STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	
APPLICATION OF BASS ENTERPRISES PRODUCTION COMPANY FOR APPROVAL OF THE EXPANSION OF THE ATOKA PARTICIPATING AREA IN THE JAMES RANCH UNIT, EDDY COUNTY, NEW MEXICO	CASE NOS. 11,602
APPLICATION OF BASS ENTERPRISES PRODUCTION COMPANY FOR APPROVAL OF THE EXPANSION OF THE ATOKA PARTICIPATING AREA IN THE JAMES RANCH UNIT, EDDY COUNTY, NEW MEXICO	and 11,603
	(Consolidated)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

ORIGINAL

BEFORE: MICHAEL E. STOGNER, Hearing Examiner

November 17th, 1997

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, MICHAEL E. STOGNER, Hearing Examiner, on Monday, November 17th, 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.

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I N D E X

November 17th, 1997
Examiner Hearing
CASE NOS. 11,603 and 11,603 (Consolidated)

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A P P E A R A N C E S

FOR THE DIVISION:

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Legal Counsel to the Division
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FOR ENRON OIL AND GAS:

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Santa Fe, New Mexico 87504-2208
By: WILLIAM F. CARR

ADDITIONAL APPEARANCE:

LOSEE, CARSON, HAAS & CARROLL, P.A.
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Post Office Box 1720
Artesia, New Mexico 88210
By: ERNEST L. CARROLL

* * *

WHEREUPON, the following proceedings were had at 11:00 a.m.:

EXAMINER STOGNER: This hearing will come to order, special Examiner Hearing, Monday, November 17th, 1997, Docket Number 35-97.

At this time I will call both Cases 11,602 and 11,603.

MR. RAND CARROLL: Application of Bass Enterprises Production Company for approval of the expansion of the Atoka Participating Area in the James Ranch Unit, Eddy County, New Mexico. It's the same caption for both listed cases.

EXAMINER STOGNER: At this time I'll call for appearances.

MR. CARR: May it please the Examiner, my name is William F. Carr with the Santa Fe law firm Campbell, Carr, Berge and Sheridan. We represent Enron Oil and Gas in this matter.

We also, as I understand pursuant to a conversation between Ernest Carroll with the Losee firm in Artesia, have been asked at this time to advise the Division through me Mr. Carroll is also entering his appearance in this matter.

At this time, Mr. Examiner, I think it would be appropriate if I would advise the Division as to the status

of these cases.

As the Division is aware, Bass Enterprises Production Company is the operator of the James Ranch Unit, located in Eddy County, New Mexico.

Approximately two years ago, Bass proposed the expansion of the Atoka participating area in this unit, to include several tracts on the western and southern portion of the unit. Approval was obtained for this approval [*sic*] from the BLM and the Oil Conservation Division before Enron became aware of it.

Enron requested that the Applications of Bass be set aside -- that the approvals be set aside and that the matters be set for hearing before a Division Examiner so they could present testimony in support of their contention that these proposed expansions that would be retroactive for a number of years -- that they would be able to present testimony showing that their correlative rights were impaired.

A hearing was held in February of last year. The approval was set aside and the matter was set for hearing.

I can advise you that last week a settlement of this matter was reached in which most if not all of the properties held by Enron and Shell were conveyed to Bass. And so I have been asked by Enron and Shell to advise you that they now withdraw their objection to the Application,

since they no longer own an interest in the properties, and that you may now proceed to consider the Application of Bass.

On Friday of last week I received a statement from Mr. Carroll, and it is my understanding that he conferred with the Examiner, and I may now read a statement on behalf of Bass into the record. It goes as follows:

A settlement has been reached between Bass Enterprises Production Company and Enron Oil and Gas Company and Shell Western, E&P, Inc., whereby the interests of those two companies in the James Ranch Unit has been bought out by Bass. Because Enron and Shell no longer own an interest in the James Ranch Unit, they no longer have standing to contest the expansion of the Atoka Participating Area and are withdrawing their formal objection hereto.

It is therefore requested by Bass that the Oil Conservation Division grant Enron and Shell's request to withdraw their objection to the expansion of the participating area. And further, Bass would ask that based on that withdrawal, that the original administrative approval of the expansion be reinstated.

That's Bass's statement.

I can advise you that Enron and Shell have no position on the reinstatement of the Bass Application, and the only reason is that they have, to this date, not seen the data supporting that Application. But we take no position on it.

And the request from Bass is as set forth in Mr. Carroll's letter, that the original administrative approvals be reinstated.

Based on earlier conversations today with you, Mr. Examiner, if it is your desire that Mr. Carroll and I prepare a proposed order we will be happy to do that and can submit it to you within ten days.

EXAMINER STOGNER: Yes, if you would, Mr. Carr, I'd like for you to prepare a rough draft.

Mr. Carroll, do you see anything further in this matter?

MR. RAND CARROLL: Mr. Carr, who is the attorney for Shell?

MR. CARR: I am the attorney for Shell.

MR. RAND CARROLL: Didn't somebody else enter an appearance, an earlier --

MR. CARR: Jim Bruce may earlier have appeared for Shell. Mr. Kellahin also earlier appeared, I believe, for Shell. They both withdrew from representation early in

the case.

MR. RAND CARROLL: Oh, that's right, a conflict arose or --

MR. CARR: Conflicts were asserted, conflicts were asserted, and ultimately both of those attorneys withdrew and I entered an appearance for Shell.

