

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. 11,510
	)	
APPLICATION OF BRANKO, INC., et al.,	)	ORIGINAL
TO REOPEN CASE NO. 10,656 (ORDER NO.	)	
R-9845) LEA COUNTY, NEW MEXICO	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: WILLIAM J. LEMAY, CHAIRMAN  
 WILLIAM WEISS, COMMISSIONER  
 JAMI BAILEY, COMMISSIONER

January 16th, 1997

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, WILLIAM J. LEMAY, Chairman, on Thursday, January 16th, 1997, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

\* \* \*

STEVEN T. BRENNER, CCR  
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## I N D E X

January 16th, 1997  
 Commission Hearing  
 CASE NO. 11,510

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REPORTER'S CERTIFICATE

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## A P P E A R A N C E S

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 By: W. THOMAS KELLAHIN

\* \* \*

1 WHEREUPON, the following proceedings were had at  
2 3:10 p.m.:

3 CHAIRMAN LEMAY: Okay, we shall reconvene, and  
4 call Case Number 11,510, which is the Application of  
5 Branko, Inc., et al., to reopen Case Number 10,656, Lea  
6 County, New Mexico.

7 Appearances in Case 11,510?

8 MR. STRATTON: Mr. Chairman, Hal Stratton for  
9 Branko, et al.

10 CHAIRMAN LEMAY: Thank you, Mr. Stratton.

11 MR. KELLAHIN: Mr. Chairman, I'm Tom Kellahin of  
12 the Santa Fe law firm of Kellahin and Kellahin, appearing  
13 on behalf of Mitchell Energy Corporation.

14 MR. CARROLL: May it please the Commission, Rand  
15 Carroll on behalf of the Oil Conservation Division.

16 CHAIRMAN LEMAY: Thank you, Mr. Carroll.

17 How many witnesses will you be presenting or -- I  
18 understood there will be no witnesses?

19 MR. KELLAHIN: We have a surprise for you. There  
20 are no witnesses.

21 MR. STRATTON: And no testimony.

22 CHAIRMAN LEMAY: And no testimony.

23 MR. STRATTON: And no argument, if you desire,  
24 Mr. Chairman.

25 CHAIRMAN LEMAY: I don't know why we're here,

1 gentlemen. We should be --

2 Mr. Chairman, if I might, I guess this is a *de*  
3 *novo* hearing, so I suppose -- I don't know who you intend  
4 to go first.

5 CHAIRMAN LEMAY: Well, generally the Applicant;  
6 isn't that true?

7 MR. KELLAHIN: I'm the one stuck as the  
8 appellant, Mr. Chairman --

9 CHAIRMAN LEMAY: Uh-huh.

10 MR. KELLAHIN: -- and, you know, I'll defer to  
11 Mr. Stratton if he would like to go first. I'm happy to go  
12 first.

13 CHAIRMAN LEMAY: You can work that out,  
14 gentlemen, but we don't care as a Commission.

15 MR. STRATTON: Why don't I go first, Mr.  
16 Chairman, since --

17 CHAIRMAN LEMAY: Okay, that would be fine.

18 MR. STRATTON: -- it's our *de novo* and it's  
19 technically our motion to reopen?

20 What we've done is, we have agreed and stipulated  
21 that we would introduce exhibits and testimony from the  
22 previous two hearings in this case.

23 And the first thing -- and I think Ms. Hebert may  
24 -- Do you have these now?

25 MS. HEBERT: We do have them.

1 MR. STRATTON: Okay. Can we use the originals  
2 for the record, or do want us to sub- -- I've got others  
3 here that we can use, but --

4 MS. HEBERT: No, I think we can just incorporate  
5 the hearing below. We have the record here.

6 MR. STRATTON: Okay. Well, let me -- What I'd  
7 like to do just for purposes of the record is to make clear  
8 what I understand is in the record. And Mr. Kellahin, I'm  
9 sure, will want to do that as well.

10 First of all, there's the January 21st, 1993,  
11 hearing transcript on the Mitchell application.

12 Then there's Strata's Exhibits 1 through 7 to  
13 that particular hearing.

14 Next, the transcript of the testimony for the May  
15 2nd, 1996, hearing. That was our motion to reopen.

16 And then we have actually 44 exhibits from that  
17 particular hearing that we would like to submit, as well as  
18 one additional letter, which would be Exhibit 45, which  
19 we've stipulated to, for the record. And what we've agreed  
20 to do here today, Mr. Chairman, is to submit all of this on  
21 the record.

22 Just so the Commission will know, the Exhibits 1  
23 through 16 are affidavits from our clients -- from my  
24 clients, indicating what they would testify about their  
25 interest in the property in this case. And we are

1 stipulating that that would be their testimony. We're not  
2 stipulating that, certainly, the Commission is bound by  
3 their conclusions. It's to what they own as -- that that's  
4 what they would testify to if they were here today, and  
5 there are no hearsay exceptions to that testimony.

6 And so those for the witnesses. We'd be  
7 traipsing in 16 witnesses here today if we didn't do that.  
8 So we've limited down their testimony to what's in the  
9 exhibits, and I believe -- It's what I think is relevant  
10 and what I want the Commission to have in regard to their  
11 testimony.

12 And also, just while I'm talking about  
13 affidavits, at the end of the last hearing, the hearing  
14 officer asked that we submit more exhibits from those  
15 individuals regarding when they knew about the previous  
16 Mitchell hearing and when they knew about Mitchell's  
17 Tomahawk well. And although that's not something I would  
18 have submitted, I did it in deference to the hearing  
19 officer, because he thought it was relevant, and I don't  
20 think it's relevant, but we submitted them and they're into  
21 evidence.

22 So I guess I'd like to formally move the  
23 admission of all those, and -- with the one other, which  
24 would be Exhibit 45 here.

25 CHAIRMAN LEMAY: For the benefit of my fellow

1 Commissioners, did you want to sum up the case in any way  
2 or form?

3 MR. STRATTON: Sure.

4 CHAIRMAN LEMAY: Is that going to be a  
5 presentation on your part?

6 MR. STRATTON: That's what I'm going to --

7 CHAIRMAN LEMAY: Yeah, okay, that's fine. I  
8 don't think Commissioner Weiss or Commissioner Bailey are  
9 familiar with the case in any form or fashion.

10 COMMISSIONER WEISS: I have no idea.

11 CHAIRMAN LEMAY: Yeah.

12 MR. STRATTON: Well, I came here expecting no one  
13 would be familiar with the case, but since we are on the  
14 record, should there be an appeal, I wanted to make sure  
15 that all the evidentiary matters were taken care of, since  
16 we don't have any witnesses or exhibits, Mr. Chairman.

17 CHAIRMAN LEMAY: Right.

18 MR. STRATTON: Unless -- I think Mr. Kellahin  
19 should --

20 MR. KELLAHIN: I need to ask Mr. Stratton a  
21 question.

22 (Off the record)

23 MR. KELLAHIN: A procedural matter, Mr. Chairman,  
24 to complete the submittal formally of the exhibits.

25 It is our intention by what Mr. Stratton just

1 requested, is that the transcript of the original force-  
2 pooling hearing, back in 1993, which includes all the  
3 Mitchell exhibits -- and they're identified in the  
4 transcript -- all of those that are identified in the  
5 transcript would be included before the Commission.

6 In addition, in the hearing on May 2nd of 1996,  
7 there was a package of correspondence, was marked as  
8 Mitchell Exhibit 1. We want that entire transcript and  
9 exhibits before you.

10 In addition, Mr. Stratton is correct, there were  
11 some supplemental affidavits that Examiner Stogner  
12 requested. There was some difference among counsel about  
13 what was to be contained in those affidavits, but they were  
14 submitted, and I believe they should be -- form part of the  
15 record.

16 In addition, there was an exchange of letters  
17 between Mr. Cavin and I. Mr. Stratton has introduced one  
18 of the letters.

19 And the last exhibit, then, would be my Mitchell  
20 Exhibit 2 to Case 11,510, which was my response to Mr.  
21 Cavin. I don't think it's particularly important for  
22 discussion this afternoon, but that document would complete  
23 our presentation of evidence.

24 CHAIRMAN LEMAY: Will there be an opportunity  
25 anywhere here for questions of you gentlemen, or is that

1 just not --

2 MR. KELLAHIN: When we talk about how to organize  
3 this, I would be most delighted if I could attempt to  
4 answer questions as you had them.

5 Both of us have filed memorandums of law and  
6 arguments. If those copies are not available to you, I  
7 have additional copies for you to consider.

8 We have attempted to organize ourselves on both  
9 sides of this, so that we could give you the facts in a  
10 summary fashion. They're all detailed at great length in  
11 my memorandum, and my support for my position is included  
12 in that document. And if you would like, I have more  
13 copies of that.

14 CHAIRMAN LEMAY: Let me ask something here, just  
15 off the record.

16 (Off the record)

17 CHAIRMAN LEMAY: Because of the unusual nature of  
18 this case -- I have to admit, I have not had a *de novo* case  
19 presented where there have been no witnesses and just  
20 summaries by the attorneys. It's helpful for us to be able  
21 to ask you questions.

22 And also, one of my Commissioners would like, as  
23 just an opening, to each one of you, for one sentence, tell  
24 him what this is all about. And then from there you can --  
25 you kind of go into it. Because right now, they have no

1 idea what's going on.

2 MR. KELLAHIN: Well, perhaps -- May I suggest  
3 that Mr. Stratton go first with maybe a five-minute summary  
4 of the major points, and I'll take five minutes and try to  
5 give you a framework of really what this dispute is about,  
6 and then we can go in more detail as you begin to become  
7 familiar with what we -- ?

8 CHAIRMAN LEMAY: I think that would be helpful.  
9 I mean, yeah, before we even get into any of this, they  
10 can't see the significance of it until they know what this  
11 is about.

12 So if you would do that, Mr. Stratton, we'd  
13 appreciate it.

14 MR. STRATTON: Your Honor, I'm not sure my  
15 presentation is much longer than that, so I think it will  
16 take me about two sentences to make things clear.

17 I might add that a first for me is also having  
18 the judge ask me if he can ask me questions. I wasn't  
19 quite sure how to respond to that. I thought about saying  
20 now, but obviously, you can ask us questions, and certainly  
21 I would hope that you would ask questions to clarify this,  
22 because this is -- it is unusual. You're not seeing the  
23 witnesses, you don't have the testimony, I know you haven't  
24 had time to read it.

25 And so we're -- so we sort of have a duty, I

1 think, I to try to get you up to speed on this.

2 What this case is about is, we represent a number  
3 of 16 working interest and overriding royalty interest  
4 owners in a particular piece of property that Mitchell  
5 filed an application to pool, that were not given notice of  
6 the hearing and did not appear at the hearing and did not  
7 receive any notice of the order that was entered pursuant  
8 to that hearing.

