for carrying any working owner. The carrying of a working interest can be on 1) a limited basis; 2) a carried basis; or 3) a net-profits basis. Each of these methods of "carrying" refers to a different method by which the operator can collect a defaulting working interest owner's share of unit costs. The use in this statute of the word "carrying" is not synonymous with the word "carried."

B. In a statutory unit, there are two categories of WIO (a) those who voluntarily commit to join the unit by executing the original unit documents or ratifying a statutory unitization order, and (b) those whose interests are involuntarily committed to the Unit pursuant to the Statutory Unitization Act. Each of these groups of working interest owners may be subject to different carrying provisions.

C. The owner of a working interest which **is not voluntarily committed** to the unit but, instead, is forced into the unit by statute obtains non-consent rights and is appropriately treated as a **"carried"** working interest owner. This owner's share of unit expense should be recoverable by the operator out of future production.

D. The owner of working interest which **is voluntarily committed** to the Unit, either by execution of the original unit documents or ratification of the statutory unitization order, is a working interest owner who has agreed to the terms and conditions of the unit instruments. These owners are subject to any and all of the **"carrying"** provisions specified in the unit instruments. Those provisions may authorize the operator to recover unpaid unit costs by any of several **non-exclusive remedies** under a Unit Operating Agreement approved by the NMOCD as just and reasonable.

E. Section 70-7-7(F) NMSA (1978) does not relieve a working interest owner who has voluntarily committed his interest to a Unit of any private contractual obligations nor deprive the Unit Operator of any private contractual remedies.

F. Section 70-7-7(F) NMSA (1978) only mandates that the Division find that any one or more of the referenced carrying provisions is contained in the unit contracts and that these provisions are fair, just and reasonable. As determined in 1980, the MLMU Operating Agreement provides for carrying on a limited basis under terms that are fair, reasonable, and equitable.

G. The NMOCD has consistently ruled in statutory unitization cases that the subject statute provides a non-consent "carried" interest only to those working interest who have not voluntarily committed their interests to the unit. *See*, Pelto Unit Case (Case No. 9210, Order R-8557); Corbin-Queen Case (Case No. ___, Order R- 9336); Marathon's Tamano Unit Case (Case No. 10341, Order R-9548; and Hanson's Shugart Unit Case (Case No. 10685, Order R-9894). Hartman is not in that category.

12. The NMOCD will docket a hearing on Hartman's claim of water encroachment into the Myers "B" Well No. 30. The hearing will examine the limited issue of the prudency of water injection within the immediate vicinity of the Myers "B" Well No. 30. The objective of the hearing is to determine whether the Myers "B" Well No. 30 is being subjected to out-of-zone water encroachment by a non-Yates formation source and, if so, whether the source of the water is the Well 142 operated by OXY. The Division orders OXY to demonstrate that it has been prudent in the drilling, casing, managing and monitoring of its immediately-adjacent injection Well 142. This means that the maximum area of review shall not exceed the area contained within a one-half mile radius of the Myers "B" Well No. 30.

13. Consistent with the hearing on Hartman's claim of water encroachment, and with respect to Hartman's Motion for Discovery and OXY's Motion to Stay Discovery, the Division finds that the following discovery shall be made available between the parties. Discovery shall be limited to the area within one-half mile radius of the Myers "B" Well No. 30 as follows:

a. No interrogatories shall be requested of any party;
b. No depositions shall be taken of any potential witness by any party;
c. OXY shall provide Hartman the following documents:
   1. well logs
   2. production/injection volumes and pressures
   3. Injection profile surveys

4. Well chronologicals
5. Completion reports
6. Sundry Notices
7. Any pressure test data, including bottomhole pressure data and analysis
8. Water analysis
9. Step rate test data
10. Most recent mechanical integrity test data
11. Any reports prepared by testifying experts

d. Hartman shall provide OXY with the following documents:

1. All data identified in subparagraph c above
2. All gas analysis, including and measurements of water vapor content and BTU (wet and dry)
3. Daily chronologicals, workover reports, etc.. relating to the work performed by Hartman
4. All of the well file information obtained from AMOCO relating to this well
5. All plugging data
6. All log analysis
7. All reserve estimates, reservoir studies, P/Z plots, drainage calculations, material balance studies, etc., performed by of for AMOCO of Hartman
8. Any computer simulation of modeling studies
9. Names and last known addresses and phone numbers of the people who worked on the well for AMOCO and Hartman
10. Any geologic maps or studies
11. Any reports prepared by testifying experts

Hartman and OXY shall mutually exchange the designated documents on the same day within 60-days of the issuance of this order. Fifteen days before the hearing scheduled for this matter, the parties shall file a prehearing report consistent with normal division practice.

