

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:

DE NOVO
CASE NO. 11510
Order No. R-10672-A

APPLICATION OF BRANKO, INC. ET
AL. TO REOPEN CASE NO. 10656
(ORDER NO. R-9845) CAPTIONED
"APPLICATION OF MITCHELL
ENERGY CORPORATION FOR
COMPULSORY POOLING AND AN
UNORTHODOX GAS WELL
LOCATION, LEA COUNTY, NEW
MEXICO."

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9:00 a.m. on January 16, 1997, at Santa Fe, New Mexico, before the Oil Conservation Commission of the State of New Mexico, hereinafter referred to as the "**Commission**" on Mitchell Energy Corporation's (**Mitchell**) Request for a *De Novo* Hearing in Case No. 11510 (Division Order R-10672) filed with the Commission on October 30, 1996.

Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Branko, Inc. et al. was represented by Harold D. Stratton, Jr. of Stratton & Cavin, P.A. The New Mexico Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department (**OCD**) was represented by Rand Carroll.

Now, on this 19th day of March, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

A. Summary of Proceedings

The procedural history of this case is long and complicated so that a summary of the proceedings to date is necessary:

1) On December 8, 1992, Mitchell filed an Application for Compulsory Pooling and an Unorthodox Gas Well Location (**1992 Application**) with the OCD pursuant to NMSA 1978, Section 70-2-17 and requested a hearing before a hearing examiner. The OCD assigned Case No. 10656 to this matter.

2) The 1992 Application was originally set for hearing by the OCD on January 7, 1993, and at Mitchell's request, the hearing was continued until January 21, 1993.

3) A hearing was held before Michael E. Stogner, an OCD hearing examiner, on January 21, 1993 (**1993 Hearing**). Mitchell was represented by W. Thomas Kellahin of Kellahin & Kellahin; Strata Production Company, a New Mexico corporation (**Strata**), appeared in opposition to the 1992 Application and was represented by Sealy H. Cavin, Jr. of Stratton & Cavin, P.A.

4) On February 15, 1993, the OCD Division Director entered Order No. R-9845 in Case No. 10656 which pooled all the mineral interests from the top of the Wolfcamp formation to the base of the Pennsylvanian formation, underlying the W/2 of Section 28, Township 20 South, Range 33 East, NMPM, Lea County to form a proration unit to be dedicated to its Tomahawk "28" Federal Com Well No. 1 (**Tomahawk 28 Well**).

5) By fax on March 11, 1993, Strata requested a *de novo* hearing before the Commission pursuant to NMSA 1978, Section 70-2-13.

6) By fax on April 28, 1993, Strata withdrew its request for a *de novo* hearing of Case No. 10656 before the Commission. The Commission entered its order on April 29, 1993, dismissing the requested *de novo* hearing of Case No. 10656.

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7) On January 31, 1996, a Motion to Reopen Case or, in the Alternative, Application for Hearing *De Novo* (**Motion**) in Case No. 10656, Order No. R-9845 was filed with the OCD by Harold D. Stratton of Stratton and Cavin, P.A. on behalf of the following: Branko, Inc., a New Mexico corporation; Duane Brown; S.H. Cavin; Robert W. Eaton; Terry and Barb Kramer, husband and wife; Landwest, a Utah general partnership; Candace McClelland; Stephen T. Mitchell; Permian Hunter Corporation, a New Mexico corporation; George L. Scott, III; Scott Exploration, Inc., a New Mexico corporation; Charles I. Wellborn; Winn Investments, Inc., a New Mexico corporation; Lori Scott Worrall; and Xion Investments, a Utah general partnership (**Branko**).

8) On February 12, 1996, Mitchell filed a Reply to the Motion to Reopen Case No. 10656 (**Reply**).

9) On May 2, 1996, a hearing (**1996 Hearing**) on the Motion to Reopen Case No. 10656 was held before OCD Hearing Examiner Stogner. The case was assigned a number, Case No. 11510. Branko was represented by Harold D. Stratton of Stratton & Cavin, P.A.; Mitchell was represented by Kellahin.

10) On October 2, 1996, the OCD Division Director entered Order No. R-10672 in Case No. 11510 which reopened Case No. 10656.