9 So once they learned of that, they came and filed  
10 an application to reopen and say, due process has not been  
11 afforded us, the order is void as to us, and you need to  
12 reopen the case and have the matter heard with our  
13 interests before the Commission.

14 So that's -- in a couple of sentences, is what  
15 the whole case is about.

16 But the facts that we think are relevant began  
17 back on October 26th of 1992 when Steve Smith, a landman  
18 for Mitchell, called Mark Murphy, the president of Strata,  
19 and started talking about drilling this Tomahawk Well and  
20 tried to negotiate a deal.

21 Strata had some of the working interests, and  
22 when we looked at the real estate records, it appeared they  
23 had 25 percent of the working interest.

24 At that time, Mr. Murphy advised Mr. Smith that  
25 he would consider it, that there were other people who had

1 interests in the property, and he was going to talk to him,  
2 and that they would proceed to consider this.

3 There then were a number of telephone calls  
4 during this period as they negotiated this well. There  
5 were a number of pieces of correspondence that were passed  
6 back and forth, and we -- they're in the record, and  
7 they're in our briefs.

8 On December 9th, Mr. Murphy sent a letter,  
9 Exhibit 19, that talked about the negotiations that were  
10 involved.

11 The important issues, when it comes to these  
12 exhibits, from my client's standpoint, is whether Mitchell  
13 or their representatives knew about or had reason to know  
14 about or could have determined by due diligence whether  
15 their interests were -- whether they had interests in the  
16 property.

17 And we allege, and if you'll look at the record  
18 and testimony and also these exhibits, Exhibits 19, 20, 21  
19 and 23, all of them had references to other individuals who  
20 had ownership in this particular piece of property, giving  
21 that to Mr. Smith.

22 It appeared that things weren't going well, so I  
23 think it was about December 8th, an application was filed  
24 for pooling, and an unconventional -- or an unorthodox  
25 site, or whatever you guys call it, as well.

1           Negotiations continued, and it continued, and  
2   then it appears that like on about January 12th -- actually  
3   January 13th, I guess, things broke down between the  
4   parties. And Mr. Smith from Mitchell said, Well now, who  
5   are these other interest owners that you have?

6           And then on the 13th, Mr. Murphy faxed to Mr.  
7   Smith Exhibit 24. And Exhibit 24 is a letter which lists  
8   each and every interest owner, their address, and their  
9   percentage of interest in the leasehold. And there's no  
10   dispute about that, Mr. Smith's got it, he was aware of it.

11           Now, the hearing on the Application was scheduled  
12   for January 21st. And so rather than continuing the  
13   hearing or rather than providing notice to the interest  
14   owners, they went ahead and had the hearing, and the  
15   pooling order was entered, and -- I think on February the  
16   15th.

17           That order, then, was never sent to these working  
18   interest owners and overriding royalty interest owners.

19           And then finally the Tomahawk well was drilled on  
20   May 18th, 1993. And just for purposes of just a little  
21   preview down the line as to what the arguments may be and  
22   what really happened, the leases -- or the ability to drill  
23   the well under the leases, I understand, expired -- would  
24   have expired on October 31st.

25           So the issue is whether under due process of law,

1 the US Constitution and the New Mexico Constitution our  
2 clients got the requisite notice and opportunity to be  
3 heard at this particular hearing. Of course, we allege  
4 they didn't; we wouldn't be here if we did.

5 Now, sometimes in New Mexico law we have problems  
6 finding authority for things. Sometimes you have to look  
7 at a lot of different cases and in a lot of different  
8 places for authority. But in this particular case we're  
9 lucky, because we have one case that controls everything  
10 here. We have a lot of interesting US Supreme Court cases  
11 in the briefs. If you don't have anything else to do,  
12 they're interesting reading. They go back to notice  
13 issues, to 1915.

14 But it's all contained in *Uhden vs. New Mexico*  
15 *Oil Conservation Commission*.

16 And the operative language -- There are two  
17 things I want to pass along to the Commission that are  
18 important in *Uhden*.

19 One is -- and it's hard to really believe they  
20 have to say this, but they say it and it's important --  
21 Administrative proceedings must conform to fundamental  
22 principles of justice and the requirements of due process  
23 of law.

24 It seems odd, and I know this Commission finds it  
25 odd that they would have to say that. But when you look

1 across the breadth of administrative hearings, sometimes as  
2 an individual representing people before those, you wonder  
3 whether the administrative agencies really believe that.

4 So the New Mexico courts continue to tell us that  
5 you have the same due process rights when somebody's  
6 getting ready to deprive you of your property, when you  
7 come before an administrative agency as you do, before the  
8 courts in New Mexico.

9 And then they give us a paragraph here which is  
10 tremendous, and I hadn't read it before this particular  
11 case, but this says it all right here, and this can be used  
12 throughout New Mexico by administrative agencies, by courts  
13 or anybody else and throughout the country, for what the  
14 standard and what the rule is when it comes to due process  
15 and notice. And it's on page 531, and I just want to read  
16 it to you. It's very brief.

17

18 If a party's identity and whereabouts are known  
19 or could be ascertained through due diligence, the  
20 due-process clause of the New Mexico and United States  
21 Constitutions requires the party who filed the spacing  
22 application --

23

24 -- this happened to be a spacing application in this  
25 case --

1           -- to provide notice of the pending proceeding by  
2           personal service to such parties whose property rights  
3           my be affected as a result.

4  
5           That's the rule. It works in any forum in New  
6           Mexico, and I'm just briefly going to apply that to this  
7           particular fact situation, using the *Uhdén* language.

8           First of all, the question who do you have to  
9           notify?

10          You have to notify those individuals in the  
11          property, who you know, or who you can ascertain through  
12          due diligence. They don't have to be recorded; there's no  
13          issue about that. Some people think that -- there's a lot  
14          of people that think that you have to have any interest in  
15          real estate recorded. That's not the case. The issue is  
16          knowledge, the issue is whether you know about that  
17          particular interest.

18          If I have a next-door neighbor who doesn't have  
19          his deed recorded but I know he lives there and I'm getting  
20          ready to do a foreclosure case or a quiet-title case, even  
21          though his interest is not recorded, since he lives there I  
22          know he has a claim to that property. I have to put him in  
23          the lawsuit. If I don't, then that lawsuit does not apply  
24          to him. Just like the Mitchell application hearing doesn't  
25          apply to our clients, that doesn't apply to him.

1           So it's not a question of recording. And that  
2 was one of the big arguments in the case. It's not in the  
3 most recent brief, but that was an argument down below, is  
4 that these interests weren't recorded, therefore, they're  
5 no good. That's not the case.

6           *Uhden* says, If a party's identity and whereabouts  
7 are known or could be ascertained through due diligence...  
8 Here, Mr. Smith of Mitchell, on October 26th, 1992, was put  
9 on notice that there were other interests in this property  
10 that was going to be pooled, and he did nothing. At that  
11 time, under *Uhden*, he had a duty to ascertain those  
12 interests using due diligence. He could have done it then.  
13 He didn't, he didn't do it. There were more telephone  
14 calls, as I indicated, throughout the fall where they  
15 talked about these interests. There are exhibits that were  
16 exchanged where these interests are mentioned, and he still  
17 didn't do it.

18           And then finally, on January 13th, he was sent a  
19 letter where he didn't have to look anywhere for these  
20 interests. He had their names, telephone numbers, and the  
21 extent of the interests. And he still -- Still, no notice  
22 was given.

23           Now, there's been another issue here which  
24 really, when I conclude here, isn't that important, but I  
25 want to talk about it because it's going to be talked

1 about, and that is, who had the duty to give the notice?

2           There's been a lot of allegations, a lot of  
3 argument in this case, down below, that Strata had the duty  
4 to give notice, or that our clients had the duty to come  
5 talk to somebody and obtain notice themselves, or somebody  
6 other than Mitchell was supposed to give notice. Well,  
7 that's just not what the law says. Uhden says that the  
8 party who filed the spacing application must give notice.  
9 Your Rule 1207 says that the applicant has to give notice.  
10 And Mr. Smith, when he testified in our hearing here, from  
11 which this appeal emanates, said that it was the applicant  
12 who is supposed to give notice.

13           So one of the ruses that's been used so far is  
14 that, well, Strata knew about this; they should have told  
15 all these people about this hearing, and then they would  
16 have had proper notice. They didn't have a duty to do it,  
17 it wasn't them who were supposed to do it.

18           But more importantly, the real point is, it  
19 doesn't matter to our clients who was supposed to give  
20 notice, because they don't care, they need the notice. And  
21 if this Commission doesn't have -- If they are not served  
22 by somebody -- it doesn't matter who it is, but if they're  
23 not served by somebody, this Commission doesn't have  
24 jurisdiction over their property rights.

25           So it really doesn't matter who was supposed to

1 give notice to us. We weren't given notice. And it's  
2 clear the applicant is supposed to give notice. You all  
3 know that. You sit through these cases all the time, so  
4 you know who gives the notice in these particular cases.

5 The next issue -- this maybe isn't an issue here;  
6 it's just slightly an issue -- is, what type of notice do  
7 you have to give? What type of notice does the Commission  
8 have to give?

9 Well, you can't do it by publication. I mean,  
10 you know that because you've had *Uhden*. *Uhden* -- The New  
11 Mexico Supreme Court has told you in *Uhden* that you can't  
12 use publication for notice when it comes to due-process  
13 rights and protective property interests.

14 Most places in the country -- and this has been  
15 approved by the United States Supreme Court -- will allow  
16 notice by mail. But I'm afraid that in New Mexico, due to  
17 *Uhden*, mail isn't even good enough. *Uhden* says that to  
18 provide notice, the Commission, in a Commission proceeding,  
19 must be by personal service to the parties.

20 And I've had people in the industry say, Personal  
21 service? Oh my gosh. There's hundreds, there's thousands  
22 of interests. Or, There's a whole lot of interests in  
23 these cases.

24 Well, there might be, and it might be burdensome.  
25 But that's what the New Mexico Supreme Court says has to be

1 done. And it seems rather -- it does seem harsh but, you  
2 know, that is the rule, as you're well aware, in the court  
3 system. If you're going to serve somebody in New Mexico,  
4 you can't mail it to them, you can't call them on the  
5 phone, you can't publish it in the newspaper. You have to  
6 give them personal service. And the New Mexico Supreme  
7 Court now says the Commission now has to give personal  
8 service.

9 Here, you know, it doesn't matter. No service  
10 was given whatsoever. There's no allegation that any  
11 service was given, whether it was by mail or personal or  
12 whatever. There was publication, I think, although I don't  
13 know that. But publication certainly doesn't work.