15. The 1800 p.s.i. provision in Order R-4680-A is hereby rescinded and the normal .2 p.s.i. standard (2/10 pound per foot of depth to the top of the injection interval) shall apply to the wells designated in OXY's 1994 EPR Project.

IT IS THEREFORE ORDERED THAT:

(1) Hartman's Motion to Disqualify Michael E. Stogner as the Division Hearing Examiner in this proceeding is hereby **denied**.

(2) Hartman's Motion to Disqualify William F. Carr, Esq., as one of the attorneys for OXY, is hereby **denied.**

(3) Hartman's Motion for Hearing Before the Commission is **denied**.

(4) OXY's Motion to Dismiss Hartman's Amended Application is **denied**, except insofar as it relates to Hartman's claims concerning the 1980 statutory unitization order, which portion is **granted.**

(5) Except as specified in Finding No. 13, *infra.*, Hartman's Motion for Discovery and OXY's Motion to Stay Discovery are **denied.**

(6) The Division will docket this matter as set forth above on a Special Examiner docket which will be not less than 30-days nor more than 60-days after the exchange of documents.

(7) Jurisdiction is hereby 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

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:

CASE NO. 11792

AMENDED APPLICATION OF DOYLE HARTMAN, TO GIVE FULL FORCE AND EFFECT TO COMMISSION ORDER R-6447, TO REVOKE OR MODIFY ORDER R-4680-A, TO ALTERNATIVELY TERMINATE THE MYERS LANGLIE-MATTIX UNIT, LEA COUNTY, NEW MEXICO

AFFIDAVIT OF PATRICK H. MARTIN
IN SUPPORT OF OXY USA INC.'S MOTION TO DISMISS

STATE OF NEW MEXICO §
§
COUNTY OF SANTA FE §

BEFORE ME, the undersigned authority, on this day personally appeared **PATRICK H. MARTIN**, being by me duly sworn, who deposed and stated as follows:

1. My name is Patrick H. Martin. I am over the age of twenty-one (21) years, and of sound mind, capable of making this Affidavit. I have personal knowledge of the facts herein stated and each such fact is true and correct.

2. I have previously filed an Affidavit in this proceeding under date of June 30, 1997, together with my resume. In response to the request made at the hearing, I now file this supplemental affidavit.* The testimony stated in this Affidavit is the same that I would give in Court or before the agency under oath if called to testify as a witness.

3. An important issue in this administrative proceeding and the related lawsuit is the proper treatment to be given to the finding in Order R-6447 that the Myers Langlie-Mattix Unit Operating Agreement provides for unit operation on "terms that are fair, reasonable, and

* As stated prviously, Louisiana State University and Law Center are in no way involved in my participation in this matter; the opinions expressed herein are based on my own experience and expertise and do not represent any view of the University or Law Center.

equitable," and which includes "a provision for carrying any working interest owner on a limited, carried or net-profits basis, payable out of production, upon such terms and conditions which are just and reasonable . . ." [Order R-6447 ¶ 21(d)]. This finding tracked the requirements of the pertinent statute.

4. In my previous affidavit I stated that "It is my opinion that there is a reasonable basis for the agency to have concluded in 1980 that the statutory criteria for a unit were satisfied by the Unit Operating Agreement." I will now explain that "reasonable basis".