MR. RAND CARROLL: Mr. Carr, are you aware of any other interest owners in the James Ranch Unit?

MR. CARR: I'm not aware -- There are other interest owners in the James Ranch Unit, but I am not aware of other interests who were working interest owners who were affected by these proposed expansions.

MR. RAND CARROLL: So as far as you know, it's just Bass and Enron which was --

MR. CARR: Right.

MR. RAND CARROLL: -- the successor in interest --

MR. CARR: Right.

MR. RAND CARROLL: -- to Shell?

MR. CARR: And Shell's interest -- And there are some properties along -- that may be -- there may be still some collateral issues because they're within the area affected by WIPP. But it is my understanding that the agreement that they've reached disposes of all the issues that are raised in this case as to the expansion of this --

of the Atoka Participating Area.

(Off the record)

EXAMINER STOGNER: If there's nothing further in Cases 11,602 and 11,603, then this matter will be taken under advisement for the consideration of the reinstatement of the administrative approval. That will be addressed in the order that will be issued in this matter.

MR. CARR: And I will contact Mr. Carroll, and we will submit a proposed order pursuant to your request.

EXAMINER STOGNER: Thank you, Mr. Carr.

If there's nothing further, then this hearing is adjourned.

(Thereupon, these proceedings were concluded at 11:00 a.m.)

* * *

I do hereby certify that the foregoing is a complete record of the proceedings in the Examiner hearing of Case Nos. 11602 and 11603 heard by me on 17 November 1992.

, Examiner
Oil Conservation Division

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 Division 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 November 22nd, 1997.

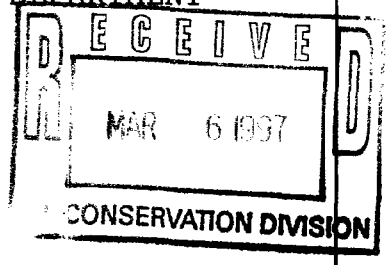
STEVEN T. BRENNER
CCR No. 7

My commission expires: October 14, 1998

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION



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

APPLICATIONS OF BASS ENTERPRISES PRODUCTION COMPANY FOR APPROVAL OF THE EXPANSION OF THE ATOKA PARTICIPATING AREA IN THE JAMES RANCH UNIT, EDDY COUNTY NEW MEXICO

CASE NOS. 11,602 and 11,603 (Consolidated)

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: MICHAEL E. STOGNER, Hearing Examiner

February 19th, 1997

Santa Fe, New Mexico

This matter came on for prehearing conference before the New Mexico Oil Conservation Division, MICHAEL E. STOGNER, Hearing Examiner, on Wednesday, February 19th, 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.

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I N D E X

February 19th, 1997
Prehearing Conference
CASE NOS. 11,602 and 11,603

* * *

Submissions by Bass, not offered or admitted:

* * *

A P P E A R A N C E S

FOR THE DIVISION:

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By: A.J. LOSEE
and
ERNEST L. CARROLL

FOR ENRON OIL AND GAS COMPANY and
SHELL WESTERN E&P, INC.,
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By: WILLIAM F. CARR
and
PAUL R. OWEN

* * *

WHEREUPON, the following proceedings were had at 3:00 p.m.:

EXAMINER STOGNER: I'll call this to order. Please note today's date, February 20th, 1997.

MR. CARROLL: It's the 19th.

EXAMINER STOGNER: 19th? Okay, what is it? 19th?

MR. CARROLL: 19th.

EXAMINER STOGNER: 19th, okay. Please note today's date, February 19th, 1997, for the matter to consider motions -- this is a prehearing conference to consider motions brought forth in Case 11,602 and 11,603.

I guess at this time we'll call for appearances.

MR. CARR: May it please the Examiner, my name is William F. Carr with the Santa Fe law firm Campbell, Carr, Berge and Sheridan. We represent Enron Oil and Gas Company and Shell Western E&P, Inc., a subsidiary of Shell Oil Company.

MR. LOSEE: A.J. Losee, Mr. Examiner, with the law firm of Losee, Carson, Haas and Carroll in Artesia. We represent Bass Enterprises Production Company.

EXAMINER STOGNER: Any other appearances for the record?

Since this is somewhat of a loose meeting, since it's your case, Bass, Mr. Losee, I'll let you state -- Oh,

I'm sorry, Mr. Carr?

MR. CARR: I'm prepared to proceed if you desire, on our motion.

MR. LOSEE: Either one, it's fine. We've both got motions.

EXAMINER STOGNER: Okay. Well, we'll hear yours first, Mr. Carr.

MR. CARR: May it please the Examiner, we're here today seeking a hearing to enable Enron and Shell to show that their correlative rights are being impaired by the way Bass is operating the James Ranch Unit.

We're seeking a hearing before the Oil Conservation Division, because this is the only place where we can get a hearing before people with the technical expertise and competence to correctly evaluate the issues and, at the same time, get a hearing where our due-process rights will be afforded. You're the only agency, of all the agencies involved in this matter, charged by statute with protecting our rights.

You have been told in the *Uhden* decision by our Supreme Court that in carrying out your statutory responsibility you are to afford us due process of law. I will tell you that in my opinion the *Uhden* decision is the central and controlling decision in this proceeding here today. It's a decision which Bass has summarily dismissed

in a footnote in the memorandum we received this morning.