14 And then finally -- I mean, the only issue that  
15 really remains at this point is, then, well, what type of  
16 people do you have to give it to? And you have to give it  
17 to people who have interests in the property.

18 And in this particular piece of property, all 16  
19 of our clients had interest, which they all acquired in  
20 1989, which was three years -- three years before the  
21 application. And they are working interest owners. We  
22 have, I think -- 14 are working interest owners and I think  
23 two are overriding royalty interest owners. That's in the  
24 affidavits.

25 But what type of interest it is, it really

1 doesn't matter, as long as it's an interest that is  
2 protected, it's a property right. And when I say  
3 "property", I don't necessarily mean real property; it's a  
4 property right.

5 So that's what happened in this case, and that's  
6 why we're here today, is because we didn't get notice of  
7 that previous hearing. We're entitled to it, and we're  
8 here asking the Commission -- We asked the Division to  
9 reopen the case, which they did, and we're asking the  
10 Commission at a *de novo* hearing now to reopen the case.

11 Now, what is the effect of not giving notice?  
12 That question always arises when it comes to notice cases.  
13 People say, Well, maybe we would have gone back and --  
14 Well, let's go back and we'll do the same thing. Or, Let's  
15 -- We would have done the same thing anyway, even if they  
16 had been here. Or something like that.

17 Doesn't work, because the order is not effective.  
18 It's totally ineffective.

19 The words that Uhden used -- We're back to Uhden  
20 again, which is the case that has everything in it. Uhden  
21 found that the orders entered by the Commission without  
22 notice to Ms. Uhden are hereby void as to Uhden.

23 "Void" means as if it had never happened, when it  
24 comes to these particular individuals. It's not voidable.  
25 You hear "voidable" and "void". "Voidable" means unless

1 somebody does something to void it, it's still okay.

2 "Void" means void from its inception, as if it never  
3 happened; the order is ineffective to the people who were  
4 not given notice. And that's clearly the case.

5 And the United States Supreme Court has also  
6 defined it as -- "void" as being that, and meaning that you  
7 have to come back and start all over.

8 So that's the issue.

9 And I just want to point out a couple of things,  
10 and I'm finished here today, with the exhibits and  
11 everything you have, certainly with my opening. But I'm,  
12 once again, certainly happy to open or answer questions.

13 There were -- I'm not quite going to try to  
14 quantify it, but there were many things that could have  
15 happened in this case, short of personal service or  
16 anything else, that would avoid us being here today. There  
17 are plenty of opportunities to avoid this.

18 I mean, first of all, on October 26th, Mr. Smith  
19 could have gone out and done the right thing. I mean, he  
20 could have gone out, ascertained the interests and then  
21 provided notice when a hearing came up, or any time after  
22 that.

23 The same thing could have been done on January  
24 13th. You know, it's my understanding that if that hearing  
25 had been delayed, it would have been a two-week delay. The

1 well wasn't drilled until May, and the well didn't have to  
2 be drilled until October. So it seemed like a very small  
3 thing to -- in order to get the right people before the  
4 Commission, to delay the hearing.

5           Next, and this wouldn't have been  
6 Constitutionally firm, but practically we wouldn't be here  
7 if after the order was entered it had been sent to these  
8 individuals. But even on February 15th, the order didn't  
9 get sent. Does that cure the Constitutional infirmity of  
10 the hearing? No. Would that have practically taken care  
11 of things? Very well -- Very well might have.

12           And Mr. Smith, in our last hearing, testified as  
13 to the real reason this doesn't happen, and he actually  
14 testified to it, and I think he was honest about it. He  
15 said they didn't want to be delayed in doing this, that  
16 stopping and waiting two weeks and providing notice to all  
17 these people -- they just didn't want to be delayed by it.

18           And I think it's just slightly more -- I think  
19 not only did they not want to be delayed, they didn't want  
20 to have to deal with my clients who had these interests.  
21 And I think he believed that that was a good enough reason  
22 to do this.

23           But I can tell you, when it gets to the New  
24 Mexico Supreme Court, they're not going to agree with that.  
25 They're not going to say, Well, because it inconvenienced

1 you we're not going to afford these people these due-  
2 process rights.

3 Those of us who engage in litigation in  
4 Constitutional cases and all types of litigation do  
5 everything we can to get everybody we can, in front of the  
6 court, so we can get them bound. I mean, we serve people  
7 we shouldn't even serve.

8 Here, it appears to me that it's just the  
9 opposite, that the idea is, if an applicant comes in and  
10 they can get away with not serving people and slip things  
11 through, that that's the way to do it.

12 That doesn't work in the court system. And I can  
13 predict for you that when this gets to the court system,  
14 the court is going to look at it and use its standards and  
15 say, My goodness, you knew about all these people and you  
16 didn't notify them? What are you thinking about? Get in  
17 there and notify them and get it over with, just as the  
18 case in *Uhden*.

19 So Mr. Chairman, that's my presentation. I'm  
20 happy to answer any questions.

21 I've got two briefs in -- before the Division,  
22 and what I'd like to do is leave those with you. Mr.  
23 Kellahin has filed another brief with the Commission. I  
24 think everything is covered, so I wouldn't intend to reply  
25 to that, but I would like to just leave you the briefs that

1 I did before the Division.

2 CHAIRMAN LEMAY: Okay, it still may be helpful if  
3 we hear Mr. Kellahin's presentation, and then we could ask  
4 some questions of either one.

5 COMMISSIONER WEISS: Yeah, yeah.

6 CHAIRMAN LEMAY: Is that okay?

7 COMMISSIONER BAILEY: Fine.

8 CHAIRMAN LEMAY: Mr. Kellahin?

9 MR. KELLAHIN: Thank you, Mr. Chairman.

10 The brief I've handed out, filed earlier is the  
11 one in the -- it's got a plastic cover sheet and it's got a  
12 spiral on it, and it should be on top of that stack in  
13 front of you, Mr. Chairman, there's a case file. Farther  
14 ahead, towards me, sir. Yes, sir.

15 CHAIRMAN LEMAY: Okay.

16 MR. KELLAHIN: Let me describe for you how it's  
17 organized.

18 In the back end I've attempted to separate by a  
19 blue tab -- and I may have missed it in some of the  
20 booklets, but there will be an Exhibit A which represents  
21 Examiner Stogner's order in 1993 on the Mitchell force-  
22 pooling application. So you'll have that to look at.

23 The next order that's in the book is marked  
24 Exhibit B, and that's Mr. Stogner's decision from the May,  
25 1996, hearing which was issued on October 2nd of 1996.

1           The brief is organized so that commencing on page  
2   6, there is the start of numbered paragraphs, which are  
3   numbered 1 through 33. And I've attempted to outline for  
4   you in detail the chronology of the specific events.

5           Ahead of the factual summary is about five pages  
6   in which I have cited to the transcript, and I have written  
7   in paragraph 4 the basic argument of our position and why  
8   we disagree with Branko's position.

9           And then after that I have subdivided the  
10   memorandum to deal with the specific topics that have been  
11   discussed, and this is my effort to consolidate, revise,  
12   analyze and provide footnotes for you so that this  
13   document, if read by itself independent of anything else,  
14   would represent Mitchell's position.

15           The fundamental issue that you have before you is  
16   the question of when the Strata partners acquired a  
17   property interest that needs to be protected. We contend  
18   that unfortunately for Strata and Mr. Murphy and all his  
19   partners, that that interest did not arise until November  
20   6th of 1995, some 32 months after Strata was force-pooled.  
21   How could that be? Well, let me tell you how.

22           In 1992, when Mitchell is beginning to propose  
23   the well, Mr. Steve Smith commences discussion with Mark  
24   Murphy of Strata, and Mr. Murphy tells Mr. Smith that he is  
25   dealing for and on behalf of a bunch of partners. He

1 characterizes them as long-term investors.

2 In October of 1992, Mr. Smith has conducted a  
3 title search of the county records, and he has determined  
4 that the federal lease for which he's attempting to get  
5 Strata's cooperation and support is a federal lease held by  
6 Strata.

7 Strata has the record title, they have the  
8 operating rights, they have the entire 25 percent of what  
9 turns out to be a 320-acre spacing unit. Mr. Smith has  
10 consolidated all the rest of the interest, and this is the  
11 outstanding interest remaining. He has gotten Santa Fe  
12 Energy and Maralo and others to buy into it.

13 So he's got 75 percent of the interest in the  
14 spacing unit, and he's going out and looking for the  
15 balance. And he makes a contact with Mr. Murphy who, of  
16 record through Strata, has the remaining 25 percent.

17 So from October 26th of 1992 to January 23rd of  
18 1993, Mr. Murphy is characterizing these people as his  
19 partners and his long-time investors.

20 Prior to January 13th -- and that's a significant  
21 date because it's just a week before the hearing -- January  
22 13th, 1993, Mr. Murphy has told Strata that he's got  
23 partners, long-time investors, but he doesn't disclose that  
24 they, in fact, own an interest, that -- doesn't disclose  
25 their identity, who they are, what percentage they have or

1     how to contact them.

2                 In November of 1992, Mr. Murphy tells Smith that  
3     Strata will defend itself and all its partners during a  
4     proceeding, including force-pooling. And there's numerous  
5     phone calls, and there's lots of correspondence back and  
6     forth.

7                 Finally, on November 20th, 1992, Mitchell  
8     formally proposes the Tomahawk well to Strata and to  
9     Murphy.

10                On December 7th, Mitchell files its compulsory  
11     pooling application, which is set for hearing on January  
12     7th. It later gets delayed.

13                But on December 9th, 1992, in accordance with how  
14     we practice the notifications, Strata is served and signs  
15     the green card, receiving notice of the hearing and a copy  
16     of the compulsory pooling application.

17                Even after that date, Mr. Murphy continues to  
18     deal on behalf of his partners and on behalf of Strata to  
19     sell or farm out the interest to Mitchell.

20                In fact, you'll find in the transcript, and we've  
21     cited the document, on December 30th, 1992, Mark Murphy has  
22     signed a letter, and he communicates it to Mitchell, and he  
23     talks about his undisclosed owners. He even characterizes  
24     them as undisclosed owners. And he says, Strata hereby  
25     represents and warrants unto Mitchell that it has the

1 power, the right and authority to sell 100 percent of the  
2 subject lease for benefit of the undisclosed owners.

3 Mr. Mitchell -- I'm sorry, Mr. Smith, on behalf  
4 of Mitchell, attempts to accept the proposal from Strata.  
5 There's a difference between Smith and Mitchell about what  
6 the deal is, and it finally falls apart.

7 And so the afternoon before the hearing, 30 days  
8 after Strata has been served, then we receive notification  
9 that Mr. Cavin is going to enter his appearance for Strata,  
10 and we continue the case.