11) On October 30, 1996, Mitchell filed a Request for a Hearing *De Novo* of Case No. 11510, Order No. R-10672 before the Commission.

B. Summary of the Parties' Claims

1) Branko's claims as alleged in its Motion:

a) Mitchell failed to give proper notice to Branko, as required by law, of Mitchell's 1992 Application in Case No. 10656.

b) Mitchell failed to give proper notice as required by law of the OCD 1993 Hearing on Mitchell's 1992 Application.

c) Mitchell failed to provide Branko with an opportunity to participate in Mitchell's Tomahawk 28 Well located in what Branko refers to as the Strata North Gavilon Lease, a federal oil and gas lease (**Lease**).

d) All of the entities referred to as "Branko" acquired and owned interests in the Lease on or before April 1, 1990, prior to the date Mitchell filed its 1992 Application with the OCD.

e) Branko's interests were made known to Mitchell by a letter dated January 13, 1993, and Mitchell otherwise had actual knowledge of Branko's interests.

f) Mitchell failed to comply with NMSA 1978, Section 70-2-17 (1995 Repl.)

g) OCD Order No. R-9845 in Case No. 10656 is void as to Branko as the OCD did not have jurisdiction over Branko because of Mitchell's failure to provide notice of the 1992 Application and notice of the 1993 Hearing.

Branko requests that the Commission:

a) reopen Case No. 10656 or, in the alternative grant Branko a hearing *de novo*; and

b) enjoin Mitchell from any operation on the Tomahawk 28 Well, including any workover, plug back or recompletion attempt which may adversely affect the interests of Branko in the well.

2) Mitchell's claims as alleged in its Reply:

a) Branko is not a party of record to OCD Case No. 10656, and Branko is not entitled to file for a *de novo* hearing in this case.

b) Branko's Motion to reopen OCD Case No. 10656 is a collateral attack on Order R-9845 and must be denied.

c) All the interests in the Lease have been pooled by Order R-9845 entered on February 15, 1993, and the time to appeal that order has run.

d) Branko did not have a protected property right in the Lease.

e) Branko is bound through Strata by OCD Order No. R-9845.

f) Mitchell requests the Commission deny Branko's Motion.

C. Findings of Fact from the January 16, 1997 hearing

1) Due public notice of this hearing was provided as required by law.

2) A quorum of the Commission was present for the hearing and has reviewed the evidence presented at the hearing.

3) Mitchell and Branko stipulated to the introduction of the evidence from the 1993 Hearing and the 1996 Hearing as well as exhibits introduced at the January 16, 1997 Commission hearing.

4) The parties did not present any testimony at the January 16, 1997 Commission hearing, but through counsel the parties made oral argument.

5) Branko was not a party of record to Case No. 10656.

6) Mitchell obtained a title opinion that showed that Strata was the owner of 100% of the record title and operating rights for the Lease, and Mark Murphy, president of Strata, confirmed that at the 1993 Hearing.

7) At the 1993 Hearing there was conflicting testimony regarding the nature of the interests, if any, obtained by the entities through Strata. Fifteen of these entities became the party "Branko" that moved to reopen Case No. 10656 in 1996.

a) Stephen J. Smith, Mitchell's landman, testified that Mark Murphy, president of Strata, "...always described them as silent partners...." (1993 Hearing Tr. p. 56). Smith also testified: "I understood that he [Murphy] was acting as a go-between, as I was." (1993 Hearing Tr. p. 58). Smith also testified that Mitchell relied on the fact that Strata was the record title owner to 100 percent interest [of the tract in question], "...and his [Murphy's] representation to us that he spoke for these silent partners and was capable of binding them in an agreement." (1993 Hearing Tr. p. 61).

b) Mark Murphy testified that he informed Smith during a conversation on October 26, 1992, that Strata had other partners, and "...that until a deal, specific deal was negotiated that we [Strata] could recommend, that I couldn't represent those partners; that, however, historically, normally when we reached an agreement that we could recommend to our partners, they would, in most cases, go along with that deal, but I could not guarantee that." (1993 Hearing Tr. p. 122). He also testified that he never represented that he could bind the other parties until they approved the terms of the deal. (1993 Hearing Tr. p. 126).