As you know, the James Ranch Unit Is a unit comprised of state and fee lands located in Eddy County, New Mexico. Prior to the formation of this unit, the agreement was submitted to the Oil Conservation Commission, and an order entered in 1953 approving the agreement and designating Bass operator thereof.

Since that time, on occasion, Bass has proposed PAs and revised those PAs. And this has been done, in our experience, after, at a very minimum, when proposing the expansion, providing to the other working interest owners in the unit copies of the proposal and the supporting data.

In fact, Mr. Stogner, in the past when we received a proposal and supporting data, Enron has objected to that proposal to the Commissioner of Public Lands. And after review of Enron's data and Bass's data, the Commissioner said, Bass, you're wrong; Enron, you're correct. And they sent the proposal back to Bass. That's the way it is supposed to be done.

But today Bass has embarked on a new course, and denying us access to the data upon which they base their recommendations, they have proposed PAs which we believe impair our correlative rights.

Today we stand before you, having not even seen the presentation to the BLM, because Bass has instructed

the BLM to keep that information confidential. And although they are supposed to be operating the unit in utmost good faith for other interest owners like us, they, a year after they have proposed the expansion of the PA, still will not permit the BLM to disclose the data they submitted to them, to us.

In February of last year, they proposed to you and to the BLM and the Commissioner of Public Lands, revisions to the Atoka PA. No notice was given, as we require -- as we believe is required by the unit agreement. And without this notice we have, of course, no opportunity to present evidence, to make our position known before the decision was entered.

And the data that Bass relied on goes back to December of 1982. Based on that data, and that data alone, in February of last year, almost exactly a year ago, the OCD approved the revised PAs and made that revision retroactive 14 years, until 1982.

And it was only after we learned that you had approved these revisions, we discovered the applications were even pending. And we wrote to you and we protested, and we asked you to rescind the approval. And we requested in April of last year a hearing that was set, initially, for August the 22nd, but two days before Bass filed for a stay pending review by the State Director, and the action

was stayed.

And in December the State Director reviewed, and the State Director upheld the district office of the BLM. But that approval noted that a hearing on this matter was pending here before you, something that Bass believes is of no consequence.

But now the State Director has acted, and now we're here seeking a setting, because we believe we are entitled to a hearing if our due-process rights are to be affected.

This action involves Constitutional protective rights in oil and gas interest, it involves correlative rights. And I think you need to know the magnitude of the issue before you.

In December of this year, Bass wrote Enron and demanded payment for 3.1 BCF of gas, approximately $6 million, and an additional $339,000 for condensate.

Shell's position is a little different than Enron's. They, in the past, owned interest, working interest, in the James Ranch Unit. But several years ago they sold the interest to Enron.

But because of the retroactive nature of these PA expansions, if they are upheld they will be required to pay approximately $2 million reimbursement for production properly allocated under the unit agreement as it then was,

years ago.

And it isn't just between the parties because, as Bass pointed out in the memo we received this morning, there are also questions concerning the impact this has on royalty that's previously been paid to the federal government, and I suspect perhaps to the State.

But I can tell you with the approval of the Oil Conservation Division there would have been no revision, that with no revision there would have been no demand for Bass. And what we are dealing with here is the impact on the property rights of Enron and Shell that spring from an action of the Oil Conservation Division.

The memo I received this morning from Bass does, however, put, I think, one issue at rest. They stated that this case involves correlative rights, your jurisdictional basis for acting. Maybe it's Bass's correlative rights, maybe it's Enron's, but we have agreed that a correlative-rights issue is presented to you here today.

Before you can act to affect those correlative rights, whoever may be coming out on the short end of this deal, we are entitled as owners of interest to due process.

Now, Mr. Stogner, this agency has been instructed by the Supreme Court on what that means in the *Uhden* decision. It isn't an abstract due-process case. It looks at an Oil Conservation Division Proceeding and it tells you

what you must do.

And when you look at the facts of this situation and you hold them up and you compare them to *Uhden*, clearly interest owners in the James Ranch Unit are entitled to all protections afforded by the New Mexico and the federal constitution. Clearly they are entitled to due process of law.

And what does that mean? They're entitled to notice, they're entitled to an opportunity to be heard, to present evidence. Today in their memo Bass says, Oh, presenting evidence may be the cross-examination. There's no benefit there. I believe the Supreme Court has found otherwise.

The due process also requires a hearing before an impartial hearing officer, something that Bass totally ignores in its memo. So let's look at these elements. Let's look at notice. Here, none was given.

Bass says, Oh, yes, we told them we were going to expand the PA. But I can tell you that there was never any evidence or information provided to Enron that would show they were going to pick an interest west of the unit, Section 35, that in this very room, under oath, they had told you was beyond the productive limit of the reservoir, that was fault-separated, and yet they're going to now contend that is being drained.

I can tell you that, in terms of notice, what they did not give us was any information at all concerning what they were up to until after decisions had been rendered by the appropriate agencies, and this is contrary to their prior conduct, and I think that it is also contrary to the unit agreement.

I've got a couple of pages, one from the unit agreement and the original order. The first page, Mr. Stogner, is a page from the unit agreement, and I'm looking at Article 25, Appearances.

And if you read that it says the "Unit Operator shall, after notice to other parties affected, have the right to appear for or on behalf of any and all interests affected hereby before the Department of the Interior, the Commissioner of Public Lands and the New Mexico Oil Conservation Commission..."