11 The case is continued. And then in January, on  
12 the 12th of January, 1993, Strata sends Mitchell this list  
13 of partners. The problem is that Mr. Murphy doesn't sign  
14 and deliver the assignments until November 7th of 1995.  
15 Thirty-one months later, he delivers the assignments, puts  
16 them of record, and writes them a letter to the effect,  
17 Dear partners, it's come to my knowledge that Mitchell's  
18 Tomahawk well has now paid out, and you might have a claim  
19 against them to recover your proportionate share of the  
20 risk-factor penalty.

21 Mr. Murphy, after the pooling order was issued,  
22 wrote Mitchell and said, I'm going to communicate all this  
23 stuff to my partners. And then apparently he doesn't do  
24 it, because he waits and it doesn't happen.

25 In fact, February 24th, 1993, Murphy advises

1 Mitchell, It is my -- Mr. Murphy's -- intention to discuss  
2 Mitchell's proposal with the other lease owners, and it  
3 goes on and on.

4 So here's the problem. The fundamental issue is  
5 to decide -- someone decide, maybe not us, but eventually  
6 we have to decide for force-pooling cases, and in this  
7 case, when do the undisclosed Strata partners have a  
8 property interest that needs to be protected?

9 We look at the statutory language. Under New  
10 Mexico law it says all assignments and other instruments of  
11 transfer are supposed to be recorded. And it says, No  
12 assignment or other instrument affecting the title -- in  
13 this one we're talking about royalties, but there's an  
14 applicable provision with regards to interest -- it says,  
15 Such royalties not recorded are herein provided shall -- no  
16 assignment shall affect record unless they're of record or  
17 without knowledge of the existence of such unrecorded  
18 instrument.

19 Mr. Stratton wants to charge Mitchell with notice  
20 of a document before it's even executed, much less  
21 recorded, and the question is, how is Mitchell supposed to  
22 know this unrecorded instrument exists until the instrument  
23 is executed and recorded?

24 Branko maintains that simply by telling somebody  
25 you've got partners and investors should trigger an

1 obligation on Mitchell's part to go out and look for all  
2 these people. And yet when you look, you can't find them  
3 of public record.

4 And therein lies the dilemma, I think, for all of  
5 us that do this kind of work, is that after a party is  
6 served with a compulsory pooling application, that service  
7 taking place on December 9th, 1992, thereafter, the  
8 following month and the next year, Mr. Murphy discloses a  
9 list of what he says is his partners.

10 And the issue is whether or not that should cause  
11 Mitchell to engage in anything else. We believe the law of  
12 New Mexico requires us to do nothing else, that having  
13 found and determined and served the parties at the time  
14 those interests were known and of record to everyone else,  
15 is the time you fix for notification.

16 The Division has agreed with us on that issue.  
17 They have characterized this in one of the orders as a  
18 cutoff date for notification.

19 You may investigate and examine that decision,  
20 but I'm in agreement with what the Division did with  
21 regards to notice -- notice of hearings for the cutoff  
22 date, and that's the notice you're served for hearing.

23 What has occurred is that after the force-pooling  
24 order was issued, Mitchell made the choice to provide the  
25 election to the parties post-order to Strata. And you can

1 look at Mr. Stogner's first order, and he goes on at  
2 incredible length, talking about this issue.

3 We spent a lot of time back in 1993 with Mr.  
4 Cavin and Mr. Murphy, talking about their desire to  
5 continue the case, so that Mitchell would be required to  
6 provide notice to all these interest owners. It was  
7 debated, discussed and decided. Their motion to continue  
8 was denied and we went forward.

9 The order was entered. Subsequent to the order,  
10 Strata was notified. We did not choose to chase after all  
11 the rest of these 15 investors. It's our position that we  
12 have no obligation to chase after them until an instrument  
13 is executed and delivered to us, to let us know that they  
14 have that interest.

15 You're not required to record it, necessarily,  
16 but if you have an instrument, an assignment that's signed,  
17 appears valid on its face, notarized and signed by the  
18 right people and they deliver it to you, then at that point  
19 you have an obligation to substitute them in. And we would  
20 have substituted them in, in the shoes of Strata, and then  
21 we'd go forward and, we contend, still be subject to the  
22 200-percent risk factor.

23 So what's occurring here is, Mr. Murphy chooses  
24 not to tell his partners, apparently -- although it's hard  
25 to believe that they did not know until a year after the

1 lease in which they held an interest expired, but that's  
2 the position they take, that they didn't know. He chooses  
3 not to tell them; he says he's going to.

4 And then the assignment is 31 months later, after  
5 the well is paid out conveniently, and he knows that. He  
6 tells them, Here's your assignment, I've placed it of  
7 record, you have it now, and by the way, you now have a  
8 claim against Mitchell to recover some of the penalty.

9 Mr. Stratton wants to rely on the *Uhden* case. I  
10 think his reliance is misplaced. Let's talk about that  
11 case. It's a starting point for convenience.

12 You may remember the *Uhden* case. It had to do  
13 with Cedar Hills, the first coal gas pool we adopted up  
14 there in the San Juan Basin. Amoco had done a couple of  
15 wells in Cedar Hills and were running some interference  
16 tests, and had originally developed it on statewide 160 gas  
17 spacing, because it was the appropriate rule to apply. It  
18 had some initial wells, two of which were on 160-acre  
19 spacing units, in which Mr. *Uhden* had an interest.

20 And how did we know she had an interest? She was  
21 Amoco's lessee. Amoco had replaced her original lessee,  
22 and Amoco knew Mrs. *Uhden*. They knew where to find her,  
23 they knew her interest was of record, it was an assignment  
24 to their company. You could check public records and find  
25 out who she was. They were paying her money. She had an

1 interest in the spacing unit.

2 Substantial difference between Mrs. Uhden and the  
3 Strata undisclosed partners. You can't find them by public  
4 record, they're not your payees, you're relying on Strata  
5 and they tell you, Hey, we defend for these people, we  
6 represent these people, they're our long-time investors,  
7 and we deal with Strata.

8 Mrs. Uhden was being paid on 160-acre spacing for  
9 the wells on her unit.

10 After Amoco developed the interference test, they  
11 developed enough science to demonstrate to the Division  
12 that we could temporarily expand spacing in Cedar Hills and  
13 go to 320 gas spacing. And Amoco filed the application to  
14 do that.

15 They did not choose to notify Mrs. Uhden, one of  
16 their payees. They argued that under her lease they had  
17 the right to change the spacing because there was a clause  
18 provision in her lease that let them change the spacing to  
19 conform to New Mexico Oil Conservation Division rules.

20 So they ignored her, changed the spacing, got it  
21 approved by the Division and went to 320 spacing. Do you  
22 see what happened to her interest? Divided right in half.  
23 And all of a sudden, Mrs. Uhden's nice check got cut in  
24 half, and she says, What are you people doing to me?

25 And they said, Well, we changed the rules.

1           She said, You should have told me, you affected  
2 my interest.

3           The New Mexico Supreme Court says this woman has  
4 a property interest, you can find it, it's there, it's  
5 vested in her, and she's entitled to notice as one of these  
6 payees.

7           I think there's a substantial difference in Mrs.  
8 Uhden who, you know, you find, her interest is by a  
9 conveyance, it exists, and yet Strata partners want to be  
10 in Mrs. Uhden's shoes. And I think what happens is, the  
11 system gets manipulated, we get taken advantage of, and we  
12 run the risk of having this game played before the Division  
13 in terms of compulsory pooling orders.

14           The problem is this: Once you serve the  
15 individuals, then the obligation shifts to those  
16 individuals served, to either defend their interest or, if  
17 they assign their interest, to make sure the parties they  
18 assign their interest to are properly substituted.

19           And that's the way it goes in district court.  
20 You can file quiet-title suit, and if I look in the records  
21 and I find that Commissioner LeMay has a house over next to  
22 me and he's affected, then I'm going to serve him. And I  
23 may not know he's got investors, and I may not know that he  
24 just agreed and took a check to sell his house to somebody  
25 else. I don't know about that person at all. But once

1 I've served him, the obligation is upon Commissioner LeMay  
2 to get his purchaser, his grantee, his assignee, the person  
3 he's going to convey the property, notified and properly  
4 substituted. Why should I chase after your assignee? And  
5 what happens if you decide, in order to defeat the pooling  
6 process, to assign your interest to everybody in the  
7 Artesia phone book? Now what happens? I'll never get this  
8 pooled. I'll never find all these people.

9 The dilemma with what we have before us now is  
10 that the Division has established a cutoff date, for which  
11 I have no disagreement. I think it's fair and appropriate  
12 for the Division to say that when a party is served, that  
13 party is the party. And if it's to be somebody else, they  
14 need to figure out how to substitute them in.

15 What I disagree with for the Division is that  
16 they have fixed another point in time to set up a different  
17 set of people to be served with the elections after the  
18 order. And I don't think they intended to do that; it's  
19 simply the way the order got drafted.

20 And here's what's the problem with the order:  
21 We've got the parties fixed as of the date they receive  
22 application, go through the hearing process, get an order.  
23 You then, under what the Division has told us to do, must  
24 again search the record, you must again go out and find all  
25 the things that may have happened between the date the

1 application is served and the order is issued for which  
2 you're going to serve people again.

3 I don't think that should be our burden. I'm not  
4 sure it helps Branko, because the search doesn't tell us  
5 anything. What we did know is, here's a list of investors.

6 If you decide that that list of investors being  
7 told to Mitchell is enough, that we should have done  
8 something else but we didn't do it, we don't think it's  
9 wrong, but you'll have to decide that issue, because that's  
10 what Mr. Stratton is debating.

11 My problem is, with the Division order, is, they  
12 say, All right, you knew that these people existed. You  
13 may not know of what they had, but you should have given  
14 them the order and given an election after the order.

15 It begs the question. It lets Strata do exactly  
16 what the Division was trying to preclude when they fixed  
17 the cutoff date for notification. It just shifts the point  
18 in time where you get to manipulate and play the game of  
19 who gets notice and what happens, when.

20 And look how far they played the game. They  
21 waited 31 months. And why? Well, because the well paid  
22 out. And we're talking about big bucks. This is a  
23 million-dollar well. Twenty-five percent of a million  
24 dollars is a bunch. And it's paid out one time, and it's  
25 moving towards twice. We're looking at \$300,000 in dispute

1 here, and that's why we have got people coming out of the  
2 woodwork after the fact, wanting their money back.

3 This is a matter of policy for the Division, it's  
4 a matter of precedent and policy for the Commission, and  
5 you need to decide the fundamental issue, is, when and how  
6 is an applicant before your agency supposed to know and  
7 determine the individuals for which you're going to serve  
8 in order to commit their interest, in order that they share  
9 in the costs of the well?