On direct examination, Murphy was asked: "Who are these parties, as a general rule?" Murphy responded: "As a general rule, they're long-term investors of Strata." (1993 Hearing Tr. p. 127). Murphy also testified that the entities identified in the January 13 letter, Mitchell Exhibit 17, were long-term partners of Strata. (1993 Hearing Tr. p. 129). Murphy also stated: "as a matter of fact, many times in leasehold situations like this, you don't immediately make assignments to all the parties until a well is drilled or some action taken. So if you do sell it, you only have to handle one assignment from Strata to whoever the purchaser is. If we [Strata] assign this out to all these parties, they would have

to gather up --we'd have to gather up 15 assignments into Mitchell or to whomever." (1993 Hearing Tr. p. 130). Murphy testified that as of the date of the title opinion, Strata had not assigned out any "working interest ownership" in the lease. (1993 Hearing Tr. p. 141).

Murphy also acknowledged on cross-examination that as of the date of the title opinion Strata was the record title or leasehold holder and continued to be the owner of the federal lease record title and operating rights on the date of the January 1993 hearing. (1993 Hearing Tr. pp. 141, 142). However, Murphy testified that he never used the term "silent partners" in conversation with Mitchell; instead he recalled telling Mitchell that Strata had "partners in this lease." (1993 Hearing Tr. p. 142)

c) George L. Scott, Jr. testified that he owned some of the stock in Strata. He also stated that his organization, Scott Exploration, was "...involved with Strata in the sense that we (Scott Exploration) try to originate prospects, and Strata operates them." (1993 Hearing Tr. p. 153). Scott Exploration Inc., a New Mexico corporation, is one of the Branko group. Testimony from the 1993 Hearing does not reveal whether Scott meant that he, as an individual, owned shares of stock in Strata or whether his organization, Scott Exploration, owned the shares of stock in Strata.

8) The testimony from the 1996 Hearing as to the ownership interests of Branko contained the following:

a) On direct examination Mark Murphy stated that he called Mitchell's landman, Smith, and "...informed him that Strata would recommend to its partners that we sell...to Mitchell." (1996 Hearing Tr. p. 19) In responding to the question of what he meant by the word "partner," Murphy said, "...they're a leasehold owner, they own operating rights." (1996 Hearing Tr. p. 20) However, when asked whether Smith ever inquired as to who the partners were, Murphy said: "I think generically he did during the course of conversations, and I've described them as long-term investors of Strata's or people that we've been involved in." (1996 Hearing Tr. p. 23). Murphy stated that Strata was a New Mexico corporation. (1996 Hearing Tr. p. 27) Murphy testified that the arrangement between Strata and the partners was not a formal agreement, and there was no partnership agreement. (1996 Hearing Tr. p. 29) Murphy on several occasions testified that he felt comfortable negotiating for some of the partners without their specific approval. (1996 Hearing Tr. pp. 37 & 38, 57 & 58)

9) The documentary evidence from the hearings revealed the following regarding the property interest held by Branko:

a) Branko Exhibits No. 1 through 16 are affidavits of the entities comprising Branko. These affidavits state: each entity's undivided interest in the leasehold operating rights or overriding royalty interest in the Lease; all but one of the interests were acquired in 1989, with one affiant stating that its interest was acquired in 1990; and each interest owner states the amount paid for the interest.

b) Branko Exhibit No. 17 is the affidavit of Mark B. Murphy, president of Strata, dated January 17, 1996. The affidavit states that Strata bought the Lease at a federal lease sale in late 1989. Also in late 1989 Strata sold interests in the leasehold operating rights of the Lease to Branko subject to a 1.5% geologic override.

In Paragraph 6 of the affidavit, Murphy states: "Following the sale by Strata of the interest in the Strata North Gavilon Lease as indicated hereinabove in Paragraph 5, **Strata retained all of the record title interest subject to the beneficial interest of the parties as described in Exhibit A hereto.**" (Emphasis added.) Exhibit A is the January 13, 1993 letter from Strata to Mitchell that contains Strata's list of "leasehold partners and ownership" some of whom became Branko.