And then it wraps up by saying other interested parties -- in that case, Enron and Shell -- "shall also have the right at his own expense to be heard" at such proceedings.

We submit what they've done violates the unit contract.

But due process requires more, Mr. Stogner, than just notice. That notice must be given prior to the time the agency acts. We have to be able to be heard by you

before you decide. We have to be able to present evidence before you decide. We have to be able to cross-examine, whether it is of benefit or not, before you decide. And we have to be able to show you before you rule how we believe our correlative rights will be violated. And on that point alone, the proceedings approving the PA by the OCD must fail.

Furthermore, the hearing must be fair. Mr. Stogner, that means you cannot be predisposed against either party before you hear the case.

And what does that mean in this case? Well, I submit it means if after this agency has approved the PAs it has, you then tell Enron and Shell they must now prove that the revisions are wrong and that your action, that your approval, is wrong, that if you now put the burden on Enron and Shell to disprove what you have done, then you don't remain neutral but you stay predisposed against Enron and Shell, and that even if you get us a hearing, that hearing will still violate due process. You simply cannot let the prior OCD approval stand.

And when due process is an issue, as it is here, and you look at *Uhden*, you see what you must do is set aside the approval, set the Bass Applications for hearing. Let Bass come in and prove their case, let them show that drainage has occurred. Let them show that the PA should be

expanded because of this drainage and that you should set the clock back 14 years, and we will respond with our evidence.

And then if you believe they're right, you approve the PA, you have protected correlative rights, and you have afforded the parties due process of law.

And so we're before you today seeking a hearing. We want to come in and show you that Bass has violated the unit agreement which this agency approved. We want to show you they've breached their duties of utmost good faith to us. We want to show you that their presentation is technically wrong, inconsistent with what they've previously said to you, and that the result of it is impairment of correlative rights.

Now, why should you hear the case? Well, clearly it's within your statutory jurisdiction. You're given by statute the duty of protecting correlative rights. This is a specific role, it's imposed by statute.

But more than that, it was agreed to by the parties to the unit agreement. We all agreed that before PAs could be expanded, this agency would have to approve the recommended revision. And it is a role that was accepted by you.

The second document I have given you is a copy of the order approving this unit. And I would direct your

attention to Finding Number 3, and that finding provides, and I will read it:

> "That the James Ranch Unit agreement plan shall be, and hereby is, approved in principle as a proper conservation measure; provided, however, that notwithstanding any of the provisions contained in said unit agreement this approval shall not be considered as waiving or relinquishing in any manner any right, duties or obligations which are now, or may hereafter, be vested in the New Mexico Oil Conservation Commission by law relative to the supervision and control of operations for exploration and development of any lands committed to said James Ranch" unit, "or relative to the production of oil or gas therefrom."

I cannot remember ever seeing a statement where an agency more clearly asserted its continuing jurisdiction.

And by asking you to assert that continuing jurisdiction and to hear this matter, we're not asking you to engage in a meaningless act. We're not suggesting, as Bass is, that this is a federal matter or a contract question and you should stay out, because, Mr. Stogner, you

are the only one charged with protecting individual rights.

The BLM in its jurisdiction, it looks after the public interest. The State Land Office is trustee for certain beneficiary institutions, and their review simply will not suffice. It is not a substitute for a review by this agency, charged by statute with protecting individual rights.

Correlative rights defined as the opportunity to produce, and it is extended to the owner of each property in the pool, to assure that they are able to produce without waste their just and equitable share.

And so what this means is that when parties believe their correlative rights are being impaired by the -- because of the way a unit is operated, they come here. And you have a significant role, and Bass agrees you have a significant role.

In the memo they filed this morning, they admit that the Division has a significant voice in the creation and the revision of PAs, and they cite Article 11 of the unit agreement.

And the BLM recognizes you have a significant role, for in their approval letter dated March 4, 1996, approving the expansion, and again in their letter in response to the protest lodged by Enron, they state, This approval is conditioned on concurrent approval from the New

Mexico Oil Conservation Division.

So we're here asking you to exercise your continuing jurisdiction. The Legislature has directed you to protect correlative rights, the Supreme Court has told us that you will afford us due process while you carry out your statutory duty. You told us in the approval order that you would exercise continuing supervision over the way this unit is operated.

And today we ask you to do what you said you would do: Set this matter for hearing, supervise the operations and determine if correlative rights are impaired. And it's important for you to do this, because I can tell you, as sure as I'm sitting here, if you do not clarify what is expected of operators in this situation, either in the context of additional PA expansions in this unit or in other units, these same questions will be brought back before you.

Now, what are Shell and Enron asking you to do?

First of all, I need to tell you that I do not believe, and Shell and Enron do not believe that you erred with your initial approval, because we believe you had a right to rely on Bass bringing something to you that at least, if it didn't have the concurrence of the other working interest owners, they knew about it and could have expressed an objection. And when they did not, we think

you did what was logical; you approved it.

But now we know they didn't do that, and so we have to ask you to start over and set aside that approval. We ask you to level the field, to now let Bass come in with their prior approval set aside and prove their case, let us respond, and then you can decide.

Mr. Stogner, in the memo we received today from Bass, they pointed out that the boundaries of the PAs are not set by the agencies but they're set pursuant to the unit agreement, and we agree with that.