10 It's our contention, as you can read in the  
11 brief, is that event did not occur until November 7th,  
12 1995.

13 The Division order, as it now stands, unless  
14 modified, has required us to come back to a hearing to be  
15 scheduled at the Division level, to go through a hearing to  
16 talk about how the Strata partners are to share in the cost  
17 and what's supposed to happen.

18 We believe that that's not necessary. Our  
19 opinion and our position is that the Strata partners --  
20 Strata went nonconsent. They were served. They received a  
21 small share, and they kept a small share, and they assigned  
22 the rest of it. And I forgot the percentages, but it's in  
23 the brief. They kept part of it and assigned the rest.

24 They were served with a notice. They failed to  
25 make the election.

1           Interesting thing happened after the Examiner  
2 order: They went *de novo*. We were ready to come before  
3 you, and the afternoon before the *de novo* hearing I got a  
4 transmission from Mr. Cavin, Mr. Stratton's partner, saying  
5 they were abandoning the appeal. You know, the issue that  
6 would have come before you in 1993 would have been the  
7 debate over these partners, and they pulled the plug on it,  
8 and it went away.

9           So we're saying that that interest, that 25  
10 percent, stayed locked at that point in time, until such  
11 time as Mitchell recovers the 200-percent penalty that was  
12 awarded, that Strata and its undisclosed partners are not  
13 entitled to any other elections.

14           Interesting what's about to happen: The Morrow  
15 zone in the well is beginning to deplete. There's concern  
16 about how long the well is going to sustain itself. It's  
17 on compression now. The evidence would demonstrate that a  
18 decision has got to be made soon about election to  
19 perforate another Morrow interval. It will not surprise me  
20 to see Strata wanting to have a free ride on that election,  
21 and yet we need that production to pay off the penalty.

22           The position is, they're not entitled to any  
23 other elections until we get paid out, and they're not  
24 parties with an affected interest until they at least take  
25 the step of signing an instrument, making that interest

1 exist and giving us a way to find out about that interest.

2 The orders are interesting. You can see how hard  
3 Mr. Carroll and Mr. Stogner struggled with the order. It  
4 goes into incredible length, talking about how disappointed  
5 the Division is with the tactics that Strata has utilized  
6 here.

7 Ultimately, they decided to open the hearing for  
8 this election. And I think, in reflection, that that  
9 wasn't necessary, because you need to look to two things:  
10 One, when did the Strata partners get their interest?  
11 November of 1995. And if you provide as a matter of policy  
12 that the notifications are tied back into the date the  
13 application is served on you, this is an effective and  
14 efficient means by which everyone's interest is protected,  
15 not only Mitchell's but Strata.

16 I can't imagine it would be any fairer than if  
17 you're the party of record, you're the party I'm dealing  
18 with, and you tell me you're going to defend and represent  
19 these interests, and I serve you, and you later tell me  
20 otherwise, it should be your obligation to get them into  
21 the hearing room, and not mine.

22 Thank you, that's all I have.

23 CHAIRMAN LEMAY: Thank you, Mr. Kellahin.

24 Okay, did you have anything to say, or is it --  
25 your presence here is to ask questions too or --

1 MR. CARROLL: Mr. Chairman, as you're probably  
2 well aware of, the Division is a very interested party in  
3 this case, and your decision in this matter is going to  
4 affect how we conduct our proceedings from here on out.

5 At the case heard in May where the Division  
6 reopened the case, we looked at the evidence and determined  
7 that there should be a cutoff date. And I could ask a  
8 million questions regarding the circumstances and pose  
9 scenarios to you as to the terrible outcomes that could  
10 occur before the Division, based upon similar-type factual  
11 situations.

12 For instance, if Strata said it had partners and  
13 in this case also represented -- it had partners in this  
14 lease it represented, it could also sell the lease on  
15 behalf of its partners, and they would represent the  
16 partners in a force-pooling proceeding and then said, Well,  
17 I'm not going to tell you who my partners are.

18 I mean, where does that leave an applicant? They  
19 know that there's partners out there, but they don't know  
20 who to serve, and the party won't tell them. Well, unless  
21 it's of record, they won't know who to serve, so they'll  
22 have to proceed just against the party of record.

23 Now, as to the second cutoff date -- The first  
24 cutoff date is for application for hearing, who should be  
25 notified of the hearing. And in the Division decision we

1 decided that the party of record and any other actual  
2 owners known to Mitchell should be notified. And at the  
3 time the application was filed Mitchell did not know the  
4 names of any of these undisclosed partners and relied upon  
5 representations of Strata.

6 The Division -- thing about the election period  
7 said that Mitchell had the names of the working interest  
8 owners in hand and did not notify them of their election  
9 rights.

10 Now, there's a bunch of questions regarding that  
11 too. For instance, a party could say, Well, my partners --  
12 using Mr. Kellahin's example -- are those listed in the  
13 Artesia phone book. And then you'll notify all of them and  
14 say, Hey, these people in the Artesia phone book don't own  
15 an interest.

16 And then the party will say, Well, I made a  
17 mistake, I actually didn't convey all these interests. And  
18 a party could really impose a lot of obstacles to an  
19 applicant ever getting an order from the Division by  
20 playing a lot of games with notice.

21 I think what the Division would like from the  
22 Commission is definitely guidance and some firm rules.

23 In this situation what would help, I guess, is  
24 that the applicant stick with the parties of record unless  
25 they receive notice and an executed instrument showing that

1 a transfer actually occurred, rather than just a bald  
2 statement saying, These are my partners, whether it be 15  
3 or the Artesia phone book, and here are the executed  
4 instruments that they have signed, even if they're not  
5 recorded. In this situation it wouldn't have helped  
6 because there was no executed instruments.

7 I could pose a number of other scenarios. We're  
8 just -- The Division is very wary, especially, of Mr.  
9 Stratton's suggestion that personal service would be  
10 required of all parties in our proceedings, and not service  
11 by mail, by certified mail.

12 I think -- I don't know the Constitutionality of  
13 providing notice just by certified mail, as we currently  
14 do, versus personal service. But as you well know, that  
15 would cost the industry many -- probably millions of  
16 dollars every year, hiring personal process servers.

17 So I guess the Division appears as an interested  
18 party, and a frightened party.

19 MR. STRATTON: Mr. Chairman, could I just -- I'll  
20 be very brief. I mean, I'd like to respond to a couple of  
21 those --

22 CHAIRMAN LEMAY: Sure.

23 MR. STRATTON: -- things and just a couple of...

24 I didn't suggest personal service. Uhden says  
25 personal service. I appreciate the elevation to the court,

1 but it wasn't me that did that; it's *Uhden* that says that.  
2 I don't think personal service ought to be necessary, but  
3 the New Mexico Supreme Court says it's necessary.

4 Secondly, I'm not representing Strata here. None  
5 of my clients are Strata, none of my clients are  
6 represented by Strata, none of my clients gave Strata any  
7 authority to accept service of process on their behalf.

8 And so Strata was here, they got notice, they  
9 made their election, they're out. But -- And so I know the  
10 attempt is to confuse Strata and impute everything that  
11 Strata did to my clients.

12 But a party can't come in here and say, Oh, I  
13 represent everybody in the Artesia phone book, and then  
14 accept service on behalf of everybody in the Artesia phone  
15 book. You've got to -- We have ways we do that in New  
16 Mexico. You file under the law. You get a registered  
17 service agent and you can serve him. Otherwise, you have  
18 to serve the party personally.

19 So to suggest that we are somehow bound because  
20 Strata had negotiations with these people is just  
21 ridiculous.

22 And then finally, I just want to say that every  
23 one of Mr. Carroll's suggestions fits under the *Uhden* rule.  
24 If a party's identity and whereabouts are known or could be  
25 ascertained with due diligence -- if I told you I had

1 undisclosed partners and I'm not going to tell you who they  
2 are, and the undisclosed partners -- we're really talking  
3 about investors, because that's the term that all these oil  
4 and gas guys use -- don't have their interests recorded,  
5 and I as an applicant can't figure out who you are, you're  
6 stuck, you don't deserve notice, because you couldn't have  
7 been found, you weren't known or you could not have been  
8 ascertained through due diligence.

9 But that that's not what happened in this  
10 particular case. I mean, the want -- You can come up with  
11 all kinds of scenarios about that.

12 This letter listing the interest owner, their  
13 address and their leasehold percentage ownership over here,  
14 this is Exhibit 24, this is the one, when you look at this,  
15 you'll come to, was given to Mitchell. This is what they  
16 had. It wasn't undisclosed. This is disclosure if you ask  
17 me, not nondisclosure.

18 So if they're not disclosed and you don't have  
19 your interests recorded, then you have an interest at your  
20 peril.

21 I mean, you're going to have -- If Mr. Murphy  
22 hadn't have sent this letter, for instance, to Mitchell,  
23 then other than the fact that Mitchell had the duty to use  
24 due diligence, which they never did -- I mean, that's  
25 certainly an argument. But if this hadn't been sent to

1    them, we probably wouldn't be here today, because this is  
2    the notice that they got and this is the knowledge they  
3    had. To suggest they didn't know where to find them is  
4    just not right. You'll see that when you look at the  
5    exhibit.

6                So that's all I wanted to say.

7                CHAIRMAN LEMAY: I'm sorry, Mr. Carroll, do you  
8    want to say something?

9                MR. CARROLL: Mr. Chairman, I might interject.  
10   There's a lot of agency issues in this case. We didn't  
11   hear the testimony of these undisclosed partners. We do  
12   know that Strata represented that it could sell the lease  
13   on behalf of the partners and that it would represent its  
14   partners' rights in any force-pooling proceeding. So --  
15   I'm just saying maybe there's some agency or partnership  
16   issues that are better decided by a court more familiar  
17   with such issues.

18               CHAIRMAN LEMAY: Okay.

19               MR. CARROLL: And to comment on Mr. Stratton's  
20   last -- holding up the letter, Strata always took the  
21   position that it had no duty to inform its partners. I  
22   guess the duty was to Mitchell in this case, to disclose  
23   the partners.

24               This is getting very esoteric legal theory, but  
25   who is the duty owed to? It seemed like Strata had a duty

1 to protect its partners by submitting this list of partners  
2 to Mitchell but had no duty to then inform its partners  
3 that there's a force-pooling proceeding.

4 And then -- To begin with, Mr. Stratton said, you  
5 know, once these partners became aware of the order and of  
6 the well, they came forward. Well, it was Strata that  
7 somehow had a duty arise to inform these partners of the  
8 proceeding. For a long time they said no duty to inform  
9 their partners. But then later they somehow had a duty to  
10 inform them they had a right against Mitchell.