5. It is to be noted that the statute and the finding refer to the unit operating agreement "carrying" a working interest owner "on a limited, carried or net-profits basis . . . " The concept of carrying is simply this: that the party doing the carrying is responsible for the operating costs and expenses attributable to the non-carrying interest. The concern of the statute and the conservation agency in having one party responsible for carrying another interest in a unit is two-fold: a) fairness to a party forced into a unit, and b) having some interest who must bear the costs of the interest in the unit. On the latter point, if there is not some party or parties carrying all costs in the unit, there will be a portion of unit costs -- such as those incurred for plugging and abandonment, remediation, possible well-blowouts and the like -- that will leave the state holding the bag on such costs. See NMSA 1978, § 70-7-7E.

6. The "carrying" party can accomplish the carrying by means of one of three methods of carrying: a) a limited basis; b) a carried basis; or c) a net-profits basis. Each of these three is different. I will address these in last-to-first order.

7. A net profits interest is defined as "A share of gross production from a property, measured by net profits from operation of the property. It is carved out of the working interest " 8 P. Martin & B. Kramer, *Williams & Meyers Oil and Gas Law* 679 (1996). The term "net profits interest" has been construed by a New Mexico court in *Christy v. Petrol Resources Corp.*, 102 N.M. 58, 691 P.2d 59 (N.M. Ct. App. 1984). In this case, the plaintiff sought to quiet title, alleging that he was "the owner and holder in fee simple of (i) a 10% net profits interest, and (ii) an overriding royalty of 1% of the amount of all oil, gas,

casinghead gas and other hydrocarbon substances . . . " The court concluded that in New Mexico law "the phrase 'net profits interest' has no independent meaning . . . " 691 P.2d at 62. Under the circumstances of the case, the court found that the plaintiff's "net profits interest" was an interest in a certain cash payment and was not an interest in the proceeds of production. The Utah Supreme Court in *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225 at 231 (Utah 1987), similarly concluded that the term "net profits interest" has not "acquired a fixed and immutable meaning such that all interests so formed automatically are entitled to treatment as estates in land. There is no body of law that clearly defines the nature and incidents of the net profits interest."

8. A "carried interest" has been defined as follows:

> A fractional interest in oil and gas property, usually a lease, the holder of which has no personal obligation for operating costs, which are to be paid by the owner or owners of the remaining fraction, who reimburse themselves therefor out of production, if any. The person advancing the costs is the carrying party and the other is the carried party. Three general types of carried interest are recognized: the Abercrombie-type carried interest, the Herndon-type carried interest, and the Manahan-type carried interest.

8 P. Martin & B. Kramer, *Williams & Meyers Oil and Gas Law* 135 (1996). This same *Treatise*, for which I am co-author for update and revision with Professor Kramer, makes the further observation that there is no standard carried interest arrangement. It states:

> The details of a carrying agreement vary considerably, e.g., whether the operator (the party who is putting up the cost of development) has control of the oil and the right to sell it or the carried party can sell his part of the oil; whether the carried interest is to be carried for the initial development period only of the operation or for the life of the lease; whether interest is to be charged and, if so, the rate; who would own the equipment, such as pipe, motors and pumps, if and when production ceased; etc. See Ashland Oil & Refining Co. v. Beal, 224 F.2d 731, 5 O.&G.R. 387 (5th Cir. 1955), cert. denied, 350 U.S. 967 (1956). As observed by Professor Masterson, Discussion Notes, 5 O.&G.R. 396 (1956):

> "The numerous different forms these interests are given from time to time make it apparent that the terms 'carried interest' and 'net profits interest' do not define any specific form of agreement but rather serve merely as a guide in preparing and interpreting instruments."
>
> Professor Masterson further noted the close kinship between carried interests and net profits interest. Either type may be employed where one coowner is to advance the entire costs of drilling.

Id., 135-36.

9. Although a "carried interest" and a "net profits interest" have a kinship, they are different. The same *Treatise* goes on to describe the usual difference between the treatment of the two:

> The major difference between the two interests is that it is customary for a carried interest relationship to cease when all costs as to the carried interest are paid; thereafter the carried and carrying parties jointly own the working interest and share in costs and receipts. A net profits interest, on the other hand, usually continues for the duration of the leasehold, one party continuing to bear costs and the other receiving a share of proceeds after payment of such costs.