And so what this means is, you're not asked to redraw the boundaries; you're simply asked to look at what is presented to you, and if it protects correlative rights you say yes, and if it does not you say no and you return it. And this is a proper role for you, an agency with engineers and geologists who can look at the data and evaluate it based on their expertise and knowledge.

And Mr. Stogner, you can determine if nonproductive lands are being included in the unit, you can determine if drainage has occurred from lands within or without the existing PA that require adjustments in that boundary. You can determine if correlative rights are being protected by the proposed revision. And if you conclude they are not, you just say no and you return it to Bass with instructions to do it right.

Now, Mr. Stogner, you're going to hear in a few minutes a lot of "why nots" from Bass. Oh, this is a federal unit, this is a matter of contract. I urge you not to be confused by all of this, because what they're trying to do is cause you to lose sight of the one issue that is before you today, and that issue is Enron and Shell's Constitutional right to due process, our right to a hearing, a hearing before an impartial Hearing Examiner before an action is taken by this agency which affects our rights.

That's the only issue before you. It's about as simple and about as fundamental as the law gets. Are we entitled to a hearing? The courts in *Uhden* told us we are. You told us you were going to continue to supervise this unit.

And now we're simply asking you to do what we submit you're required to do, set aside prior approvals, give us a hearing, afford us due process and protect our correlative rights.

EXAMINER STOGNER: Thank you, Mr. Carr.

You mentioned today's memo.

MR. CARR: Yes.

EXAMINER STOGNER: I do not know what you're talking about.

MR. CARR: This morning -- and it may not be a

today's memo for you -- I received a copy of a memorandum from Bass. I have had an opportunity to review it.

EXAMINER STOGNER: Does it show that it was cc'd to us?

MR. CARR: I don't know.

MR. LOSEE: You have -- The original was sent to you last week.

MR. CARROLL: Okay, by letter dated February 11th?

MR. LOSEE: Yes, that's correct.

EXAMINER STOGNER: Okay, and that's the one you were referring to?

MR. CARR: And that was -- And I got it today. I've had time to review it; there is no problem.

EXAMINER STOGNER: Okay, sorry if I confused -- I do have it in front of me.

MR. CARR: And that's -- That's what I was referring to.

EXAMINER STOGNER: Okay.

(Off the record)

MR. LOSEE: Give me just a couple of minutes on some factual matters.

(Off the record)

MR. LOSEE: Thank you for allowing me the time.

To the extent my argument doesn't address the

issues raised by Mr. Carr, I want to address them at this point.

I think the *Uhden* decision is clearly distinguishable. It was a hearing -- force pooling hearing before this Commission, and they moved to increase the spacing unit. Mr. Carr is well aware of the decision because I believe he represented one of the parties.

And it was an adjudicatory hearing, which is different than the question before the Division at this time. As we'll address later on, it's our position that it's the responsibility of the unit operator to propose the revisions in participating areas, submit the technical data to the three oversight agencies for their approval. If they all approve it, then it becomes a revised participating area. It does not require a hearing as such and as urged by Mr. Carr on behalf of Enron.

That decision, as he points out clearly, talks solely about protected property rights, which we don't have any problem with. An oil and gas right is a property right in New Mexico. But the hearing involved there was an adjudicatory hearing involving an increase in the spacing unit, force pooling. And that's clearly distinguishable from a request for a revision in the PA system, as I'll point out later.

As far as the reference to what the State Land

Office did with respect to a hearing of three or four years ago, the State Land Office and, as a matter of fact, the other requesting PAs of 640 rather 320, Bass presented these to all parties, presented these to the three oversight committees, oversight agencies, and each of them rejected the request for 320 and submitted it for 640.

MR. McCREIGHT: No, just the opposite.

MR. LOSEE: Just the opposite. But it was returned to Bass and it was resubmitted, but the copies were not furnished Enron in that case.

We'll address -- I'll address later in my response this hearing question which I think is truly the question before the Examiner.

I think the real question in their motion to rescind and for a hearing, and in our motion to dismiss, is formed in their response. Paragraph 3, page 3 of their response, and I quote, the BLM procedures did not protect Enron's due process rights.

Interpreting that response in the simplest terms, we did not win before the BLM, and we would like another opportunity before the OCD.

Now, this -- As Mr. Carr pointed out, the James Ranch Unit was approved in 1953; 90 percent of the lands, approximately, are federal lands and 10 percent are state lands.

The unit agreement is on a form provided for and specified in the federal regulations. It's a contract between private parties, the oil and gas interest owners, working interest owners, with oversight by the three governmental agencies, the BLM, the Oil Conservation Division and the State Land Office.

Enron argues that the unit agreement requires a formal due-process hearing before the BLM, which it did not receive. And it also argues that it's entitled to a formal due-process hearing before this OCD.

We suspect that if the OCD grants Enron's request and holds a hearing, and if they lose before the OCD, they may well go to the State Land Office and also request a hearing.

In the litigation arena, this is called forum shopping or searching for a court that will agree with your position.

To interpret the unit agreement to permit separate hearings before each of the three oversight regulators is preposterous. Federal courts have appellate jurisdiction over the BLM in the IBLA decisions. State courts have appellate jurisdiction over the Oil Conservation Division and State Land Office decisions.

Different results by these agencies or by the BLM and the OCD could subject the parties to penalties and

interest for improper payment of royalties, overriding royalties, and working interest.