Exhibit B to the affidavit is the federal BLM form titled "Transfer of Operating Rights (Sublease) in a Lease for Oil and Gas or Geothermal Resources" executed by Murphy for Strata on November 7, 1995. It is the transfer of overriding royalty interests. On the first page of Exhibit B at the bottom of the form marked with an asterisk is the following statement: "**Strata owns 100% of the record title interest and leasehold operating rights.** Strata is conveying a 1.5% overriding royalty interest to the parties and in the percentages indicated at Exhibit A hereto. **Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the 1.5% overriding royalty interest which is hereby conveyed.**" (Emphasis added.)

Exhibit C to the affidavit is the same federal BLM form also executed by Murphy for Strata on November 7, 1995, but this is the transfer of operating rights.

Both Exhibit B and Exhibit C state that the transfer "...shall be effective as of ...November 1, 1989." Neither Exhibit B nor Exhibit C is signed by the transferee.

c) Branko Exhibit No. 23 is a January 1993 letter from Strata to Mitchell. On page 3 of the letter is the statement: "Strata would defend itself and it's [sic] partners [sic] rights during any proceeding including a force pooling hearing."

10) No evidence was presented that Branko had a recordable interest in the Lease until the execution by Murphy for Strata of the BLM transfer forms on November 7, 1995.

D. Conclusions of Law

1) The Commission has jurisdiction over the parties and the subject matter.

2) NMSA 1978, Section 70-2-13 provides, in part, that "[t]he division [OCD] shall promulgate rules and regulations with regard to hearings to be conducted before examiners,...." This section also states that "[i]n the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing." The section concludes with the statement: "When any matter or proceeding is referred to an examiner and a decision is rendered thereon, **any party of record** adversely affected shall have the right to have the matter heard *de novo* before the commission **upon application filed with the division within thirty days from the time any such decision is rendered.**" (Emphasis added.)

Rule 1220 of the OCD Rules and Regulations states: "When any order has been entered by the Division pursuant to any hearing held by an Examiner, **any party of record** adversely affected by such order shall have the right to have such matter or proceeding heard *de novo* before the Commission." (Emphasis added.)

NMSA 1978, Section 70-2-25 states, in part: "Within twenty days after entry of any order or decision of the commission, **any party of record** adversely affected thereby may file with the commission an application for rehearing...." (Emphasis added.)

Branko was not a party of record in Case No. 10656 and did not have standing to request the OCD reopen the case or to request the Commission grant Branko a *de novo* hearing pursuant to NMSA 1978, Section 70-2-13 or 70-2-25 or Rule 1220.

However, Rule 1203 of the OCD Rules and Regulations, provides, in part: "**The Division upon its own motion, the Attorney General on behalf of the State, and any operator or producer, or any other person having a property interest may institute proceedings for a hearing.**" (Emphasis added.) The Commission concludes that the OCD provided Branko a hearing on May 2, 1996, pursuant to Rule 1203 to determine whether Branko had a property interest affected by Case No. 10656 and Order No. R-9845.

3) NMSA 1978, Section 70-1-1 states: "That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any land in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, shall be recorded in the office of the county clerk of the county where the lands are situated."

NMSA 1978, Section 70-1-2 states: "Such records shall be notice to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record, and no assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right of such royalties of any purchaser or transferee in good faith, without knowledge of the existence of such unrecorded instrument."

No evidence was presented that Branko's interests in the Lease were recorded prior to November 7, 1995; Strata was the record owner of the Lease at the time Mitchell filed the 1992 Application and at the time of the 1993 Hearing.

The Commission concludes that at the time the 1992 Application was filed with the OCD, Branko was not an interest owner entitled to notice pursuant to NMSA 1978, Section 70-2-17 and OCD Rule 1207.

IT IS THEREFORE ORDERED THAT:

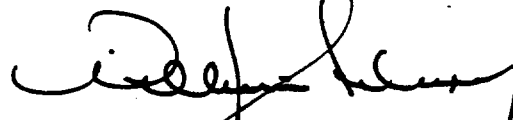
- (1) Branko's Motion be, and hereby is, denied.
- (2) The OCD Order R-9845 issued February 15, 1993, is in full force and effect.

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

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