8 P. Martin & B Kramer, *Williams & Meyers Oil and Gas Law* 136 (1996)

10. As observed earlier, the statute and order provide that "carrying" can be on a "limited" basis The same *Treatise* I have been quoting from states the following definition for a "Limited carried interest":

> A Carried interest (q.v.) which is to be carried for the initial development phase only of the operation. After the operator has recouped his advances to the carried interest, the carry terminates.

8 P. Martin & B Kramer, *Williams & Meyers Oil and Gas Law* 589 (1996). When there is a carrying on a limited basis the carry terminates, and the non-carrying party must be responsible for its share of costs or the interest itself may terminate or be relinquished. This has been the treatment in New Mexico law for such an interest. The meaning of carrying a working interest owner on a limited basis is seen in a New Mexico case decided the very same year that the unit operating agreement was signed. This was in *Bolack v. Sohio Petroleum Co.*,

475 F.2d 259 (10th Cir. 1973). In this case, Tom Bolack sold and assigned to Sohio Petroleum Company a producing Federal oil and gas lease, reserving an interest described as a "limited term carried working interest." Bolack's interest was not to begin until seven-eighths of the production subsequent to the sale and transfer of the producing lease amounted to 1,500,000 barrels, and the interest was then to terminate when the "reasonably estimated quantity of oil that is recoverable from said lands has declined to four hundred thousand (400,000) barrels." The question in the case concerned whether the limiting condition had occurred, and the court concluded that it had indeed occurred and that the carrying party's obligations ceased and the noncarrying party's interest had terminated. Thus, it should be clear that at the time the New Mexico legislature in 1975 adopted the statute in question in this proceeding, the concept of carrying another interest on a limited basis was recognized in the New Mexico courts.

11. Other states' statutes providing for options for working interest owners in pooling and unitization have provided for carrying on a "limited" basis as well as a "carried" basis. The Kansas Statute is quite similar to the New Mexico statute with provision for "carrying any nonoperating working interest owner on a limited, carried or net-profits basis, . . ." K.S.A. § 55-1305(g). The West Virginia pooling statute, W. Va. Code § 22C-9-7(b)(5)(ii), enacted originally in 1972, provides for options available to the owner of an operating interest who does not elect to participate in the risk and cost of the drilling of a deep well: "To participate in the drilling of the deep well on a ***limited*** or ***carried*** basis on terms and conditions which, if not agreed upon, shall be determined by the commissioner to be just and reasonable." [emphasis added]. The Kentucky pooling statutes, Ky. Rev. Stat. § 353.640(3), contain a provision whereby the nonconsenting owner may be afforded certain options, including one in which the owner "May elect to participate in the drilling, deepening or reopening of the well on a ***limited*** or ***carried*** basis upon terms and conditions determined by the director to be just and reasonable." [emphasis added]. A similar provision is contained in the Pennsylvania statutes 58 Pa. Stat. § 408(c).

12. The concept of a working interest owner participating on a "limited" as opposed to "carried" basis in unitization operating agreements has been brought forward in requests by parties for such carrying. An especially significant case for this proceeding is *Newkirk v. Bigard*, 125 Ill.App. 454, 80 Ill.D. 791, 466 N.E.2d 243, *affirmed in part and reversed in part*, 109 Ill.2d 28, 92 Ill.D. 510, 485 N.E.2d 321 (1985), *cert. denied*, 475 U.S. 1140, *reh. denied*, 477 U.S 909 (1986). In this case the applicant for an order for a unit requested that the Illinois Mining Board "Provide that Walter Newkirk may elect to participate in the drilling and operation or operations of the well on a limited or carried basis upon the terms and conditions to be just and reasonable." 466 N.E.2d at 245. Newkirk did not attend the hearing. The order was issued in 1980 but did not provide for Newkirk's participation on "a limited or carried basis" but instead that he was simply responsible for his share of costs. The order failed to state a time and manner in which Newkirk could elect to participate in the unit and did not provide, as requested by the applicants, one or more equitable alternatives if Newkirk elected not to participate in the risk and cost of the drilling and operations; it did state Newkirk would participate in the costs and risks of the drilling units and set out the participation factors. Omission of the election of the statutory alternatives to participation in the drilling of the well rendered the order voidable, not void; thus it was not subject to collateral attack. The order was defective because it did not give alternatives, but this did not mean the board was without jurisdiction to enter the order. The nonconsenting party could not now challenge the order. As an appendix to this Affidavit I have reproduced pertinent pages from B. Kramer & P. Martin, Pooling and Unitization, §25.06[7] (1996), for which I am the co-author, concerning the fact that a conservation agency's failure to afford a nonconsenting party the statutory alternatives cannot be attacked collaterally later by that nonconsenting party.