11 And it's -- the agency issues are confusing and  
12 where the duties lie. If Mr. Stratton can answer those...

13 MR. STRATTON: Mr. Chairman, I didn't say that.  
14 I didn't say that once they became aware, they came  
15 forward. So I have a hard time answering that since I  
16 didn't say that.

17 MR. CARROLL: Well, the transcript will say that.

18 MR. STRATTON: I don't see -- To me that's not an  
19 issue. I mean, we know when they became aware, because Mr.  
20 Carroll asked us to get affidavits from them, which we did,  
21 that indicated when each individual became aware of the  
22 well and when the proceedings occurred.

23 And those affidavits are in the record at --  
24 They're our last set of affidavits. I don't know, they're  
25 the last 16 exhibits.

1 But why that is important I don't know,  
2 because --

3 CHAIRMAN LEMAY: Okay, I guess we can dig that  
4 out of the record, what that says. It sounds like an open  
5 issue.

6 Are you ready to take some questions from the  
7 Commissioners? I'd like to include Lyn Hebert in the  
8 question-and-answer, and she can -- Since this is a lot of  
9 legal issues, if you have a question, Lyn, I would  
10 appreciate, on the legal side, you asking them for  
11 clarification.

12 Start with Commissioner Weiss.

13 COMMISSIONER WEISS: Yeah, I don't hear any  
14 issues here about correlative rights or waste. I think we  
15 need to form a committee of law professors, is what I  
16 think, and study this sucker.

17 CHAIRMAN LEMAY: There are some heavy legal  
18 issues involved. I --

19 COMMISSIONER WEISS: I mean, this is...

20 CHAIRMAN LEMAY: Commissioner Bailey, with your  
21 law hat on, do you --

22 COMMISSIONER BAILEY: Did Strata receive any  
23 disbursements from Mitchell or any billings concerning this  
24 well?

25 MR. KELLAHIN: Yes, ma'am.

1 COMMISSIONER BAILEY: On behalf of its partners?

2 MR. KELLAHIN: Yeah, I can't characterize it on  
3 behalf of their partners, but as information is distributed  
4 it went to Strata, even after the -- We had the force-  
5 pooling application and the notice, and then they gave us  
6 the list. But all the information has been sent to Strata.

7 COMMISSIONER BAILEY: And were there any moneys  
8 paid to Strata?

9 MR. KELLAHIN: No, ma'am, because we are still  
10 trying to recover the penalty component of the Order. And  
11 we have recovered the costs of their share one time, and  
12 we're moving towards the two-time number, and so we haven't  
13 got to 300 yet.

14 COMMISSIONER BAILEY: That's all I have.

15 CHAIRMAN LEMAY: I guess I had a couple questions  
16 about the structure of the partnership arrangement. These  
17 have been characterized as Strata partners. Now, these  
18 Strata partners, I take it, are your clients, Mr. Stratton?

19 MR. STRATTON: I wouldn't characterize them as  
20 Strata partners --

21 CHAIRMAN LEMAY: Okay.

22 MR. STRATTON: -- Mr. Chairman, but --

23 CHAIRMAN LEMAY: Well, how would you characterize  
24 them, then?

25 MR. STRATTON: Working interest owners and

1 overriding royalty interest owners.

2 CHAIRMAN LEMAY: Okay.

3 MR. STRATTON: I think, Mr. Chairman --

4 CHAIRMAN LEMAY: Is there a relationship between  
5 these working interest owners and Strata?

6 MR. STRATTON: They know each other. But do you  
7 mean is there a legal relationship between them --

8 CHAIRMAN LEMAY: Both.

9 MR. STRATTON: -- like a partnership or --

10 CHAIRMAN LEMAY: Okay, both.

11 MR. STRATTON: No.

12 CHAIRMAN LEMAY: No legal relationship --

13 MR. STRATTON: No.

14 CHAIRMAN LEMAY: -- it's not a limited  
15 partnership --

16 MR. STRATTON: No.

17 CHAIRMAN LEMAY: -- it's not a -- There's no  
18 corporate identity there, so they are working interest  
19 partners?

20 MR. STRATTON: Some are individuals, some are  
21 corporations, some are -- you know, all kinds of different  
22 folks. But there is no legal relationship, whether it's  
23 corporate, limited liability company, limited partnership  
24 or partnership, between these individuals.

25 I find that oil men and oil people use the word

1 "partner" as "investor", and -- these are partners, they're  
2 our partners in this well. They don't mean they have a  
3 partnership --

4 CHAIRMAN LEMAY: Okay.

5 MR. STRATTON: -- under New Mexico law; they mean  
6 they're investing in this well.

7 CHAIRMAN LEMAY: But they're partners in a lease,  
8 then; wouldn't they be that? Or co-owners in the lease?

9 MR. STRATTON: No.

10 CHAIRMAN LEMAY: How do they get their interest  
11 in this 25 percent that became part of the proration unit?

12 MR. STRATTON: They go purchase an interest, and  
13 then they get a percentage interest, like a 1-percent  
14 interest, working interest, in the lease.

15 CHAIRMAN LEMAY: And who do they purchase that  
16 from?

17 MR. STRATTON: These -- Our clients purchased it  
18 from Strata --

19 CHAIRMAN LEMAY: Okay.

20 MR. STRATTON: -- in 1989 and 1990.

21 CHAIRMAN LEMAY: Okay. Why didn't they receive  
22 an assignment, then?

23 MR. STRATTON: You know, I don't know the answer  
24 to that, Mr. Chairman. You mean a written assignment?

25 CHAIRMAN LEMAY: Well, something to show they

1 have interest. I mean, anytime you have a financial  
2 transaction, real estate transaction, there's usually some  
3 paper that's signed designating the interest if you pay  
4 money.

5 MR. STRATTON: They may have some of what you're  
6 talking about. I mean, not necessarily an assignment that  
7 occurred prior to this time.

8 But I find that that isn't always the case in the  
9 oil and gas industry. I see a lot of these deals where  
10 people are using -- where people don't have that right  
11 away, and they don't assign the interest right away. And I  
12 -- I mean, I see a lot of it; I'm surprised you all don't  
13 see it a lot.

14 Maybe by the time it gets here, we're at this  
15 situation and a lot of water has gone under the bridge.  
16 But when -- I certainly know the deals I've been involved  
17 in and that my clients have been involved in, that that  
18 doesn't always happen right away.

19 CHAIRMAN LEMAY: Would you characterize these  
20 people, these investors, as knowledgeable oil people?

21 MR. STRATTON: Some of them certainly are, yes,  
22 sir, absolutely. Some of them are oil companies.

23 CHAIRMAN LEMAY: So they pretty well know what's  
24 going on in the patch and how things are done and --

25 MR. STRATTON: Some of them -- most -- I would

1 say most of them do. I would say most of them do. I'm not  
2 testifying here; I'm giving you my opinion.

3 CHAIRMAN LEMAY: Well, yeah, I'm trying to --  
4 We're trying to characterize --

5 MR. STRATTON: Right, I understand.

6 CHAIRMAN LEMAY: -- these partners, the  
7 relationship between Strata and the investors, working  
8 interest owners, partners, whatever. And that  
9 relationship, I think, is important to this Commission's  
10 deliberations. What constitutes a relationship -- What  
11 constitutes these relationships? They can be confusing, it  
12 sounds like.

13 MR. STRATTON: Well, the one thing I would say,  
14 Mr. Chairman, is, the reason *Uhden* and other cases in New  
15 Mexico have this fairly strict Constitutional notice  
16 requirement is so that you don't have to do that. You all  
17 have been very patient sitting here today, listening to our  
18 esoteric legal arguments, and I know they're very  
19 difficult, and they're very difficult for the best of  
20 lawyers.

21 But what solves all of this is to make sure you  
22 have them here. I mean, what if, for instance, they had  
23 notified them and then somebody decided they didn't have  
24 to? I mean, that wouldn't have been the worst thing to  
25 happen in the world.

1 But the idea to try to get around notifying  
2 somebody is what puts us in these situations, where we're  
3 going to have to do that.

4 So my suggestion to you is, it almost doesn't  
5 matter how you characterize their interest. You can  
6 characterize it any way you want, but the fact is, they do  
7 have a protected property right, because they had purchased  
8 this interest back in 1989 and 1990.

9 And so they're entitled to notice, if somebody  
10 knows about their interest, only if they know about their  
11 interest. I will stipulate right here on the record that  
12 if it had never come to Mitchell's attention and Mitchell  
13 had used some -- if they had gone through the phone  
14 directory in Artesia, to use Mr. Carroll's example, and  
15 couldn't find the interests, then all of my clients are out  
16 of luck, because they're not recorded.

17 CHAIRMAN LEMAY: My question still is, what  
18 constitutes the interest? Strata saying they have interest  
19 or -- Normally interest becomes a definable interest when  
20 there's some document there to say they have an interest,  
21 because we can characterize a lot of things different ways,  
22 but without some kind of documentation -- I guess they  
23 should have taken the word of Strata on that, that they had  
24 interest, because Strata told them they had interest?

25 MR. STRATTON: They wouldn't be here today if

1 they had done that. They could have served them, and they  
2 would have found they had interests, and everything would  
3 have been litigated.

4 So the answer in that particular case -- I  
5 wouldn't say they should have taken their word. They  
6 should have taken the letter, and somebody should have  
7 called up Branko, or somebody should have called up Duane  
8 Brown, or somebody should have called up Chuck Wellborn and  
9 said, Now, we're informed you have an interest in this  
10 particular lease; is that true? They have a duty to use  
11 due diligence to ascertain this.

12 Strikes me, if they didn't believe Strata, which  
13 actually turned out to be true -- it would have been  
14 somebody they could have believed -- but if they didn't  
15 believe them, pick up the telephone and call them. And if  
16 that individual, if Mr. Brown, had said, No, I don't have  
17 an interest in that...

18 But if he says, I do have an interest in that,  
19 then they've used their due diligence to ascertain what  
20 interests there were.

21 But none of that was done. There was no attempt  
22 to do that.

23 CHAIRMAN LEMAY: All right, that helps clarify.  
24 Did you have any questions, Lyn, concerning some of the  
25 legalities?

1 MS. HEBERT: Well, I did have a question, Mr.  
2 Kellahin. You indicated that you thought the date should  
3 be the date the party is served. But with more than one  
4 party -- So that would be a different date for every party  
5 prior to cutoff date, as opposed to having the date of the  
6 known interest owners be the date the application is filed  
7 with the Commission?