Our computerized review of the IBLA decisions for cases involving PAs, initial PAs, and revisions thereof, failed to reveal any reference to any separate hearings before the state agencies. Nor did we find any cases in the federal oil and gas lease -- in the large federal oil and gas lease states such as Wyoming, Utah, Colorado, New Mexico, arising in hearings before separate state and federal regulatory agencies.

We know of no incident where the OCD held a hearing on an initial participating hearing or revision of a participating area. There is no precedent for such a hearing.

Bass proceeded with its application for the third and fourth revisions of the James Ranch Unit participating area in exactly the same manner as it and other operators in New Mexico have done for 40-plus hears. Bass followed the same procedure it has done as operator of three federal units, having 33 separate participating areas. Bass relied on this administrative procedure in the James Ranch revisions three and four.

In recent years, the OCD has been attempting to administratively handle more matters, thereby reducing the hearing case workload. And an OCD hearing in this case

will signal a change of that policy. Hereafter, any party dissatisfied with the initial participating area or any revision thereof will request a hearing before the OCD.

Now, Enron claims that it was denied due process in the BLM's approval proceedings. The claim is based on the erroneous assertions that first it did not receive notice of the applications, didn't know of them, prior to the approval of the three agencies. And second, it did not get an opportunity to present its technical evidence in opposition to the revisions.

Bass attended a meeting on November 2, 1995, almost a year and a half ago, at the BLM office in Roswell, on revisions to the PA unit agreement. Enron left some maps with the BLM. That fact is reflected in Mr. Ferguson's letter, I believe, of March the 4th.

The BLM required Bass in its March 4 letter to give notice to Enron, and Bass gave the notice of the Application.

On April the 16th, the BLM requested the State Land Office -- which at that time, April 16, 1996, the State Land Office had not approved the expansions -- they asked them to withhold approval, suspend proceedings until Enron made a presentation of its technical data.

On June 16th, last, Enron presented its technical evidence to the BLM in Santa Fe. We understand that the

State Land Office and OCD were invited to attend that presentation. We also understand that the State Land Office had a representative present.

After such presentation, the second for Enron, I might point out, the BLM affirmed its prior approval, and the State Land Office finally gave its approval to the third and fourth revisions.

Enron then requested State Director's review, and that review was held on October the 28th, 1996. Enron presented its technical evidence to the BLM in Santa Fe. We understand it took nearly a day. The BLM State Director affirmed the prior approval of the Roswell office to the BLM.

Enron cannot with a straight face claim that it did not have notice of the Bass application after presenting its evidence on three occasions to the BLM, two prior to the time all three agencies had consented or approved the revisions.

Enron asserts that the BLM procedure does not satisfy due process, and therefore the OCD should give Enron a hearing.

Before the OCD affords a hearing based on this assertion, the OCD must first determine that this contract, the unit agreement between private parties, somehow requires a hearing before the regulatory agent before it

approves any participating area revisions and, secondly, that due process was in effect denied in the BLM procedure.

All of these matters are matters of contract interpretation and, we do not believe, are properly subject to the decision-making process of the OCD.

Enron is attempting to create a right of hearing when one does not exist, nor has it ever previously existed. Enron claims that the approval by the Division of a proposed participating area requires notice to it and hearing. This is simply not correct. The Division has the right of affirmation or denial.

Let me read from paragraph 11 of the unit agreement, found on page 11. This is the first phrase. Upon completion of a well capable of -- This is entitled "Participation after discovery". Upon completion of a well capable of producing unitized substances in paying quantities, or as soon thereafter as required by the supervisor or the Commission, the unit operator shall submit for approval by the Director, the Commissioner and the Commission, a schedule showing all unitized land then regarded as reasonably proved to be productive of unitized substances in paying quantities.

What that clearly says in the English language is that it's the responsibility of the unit operator, and the unit operator alone, to submit proposed revisions of unit

areas, as well as the initial.

Neither the BLM nor the Division have the right to promulgate revised participating areas or to amend proposals which are submitted by the operator under the unit agreement. Neither the unit agreement nor the regulations of the BLM or the OCD, nor the long-established policies, allow or provide for hearings before the Division on participating areas of federal exploratory units.

A review of the decisions of various state jurisdictions finds no cases holding that revisions of participating areas in a federal unit require or even allow hearings before the state agency administering oil and gas conservation matters.

Enron spends a great deal of time setting out the procedures which should be afforded. However, Enron ignores the fact that the James Ranch Unit agreement is a contract between private parties. The actions performed by Bass as unit operator were pursuant to the contract between the parties. There's no due-process right owed between parties to a contract unless the contract so specifically provides.

Enron's rights under this contract were set forth upon its execution many years ago. They should not be allowed to attempt to rewrite the contract at this late date.

Whether or not Enron was denied due process by the BLM is not a proper matter for the OCD to determine. It is clearly outside of your statutorily limited jurisdiction. Whether it is a right created by the contract is a decision for the IBLA and the federal courts.

Now, Enron argues that the OCD is the only agency charged with protecting correlative rights, that the BLM is only interested in protecting -- and I quote -- the public interest. Therefore, they follow, an OCD hearing is necessary to guard Enron's correlative rights against injury.

This argument is a red herring. The parties were concerned about the correlative rights 40-plus years ago, when they entered into the James Ranch Unit.