13. From the foregoing discussion of the New Mexico statute, it should be obvious that the terms "carrying" on a "limited" basis or a "carried" basis or a "net-profits" basis refer to several different conceptual bases on which the "carrying" might be accomplished. After reviewing the Unit Operating Agreement for the Myers Langlie-Mattix Unit, I am of the

opinion that the responsible New Mexico agency in 1980 in Order R-6447 had a very reasonable basis for concluding that the Operating Agreement did provide for "carrying" on a "limited basis" under terms that were just and reasonable. The unit operating agreement does provide for a limited carrying of nonconsenting parties. If, for example, the nonoperating party fails to authorize and pay for certain operations he may do so for a time. The other working interest owners will have a right to a lien on the production. If the operations are successful, the nonoperating party will have his share of costs deducted out of production and then can resume taking his share of production after the carrying parties have recouped their costs. If it appears the operations are to be unsuccessful, the nonconsenting party may relinquish his interest and thereby avoid any liability for costs incurred subsequent to his relinquishment. This example would certainly qualify as carrying the nonconsenting party on a limited basis. Because the working interest owners had all participated the Unit Operating Agreement for some seven years and had enjoyed substantial benefits thereunder, it is very reasonable to conclude that the limited carrying provision of the agreement was "just and reasonable".

14. I am also of the opinion that any challenge to the agency's 1980 conclusion and Order R-6447 must be dismissed by this agency or by a court as a collateral attack on the order. It is further my opinion that there is no reasonable basis on which the agency could conclude that the statute or Order R-6447 imposes a particular method for carrying on "limited" basis or "carried" basis, or "net profits" basis. Such an end could only be achieved by rewriting the Unit Operating Agreement since none of these terms has a precise meaning that could imported, and the statute in no way indicates which of these three broad concepts should be employed. While it may be open to question whether in 1980 the agency could have refused to approve the Unit and the Unit Operating Agreement for not containing a satisfactory carrying provision when no working interest owner made complaint, it is my opinion that the agency has no statutory authority and no power under the circumstances to impose a new

operating agreement upon parties to an existing unit operating agreement. It is quite simply unheard of and unprecedented in case law.

FURTHER AFFIANT SAYETH NOT.

Patrick H. Martin

SUBSCRIBED AND SWORN TO BEFORE ME on this 7th day of July 1997, to certify which witness my hand and official seal of office.

Notary Public, In and for the
State of Louisiana

My commission expires:

for life

[7] Illinois

The Illinois conservation act allows suit by any interested person affected by the act or by any rule, regulation, or order of the Illinois Mining Board in the circuit court of the county where any part of the affected land.[92] Any such suit is to be determined as expeditiously as possible. The burden of proof is on the party challenging the validity of the act or rule, regulation, or order and any rule, regulation, or order is deemed prima facie valid.

Omission of election of statutory alternatives to participation in drilling of well rendered order voidable, not void, thus it was not subject to collateral attack — The case of *Newkirk v. Bigard*[93] involved an order of the Illinois Mining Board, which had force-pooled and integrated 40 acres into two drilling units of 20 acres each. The complainants had a one-half interest in 30 acres and contended the order was void as it had not spelled out any election they could make as to whether they paid costs up front or whether they were to be carried to payout or given some other basis for paying costs. Notice had been given, but they had not taken part in the hearing. They also contended the other one-half interest, which was a term interest, had expired as there were no operations on the land itself but instead on unit lands for a void unit. The order failed to state the time and manner in which Newkirk could elect to participate in the unit and did not provide, as requested by the applicants, one or more equitable alternatives if Newkirk elected not to participate in the risk and

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ty-day provision for challenging an order of the commission thereby giving the plaintiff a full year to bring a suit against the commission claiming that the order of the agency is in violation of the statute. It could seem to refer to tort suits between private parties for claims based on violations of commission regulations and orders, such as a well blowout, pollution, or failure to account for production. However, is it also a restriction on the authority of the commission to enforce its own statutes or regulations or orders? In a doubtful matter, the authors do not think a court should read a restriction to limit the ability of the state to enforce its exercise of the police power.