8 MR. KELLAHIN: I under -- Yes.

9 MS. HEBERT: You've got a sort of moving target,  
10 it seems.

11 MR. KELLAHIN: Yeah, it is a moving target, and  
12 it's bothered me, and I've thought about how convenient it  
13 would be for the agency and for the applicant to say the  
14 target is fixed when we file the application.

15 But if the application is filed and each of the  
16 parties to be pooled does not yet know that's happened,  
17 maybe it's fair that the target floats, so that by the time  
18 you come to the hearing you can fix that individual's  
19 involvement in the process with the date they sign the  
20 green card. And you're going to have different dates based  
21 upon service, but I think that's fair.

22 I don't think it would be fair to file a pooling  
23 application, serve Santa Fe Energy, get around to serving  
24 Burlington a few days later, and find that Burlington says,  
25 Hey, wait a minute, my interest has already been assigned

1 of record. And I think maybe we need to deal with the  
2 floating concept of actual service until we have a better  
3 sense of how cumbersome that might be.

4 MS. HEBERT: Well, to some extent it seems like  
5 the reason that the Division keeps all the voluminous  
6 records it keeps is because it becomes something of -- not  
7 like the county records, of course, but it becomes a source  
8 of notice for where things -- or for when things occurred  
9 that affect the property interests.

10 So it just occurred to me that the filing of the  
11 application would be of notice to people in the oil and gas  
12 industry. If they knew that that was the case, they would  
13 check the dockets. And they do check the dockets. I mean,  
14 I believe they do.

15 MR. KELLAHIN: And that's a decision for you to  
16 make. I'm not debating one or the other. And I think  
17 there's a range of choice in there that's reasonable in any  
18 extent.

19 But it's troublesome to have investors for an  
20 opponent and not receive documentation as to their property  
21 interest. And to equate the fact they may have sent a  
22 check to Strata with having that property interest vested  
23 at that point in time, I think, fixes the property interest  
24 too soon.

25 MS. HEBERT: Well, I also had a question for Mr.

1 Stratton.

2 You said that their working interest, their  
3 ownership interests, those weren't in writing until 1995?

4 MR. STRATTON: I didn't say that. That's what  
5 Mr. Kellahin said. I think --

6 MS. HEBERT: Well, I think Mr. LeMay did ask if  
7 they had any written documentation.

8 MR. STRATTON: Oh, okay, of record in this  
9 particular case. The only thing that I know of -- Are the  
10 assignments in the record?

11 MR. KELLAHIN: Yes.

12 MR. STRATTON: Okay. -- are the assignments that  
13 did take place in -- whenever the date was. If it was  
14 1995, it was 1995.

15 MS. HEBERT: Are you aware of any of your 16  
16 clients had any kind of limited partnership or other  
17 partnership agreement with Strata prior to that?

18 MR. STRATTON: I'm aware that they don't.

19 MS. HEBERT: They don't?

20 MR. STRATTON: No.

21 MS. HEBERT: There was nothing in --

22 MR. STRATTON: There's no evidence in the record  
23 that they do, and I'm telling you as an officer of the  
24 Commission, or whatever you call people here, that they  
25 don't have any such relationship, certainly not in regard

1 to this, but no other relationship like that.

2 CHAIRMAN LEMAY: Mr. Carroll?

3 MR. CARROLL: Let me bring up another issue that  
4 hasn't been touched on, and that is actual notice and  
5 whether actual notice can cure any absence of  
6 Constitutional or statutory notice.

7 At the hearing in 1993, a George Scott testified  
8 as the consulting geologist for Strata. There's a number  
9 of Scott interests, but Mr. Scott testified at that hearing  
10 that he was the owner of Scott Exploration, and Scott  
11 Exploration is one of these undisclosed partners.

12 Now, the owner of one of these partners was at  
13 the hearing and did not enter an appearance as a partner.  
14 He was a consulting geologist. So for sure, at least Scott  
15 Exploration had notice of the hearing. And I notice one of  
16 the affidavits is signed by a geologist with Scott  
17 Exploration, and they said they had notice back in 1993.

18 I was wondering if Mr. Stratton could address  
19 whether actual notice could substitute for lack of  
20 statutory notice, because I found a couple cases in  
21 Oklahoma where an Oklahoma court said in a compulsory  
22 pooling case -- in two cases -- that parties cannot, you  
23 know, even if they haven't received statutory notice, can't  
24 stand by and wait to see whether the well is good and then  
25 elect to join in after the fact.

1 MR. STRATTON: Mr. Chairman, I'd be pleased to  
2 address that --

3 CHAIRMAN LEMAY: Okay.

4 MR. STRATTON: -- if you would like me to.

5 First of all, I regret I can't -- Being from  
6 Oklahoma, I'd like to agree that that is what they did, but  
7 it's not. The United States Supreme Court, however, did  
8 address the issue in 1915, cited in our brief, *Coe vs.*  
9 *Armor Fertilizer Works*, a 1915 case.

10 And the United States Supreme Court held that  
11 extra-official or casual notice for a hearing granted as a  
12 favor of discretion in proceedings for taking one's  
13 property -- that means, if you messed up and you just  
14 granted them a new hearing -- is not a substantial  
15 substitute for the due process of law, which the 14th  
16 Amendment of the US Constitution requires. The notice must  
17 be formal and provided within the context of the  
18 proceedings.

19 So what we're saying is, if I'm in the barber  
20 shop and my barber says, You know, Mr. Carroll was in here  
21 the other day and he says that there's a hearing going on  
22 over there at the Commission and it's going to affect a  
23 whole gunny sack full of your oil and gas interests, that's  
24 not good enough, because you have to have personal service  
25 under *Udden*. The US Supreme Court says casual or extra-

1 official notice is not good enough. So...

2 CHAIRMAN LEMAY: But that's just a -- I'm not  
3 sure we're talking about the same thing. I understood it  
4 to say that it wasn't casual, but actually one of the  
5 witnesses at the hearing was also one of the partners?

6 MR. CARROLL: That's correct.

7 CHAIRMAN LEMAY: So it's --

8 MR. STRATTON: I think that's not correct.

9 CHAIRMAN LEMAY: -- casual notice of the --

10 MR. STRATTON: I don't think Mr. Scott actually  
11 is one of the interest owners.

12 MR. CARROLL: He testified he owned Scott  
13 Exploration. Scott Exploration is one of the partners.

14 MR. STRATTON: I'd have to check that, but I'm  
15 not sure that that is correct.

16 CHAIRMAN LEMAY: Okay, but the fact that if  
17 they're there and it's obvious or would appear obvious to  
18 us that they knew about it there, then -- and they were a  
19 partner, that wouldn't be constructive notice? Or --

20 MR. STRATTON: Constructive notice --

21 CHAIRMAN LEMAY: -- we would assume that he  
22 didn't know, even though he knew?

23 MR. STRATTON: Constructive notice doesn't work.

24 CHAIRMAN LEMAY: I don't know what I'm talking  
25 about, saying "constructive notice". I mean, I pulled

1 "constructive" out of the air. I mean, if he knows, he  
2 knows, doesn't he? Or not?

3 MR. STRATTON: I'm going to say, I don't have a  
4 case on that, and I don't think there is a case on that,  
5 because I don't think that happens very often. But I'm not  
6 going to concede it, because I haven't looked -- That's one  
7 out of 16 people, so --

8 CHAIRMAN LEMAY: Well, what's the relationship of  
9 these people? Are they interrelated, are they brother-in-  
10 laws or --

11 MR. STRATTON: Well, I don't know.

12 CHAIRMAN LEMAY: -- or neighbors, or do they all  
13 live in one town, or are they scattered throughout the  
14 country, or --

15 MR. STRATTON: They're scattered. We have  
16 somebody in Salt Lake City, we've got somebody in Canada,  
17 we've got some people in Roswell. Some of them know each  
18 other, some of them are related.

19 But I'll tell you what you have. I mean, if  
20 that's a serious concern, if you don't believe the US  
21 Supreme Court and you don't want to look at *Udden*, go look  
22 at their affidavits. They have filed, under the --

23 CHAIRMAN LEMAY: We'll look at those, because I  
24 think --

25 MR. STRATTON: -- they have filed, under the

1 penalty of perjury, affidavits saying they didn't know  
2 about the hearing. Now, if Mr. Carroll can come prove that  
3 they did, then he can go over and see the US Attorney or  
4 the district attorney and talk to him about it.

5 But once again, I want -- When you're doing this  
6 and when Mr. Carroll says, I don't know what is  
7 Constitutional notice, that really concerns me as a  
8 litigant here.

9 But please, when you do this, make sure -- And  
10 when you decide what a cutoff date is -- this question  
11 wasn't asked for me -- please try to make sure you do it in  
12 accordance with what the courts say and not just what is  
13 convenient for an applicant. Because that, when it gets to  
14 court, like in *Uhden* -- I mean, that's what they're going  
15 to look at. They're not going to look at what's convenient  
16 for Mr. Kellahin's clients. They're going to look at what  
17 they think the Constitution requires, even if it's a little  
18 bit burdensome, like personal service.

19 MR. KELLAHIN: One footnote to that, if I might.

20 CHAIRMAN LEMAY: Well, I was going to say  
21 first --

22 MR. KELLAHIN: Yeah.

23 CHAIRMAN LEMAY: -- because he was -- and then  
24 you.

25 Go ahead, Rand.

1           MR. CARROLL: Yeah, there was some recollections  
2   that some of the partners showed up at the hearing, besides  
3   just being a witness there. In fact, some of the partners  
4   may be in the audience here -- it appears so --

5           CHAIRMAN LEMAY: Uh-huh.

6           CHAIRMAN LEMAY: -- and maybe they can be put on  
7   the stand.

8           MR. STRATTON: Well, I'm not calling them to the  
9   stand, Mr. Chairman.

10          CHAIRMAN LEMAY: Mr. Kellahin?

11          MR. KELLAHIN: Thank you, Mr. Chairman.

12                 I would refer Ms. Hebert to page 18 of my brief.  
13   There are some Oklahoma cases that we have found. I think  
14   this one is interesting. It helped me work my way through  
15   it.

16                 And it simply says, The Supreme Court of Oklahoma  
17   held in *Chancellor* -- talking about a 1982 case -- that the  
18   notice requirements were not intended to compel the unit  
19   operator to check county records from the date of the  
20   Application until the Commission order to assure that all  
21   interest owners had been notified. Such a ruling, the  
22   court noted, would permit an adverse party to defeat an  
23   application by simply transferring ownership after the  
24   hearing.

25                 What we're contending here is that we had notice

1 of these people only after the application was filed.  
2 Their interest is not even of record.

3 The point in time to fix is the date we filed the  
4 application and served Mr. Murphy. And if you adopt that  
5 date, I think that fixes the problem, because their  
6 property interest does not occur and is not known to us  
7 until after that date.