Paragraph 11 of the agreement expressly provides the manner in which correlative rights are protected. And I quote from page 11, it's that opening phrase of the second paragraph at the bottom: It is the intent of this section that a participating area shall represent the area known or reasonably estimated to be productive in paying quantities.

And then following, over on paragraph 12 on page 12, it simply says, All unitized substances from each participating area shall be deemed to be produced equally on an acreage basis from the several tracts of the unitized

land. Correlative rights under the unit agreement are protected by the requirement that the PAs shall include all lands capable of producing unitized substances in paying quantities and the allocation of production from the PA, based on a surface-acre basis.

The three oversight agencies are bound by this methodology in interpreting and protecting correlative rights. In the beginning, all parties agreed upon this method of protection when they signed the agreement. The three agencies also agreed upon this method when they approved the agreement. Notwithstanding any statute or regulation, the agencies must use this standard in determining the correlative rights of all parties. Neither the BLM nor OCD can rewrite the contract without the consent of all the private parties.

Now, Enron has gone to great efforts to paint this dispute as a justified effort to protect its correlative rights, which Enron claims have been unjustifiably impaired by the revisions. They're partially correct as to the focus of this dispute. It does, indeed, involve the impairment of correlative rights. However, the correlative rights which have been impaired are those of Bass. The revisions correct the impairment of Bass's correlative rights which has existed for over 20 years.

The first well in the James Ranch Unit, Atoka

participating area, was the James Ranch Unit Number 1 well, drilled in Section 36 in the late 1950s. The initial Atoka participating area for this well was 320 acres. As of late 1996, this well had produced more than 25 billion cubic feet of gas. Engineering and geological data indicate that the greatest quantity of gas which could have underlain the original participating area for this well is 3.5 BCF of gas.

Enron has enjoyed the fruits of other owners' production without compensation to them for more than 20 years, since the date of the second revision. The revisions remedy this injustice and protect the correlative rights of all parties to the Atoka participating area, not just those of Enron. As Enron has often stated, it is the duty of the duty of the Division to protect correlative rights.

In conclusion, whether or not Enron received due process in the BLM procedure is not grounds for the Division holding a hearing. The Division is not the proper forum for such a determination. It will be decided by the IBLA where Enron's present appeal is pending and, if necessary, by the federal courts.

The BLM decisions reflect that it followed -- contracts were mandated, standard in protecting correlative rights of the parties. All tracts recently proven to have

oil and gas in paying quantities, including those which were drained by the 25-BCF James Ranch Number 1 well, were included in the revised participating area. Participation and production from these areas was contractually provided for on a surface-acre basis.

The OCD should avoid the pitfall of having two agencies decide -- oversight agencies, decide the same question. They should not ignore its 40-year-old precedent and start holding hearings on participating areas or revisions thereof.

The OCD decision should not be set aside, and they should not hold a hearing. Enron should be denied its forum-shopping, and Bass's motion to dismiss should be granted.

Thank you.

EXAMINER STOGNER: Thank you, Mr. Losee.

MR. CARR: Mr. Stogner, could I respond with a couple --

EXAMINER STOGNER: Mr. Carr?

MR. CARR: I think it needs to be clarified, first of all, that Enron and Shell are not before you today complaining about the lack of due process before the BLM. We're talking about the lack of due process here. And we submit that *Uhden* says you must afford us that.

Mr. Losee noted that I had a role in the *Uhden*

case. I lost that case. And *Uhden*, however, clearly applies to the facts here, and the Court notes in *Uhden* that due process applies because this was an adjudicatory, not a rule-making proceeding.

It then goes on and it tells you what they meant by an adjudicatory proceeding. It says, This order was not a general application but rather pertained to a limited area -- that's the first test -- the persons affected were limited in number and identifiable -- second test -- and the order had an immediate effect on *Uhden* -- third test.

Here, it's a limited area, the James Ranch Unit. You can identify the persons who are affected; they are in this room. And it has an immediate effect on Enron and Shell, or perhaps Bass. It falls squarely under *Uhden*.

Uhden is the controlling case, and it tells you what you must do. In that case they expanded a spacing unit and it diluted Mrs. Uhden's interest. Here they're expanding the PA, and we contend it is diluting our interest. It's as clear authority as there is.

I don't understand what Bass is so afraid of. If the data they have on the drainage, and if they can show the fault they've argued about before it disappeared, then they shouldn't be concerned about bringing that before you.

But they run in here and, Mr. Stogner, they say we're forum-shopping. That argument might apply if we had

ever had a forum where we were given notice before the agency acted, where we were given an opportunity to appear and to present evidence and to cross-examine, something we, unlike Bass, think is of some benefit.

But they sit here and they say, Oh, there's never been precedent for this, never done, suggest it's improper. Well, we have appealed to the IBLA. Yesterday I got a decision where the administrative law judge isn't going to rule right now on our request for a stay. And one of the things they noted was, there's an appeal pending here. If it's so odd, it's odd also that the administrative law judge referenced this without noting that.

But this is not the precedent-setting matter that Mr. Losee would have you believe. Yes, you can always draw your questions so narrowly that anything is a precedent-setting matter. But 40 years ago, Mr. Stogner, we signed a unit agreement, and now the issue is, are they following the provisions of that agreement in good faith and in a way that protects correlative rights?

The issue is the conduct of Bass. The issue is, are they acting in good faith, are they carrying out the duties as we had a right to expect them to do it?