[92] Ill. Rev. Stat. ch. 96, § 5416, at § 30.13A *infra*.

[93] Newkirk v. Bigard, 92 Ill. Dec. 510, 485 N.E.2d 321, 87 O.&G.R. 266 (Ill. 1985), *cert. denied*, 475 U.S. 1140, *reh'g denied*, 477 U.S. 909 (1986).

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cost of the drilling and operations; it did state Newkirk would participate in the costs and risks of the drilling units and set out the participation factors. The Mining Board said that inasmuch as it had the authority to enter orders pertaining to the integration of mineral interests, and as notice had been given to all affected owners, its integration order could not be attacked collaterally. The court of appeals, however, disagreed. It stated: "[T]he Mining Board, as an administrative agency, is a creature of statute, having no general or common-law powers. It must find within the statute the authority to act, and if it lacks the inherent power to make or enter the particular order involved,' that order may be attacked at any time or in any court, either directly or collaterally."[94] Interestingly enough, the court found that the order was not completely void so the term interest had not expired; it was only void as to the interest of the claimants. In other words, the board had jurisdiction, but not to make part of the order it had entered. This approach makes the collateral attack rule almost meaningless and encourages parties not to take part in unit hearings.

The Illinois Supreme Court reversed. Omission of the election of the statutory alternatives to participation in the drilling of the well rendered the order voidable, not void; thus it was not subject to collateral attack. The order was defective because it did not give alternatives, but this did not mean the board was without jurisdiction. The board had personal jurisdiction over Newkirk and had subject matter jurisdiction. It had inherent authority to issue the order. The order was authorized by statute and not subject to collateral attack; agency jurisdiction or authority is not lost merely because its order might be erroneous.[95] The general rule is that a party cannot collaterally attack an agency order in a proceeding such as this unless the order is void on its face as being unauthorized by statute.[96] The court observed:

> Plaintiffs' argument would allow a collateral attack on an order whenever the agency has failed to follow the

[94] 466 N.E.2d at 247, 82 O.&G.R. at 247–248.

[95] 485 N.E.2d at 324–325, 87 O.&G.R. at 273.

[96] 485 N.E.2d at 325–326, 87 O.&G.R. at 274.

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> exact letter of a statutory provision. A party could merely point to any provision of a statute which was not complied with and claim that the agency did not have authority to act unless the provision was complied with.[97]

The court noted the distinction "between orders which are void and subject to collateral attack, and those which are merely voidable and subject to attack only through the applicable administrative and judicial review proceedings."[98] The mining board's failure to include the omitted provisions did not render the order void; it merely made the order voidable. On its face the order was authorized by statute and thus not subject to collateral attack by means of a declaratory judgment action.[99]

The standard of review in Illinois in a case not involving an order of the Mining Board but instead an order of the Illinois Commerce Commission was taken up in the case of *Canady v. Northern Illinois Gas Co.*[100] However, it will be of interest for conservation matters as well. The case involved the expropriation of a gas storage easement. The Illinois Commerce Commission found that the underground water supply would not be injured by the gas storage. The court stated:

> It is not a question of whether we agree or disagree with the findings below, or whether we would have made such findings had we heard the case in the first instance. The sole question is whether as a court of review we can say that the findings of the Illinois Commerce Commission and of the circuit court are manifestly contrary to the weight of the evidence, i.e. are obviously wrong.[101] Substantial evidence was introduced to support the contentions of the Gas Company,

[97] 485 N.E.2d at 326, 87 O.&G.R. at 274.

[98] 485 N.E.2d at 326, 87 O.&G.R. at 275.

[99] 485 N.E.2d at 326, 87 O.&G.R. at 275.

[100] Canady v. Northern Illinois Gas Company, 43 Ill. App. 2d 112, 193 N.E.2d 48, 10 O.&G.R. 1 (1963).

[101] 193 N.E.2d at 50.