8 MR. STRATTON: Mr. Chairman, can I go back to  
9 your other point, because you -- I mean, it's an  
10 interesting point, and I'm thinking about it.

11 You know, if I was in a lawsuit and there were  
12 four or five people that should have been served and I  
13 didn't get served, for instance, and I show up and watch  
14 the trial, I'm not bound by what they do there. Nobody  
15 ever got personal service.

16 If somebody calls me to the witness stand and I  
17 testify, I'm not bound by what occurred at the proceeding,  
18 because the court doesn't have jurisdiction over me.

19 And it works the same way here, that unless you  
20 obtain jurisdiction -- and that's probably a better way to  
21 think about it and look at it -- over the individual, they  
22 can come frolic around all they want, listen to the  
23 hearing, do whatever they want; but you don't have  
24 jurisdiction over them to affect their rights.

25 So in thinking -- I mean, it's an easy answer in

1 a judicial context. I know we tend to think about  
2 administrative proceedings as being more informal and  
3 having different rules. But when it boils down to  
4 Constitutional considerations, technically we don't here.

5 So I guess in thinking about that, I'd answer  
6 that it didn't matter who was here if they hadn't been  
7 served appropriately under the *Uhden* standard.

8 MR. CARROLL: Mr. Chairman, one more note.

9 It's my recollection that you don't represent all  
10 the undisclosed partners? There's a couple that did not  
11 join in this action?

12 MR. STRATTON: I don't subscribe to the  
13 undisclosed partner theory, so I don't know who you mean,  
14 Mr. Carroll, when you say that.

15 MR. KELLAHIN: It's Warren and Arrowhead.

16 MR. CARROLL: Do you represent all the partners  
17 or the working interest owners besides Strata in this?

18 MR. STRATTON: No, I don't.

19 MR. CARROLL: Who don't you represent?

20 MR. STRATTON: Well, maybe I should tell you who  
21 I do represent, and then you can determine for yourself --

22 MR. CARROLL: Is it Warren and Arrowhead?

23 MR. STRATTON: -- because I don't know who all  
24 the working interest --

25 MR. CARROLL: Warren and Arrowhead that --

1           MR. STRATTON: I don't know who all the working  
2 interest owners are. I don't represent Warren and I don't  
3 represent Arrowhead. They're not parties to this  
4 proceeding.

5           MR. CARROLL: Do you know why?

6           MR. STRATTON: I don't. And I would say once  
7 again, Mr. Carroll, I can't think of anything more  
8 irrelevant as to why they're not here. Just because  
9 they're not here doesn't mean that the Commission can  
10 violate the Constitutional rights of the people that are  
11 here.

12          CHAIRMAN LEMAY: So Branko is who? Is that -- Is  
13 one of the investors, is that who Branko is?

14          MR. STRATTON: Yes, Branko, Inc.

15          CHAIRMAN LEMAY: Is it a corporation?

16          MR. STRATTON: Branko, Inc.

17          CHAIRMAN LEMAY: Is it a corporation?

18          MR. STRATTON: Uh-huh.

19          CHAIRMAN LEMAY: And you're representing them?

20          MR. STRATTON: Correct, yes.

21          CHAIRMAN LEMAY: Okay.

22          MR. STRATTON: Do you want a rundown who I'm  
23 representing?

24          CHAIRMAN LEMAY: That would help, probably.

25          MR. STRATTON: It's listed -- Well, it's listed

1 in the motion --

2 CHAIRMAN LEMAY: Okay.

3 MR. STRATTON: -- but I can run down it.

4 Branko, Inc.; Duane Brown; S.H. Cavin -- that's  
5 not my law partner -- Robert Eaton; Terry Kramer; Landwest,  
6 which is a general partnership out of Utah; Candace  
7 McClelland; Permian Hunter Corporation; Scott Exploration,  
8 Inc. -- and I believe that the actual owner of that is  
9 Charles Warren Scott and not the Mr. Scott that Mr. Carroll  
10 is talking about -- Chuck Wellborn; Winn Investment, Inc.;  
11 Lori Worrall; Xion Investments; George Scott, III -- who is  
12 also not the Mr. Scott that Mr. Carroll was talking about  
13 -- Stephen Mitchell; and Scott Exploration, Inc.

14 CHAIRMAN LEMAY: Okay, probably helps. A lot of  
15 this information, I'm sure, is in there, but --

16 MR. STRATTON: And you haven't seen it and it's  
17 unusual. And we appreciate your patience. We hope the  
18 Commission doesn't mind us. We could have taken two days  
19 to do this. We hope this is better; I don't know.

20 CHAIRMAN LEMAY: Okay, any more questions? Do  
21 you have anything?

22 Are you going to make a motion to incorporate the  
23 record of the previous hearing into our record and we work  
24 with that, plus what you've supplied us today?

25 MR. KELLAHIN: If we have not already

1 accomplished that, Mr. Chairman, we, I think, jointly so  
2 move.

3 CHAIRMAN LEMAY: Any objection?

4 If no objection, then the record of the previous  
5 hearing will be introduced into this record, and --

6 MR. KELLAHIN: There's two hearings, Mr.  
7 Chairman.

8 CHAIRMAN LEMAY: Or both hearings. And you want  
9 to introduce the record of both those previous hearings?  
10 We're talking about the force-pooling hearing initially --

11 MR. KELLAHIN: Right.

12 CHAIRMAN LEMAY: -- back in 1993 or --

13 MR. KELLAHIN: Yes, sir.

14 CHAIRMAN LEMAY: -- 1992 --

15 MR. KELLAHIN: Yes, sir.

16 CHAIRMAN LEMAY: -- plus the one we just heard.

17 Okay, without objection, the record of those  
18 hearings will be entered into this record.

19 Anyone else?

20 MR. KELLAHIN: I'd like to take a moment and  
21 introduce my guest. Bobby Hickman is a petroleum engineer.  
22 Mr. Hickman is responsible for this project for Mitchell  
23 Energy, and he's come from Houston today to be the  
24 representative of my client, and he's come a long way in  
25 bad weather, and I'd like to introduce him.

1 MR. HICKMAN: Thank you. How you doing?

2 CHAIRMAN LEMAY: Welcome, Mr. Hickman. Sorry you  
3 didn't have more to say.

4 MR. HICKMAN: Don't be.

5 CHAIRMAN LEMAY: Usually people like you are  
6 sworn in, and we ask you questions.

7 Does anybody else want to make a statement or...

8 MR. CARROLL: I'd just ask the Commission again  
9 whether they want to ask any questions of any partners that  
10 are in the audience.

11 MS. HEBERT: I just kind of think -- I'll  
12 interrupt. I think the understanding was, there wasn't  
13 going to be any testimony in this hearing. I mean, that  
14 was the --

15 MR. STRATTON: That was our stipulation, Mr.  
16 Chairman.

17 CHAIRMAN LEMAY: Sure. I mean, this is  
18 voluntary. I wasn't -- you know, anyone wants to -- We can  
19 always ask for statements and things. If there's anyone  
20 that wants to say anything, they can do so and -- if that's  
21 the case.

22 Do you all have anything you want to add to what  
23 you've told us already?

24 MR. STRATTON: Us, Mr. Chairman?

25 CHAIRMAN LEMAY: Yes.

1 MR. STRATTON: Oh.

2 CHAIRMAN LEMAY: I mean, I'm ready to sum it up  
3 and take the case under advisement unless you have anything  
4 else to --

5 MR. KELLAHIN: Mr. Chairman, I've written 28  
6 pages. It's probably ten too many. I don't know what else  
7 to tell you.

8 CHAIRMAN LEMAY: I don't know what's in those 28  
9 pages, Counselor. It can't be that --

10 MR. KELLAHIN: Oh, it's good stuff, Mr. Chairman.

11 MR. STRATTON: I've got some briefs myself that  
12 I've made copies of, Mr. Chairman.

13 CHAIRMAN LEMAY: Okay. Sounds like a very -- a  
14 case laden with very heavy legal issues. And recognizing  
15 that I'm a geologist, that Commissioner Bailey is a  
16 geologist, Commissioner Weiss is an engineer, that we --  
17 Fortunately, we have Lyn Hebert here as our Commission  
18 counsel.

19 We'll certainly look at the legal issues. We  
20 have to, as I understand this case, the way it's  
21 formulated.

22 And I understand what you're trying to say to us.  
23 If I'm -- Besides the case you're making for your clients,  
24 you also would like to have some direction from this  
25 Commission as to what we consider a good policy for

1 notification would be, that conforms with the *Uhden*  
2 decision, as interpreted for us, I guess. I know these  
3 decisions can have more than one interpretation, so...

4 You're making a face there, Mr. Stratton, like  
5 there's no -- there's only one interpretation of *Uhden*?

6 MR. STRATTON: Well, on that issue, you know,  
7 reading the rules, you have a provision for actual notice  
8 in your rules, and it just doesn't -- it just doesn't  
9 comply with *Uhden*, and it's going to be in the future  
10 unless that gets taken care of.

11 I know I'm risking upsetting the Commission. I'm  
12 not meaning to; I'm trying to be helpful. Unless that gets  
13 taken care of, then anybody who didn't receive personal  
14 notice is going to be able to come in and do what we're  
15 doing here today.

16 So I would suggest to the Commission that that be  
17 looked at and Ms. Hebert look at it -- she's as capable as  
18 anyone that I know of to do that -- and try to get that --

19 CHAIRMAN LEMAY: You understand she used to work  
20 for you back in the old days.

21 MR. STRATTON: I have no comment for the record,  
22 Mr. Chairman.

23 CHAIRMAN LEMAY: Sorry, I just know your previous  
24 position --

25 MR. STRATTON: Thank you.

1           CHAIRMAN LEMAY:  -- and I know that's not an  
2   issue in this case.  I wasn't saying that because of that.  
3   I didn't mean to imply anything like that.

4           But I do think there's some heavy issues involved  
5   here, and *Uhden* certainly has been an issue that's been  
6   with us for a long time.

7           Does anyone else have anything further to add in  
8   Case Number 11,510?

9           If not, this Commission will take that case under  
10  advisement.

11          Thank you.

12          Thereupon, these proceedings were concluded at  
13  4:40 p.m.)

14                           \* \* \*

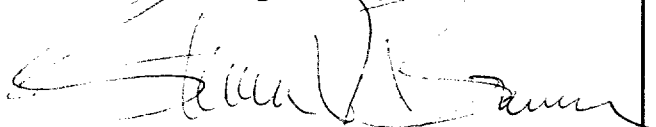
## CERTIFICATE OF REPORTER

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

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

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

WITNESS MY HAND AND SEAL January 22nd, 1997.



STEVEN T. BRENNER  
CCR No. 7

My commission expires: October 14, 1998