And the precedent is Bravo Dome, where you called Amoco back at least four times, made Amoco give notice, and made them come in here to show not only was the agreement

fair, but were they operating under that agreement in a fashion that on a continuing basis would protect correlative rights? That, in fact, is the precedent for this action.

But the only precedent you may set here is by refusing to hear it and giving a green light to an operator, telling them that once we approve it, go for broke, we're not going to look at it again. And we think if you do that, you are breaching your duty and you are violating what you said you would in terms of supervising this unit when you initially approved it.

Bass says, Oh, yes, we've got conflicting problems, gosh, it's going to be terrible. Somebody may say we pay royalty, somebody else may say we don't. Had they given notice to us, I submit, they would be in this problem.

I will tell you right now, they're complaining about a problem they've created, for we have talked to the State Land Office about holding at a state level the royalty issue, and we have gone to the BLM and we have asked them to stay until this is resolved. But Bass opposes the stay. They'd rather have the problem and come here and complain to you.

They say, Oh, yes, Enron -- They had notice. Back in November of 1995, yes, there were meetings, they

talked about revisions. They did not tell anyone they were going to include acreage that they had previously in this room told you was beyond the limits of the reservoir and that they were going to go in and contend it was now being drained.

And then they say, Well, we gave them notice on March the 4th. That's after the BLM had ruled, that is after you had ruled. And I submit to you that is not sufficient notice.

They talk about other agency proceedings. I suggest if you read the Santa Fe Exploration decision you'll find that once you approve a unit, you can't pass responsibility for supervision to the operator, nor can you pass it to another agency. And we simply are asking you to do what I believe you have agreed to do and what the Supreme Court has told you to do.

In the memo I received this morning, Bass stated there is no due process right owed between parties to a contract unless a contract so specifically requires. And then they suggest that there is no requirement here.

I will tell you that you do not perform contracts in a vacuum, that when they stand before you here and point to a contract between private parties and say, It doesn't say we have a right to a hearing or due-process rights, they're ignoring the fact that the contract requires

approval of this agency before a PA can be expanded.

And the law within which that plays out requires that before you do something that affects our property rights, we have notice and an opportunity to be heard. And I submit to you that this contract must be played out in the framework of the Constitution and relevant law and applicable law, and we have a right to due process or right to a hearing.

And if you'll look at the provision I quoted you a while ago from Section 25 of the unit agreement where it first says you get notice before they come in and then in the last sentence it says we have a right to a hearing, I don't know how it sounds to you, but it sounds like due process to me.

The brief that they filed then goes on and says Enron's rights under this contract were set upon its execution many years ago. We agreed, and so were Bass's obligations to us.

They then go on to say, Enron should not be allowed to attempt to rewrite the contract at this late date, and we agree with that. And we say Bass should not be allowed at this late date to ignore the contract.

And then right before their conclusion they come in and they make an interesting statement. They say to us and to you, for this is who this is directed to, It should

be noted that the applications were not arbitrarily drawn to the benefit or detriment of any leasehold operator.

If you read that statement and compare it to the last sentence of the first paragraph of their introduction, they say, The revisions correct the impairment of Bass's correlative rights which has existed for over 20 years.

I submit to you when you read those together, it is fairly clear that they were drawn to benefit Bass, to correct their perceived correlative-rights problems.

And then they go on and they say right before their conclusion in the memo, The boundaries of the third and fourth revisions were drawn after an exhaustive study of geological and engineering data for the Atoka participating area.

Well, maybe they were, and maybe they weren't. But we can't tell, we don't know, because we have not been allowed to even look at the data. They've insisted they be kept confidential. We do know that what they're presenting is inconsistent with what they told you under oath two years ago, that what they're adding is beyond what they said were the productive limits of the reservoir, that what they are adding is beyond and away on the other side of a fault, and they now contend that's being drained. But they kept the data confidential.

And we submit to you, Mr. Stogner, that since we

have a correlative-rights issue, the correlative-rights issue is better decided by you following a full hearing, that it should not be decided by Bass's counsel in this memo, it should not be decided by me.

It should be decided by you after a full hearing. And in doing that, our correlative rights, whoever's rights may be impaired, can be protected, and we will have a decision based on a record, evidence and a Constitutionally sufficient hearing, and not based on words emanating from the lips of counsel, not based on *ex parte* communications with employees of the BLM.

EXAMINER STOGNER: Thank you, Mr. Carr.

Mr. Losee?

MR. LOSEE: I'll just address two or three things that Mr. Carr raised at the end.

He pointed out that Bass opposed the stay before the IBLA, and that's because the MMS is pretty obvious. MMS is requiring payment of royalty based on the revisions of the participating area. And Bass is in the awkward position of now determining whether to comply with the MMS or suffer penalties and interest.

Yes, we oppose the stay, and for that reason.

And we'll be in a bigger dilemma if we have a hearing before the OCD and the OCD for some reason should disagree with the opinion of the BLM on the data submitted,

and we'll have two separate hearings. That's something we would like to avoid, and I'm satisfied it was not in the contemplation of the drafters of this unit agreement, nor has it ever been determined in the 40-plus years of unit agreement application in New Mexico.

Now, Enron can complain that they have not been treated fairly. But I submit to you, the manner in which the revisions were submitted to the BLM and the other three agencies is exactly the same that they've done in their 33 other participating areas, and it's exactly the same, to my knowledge, that other operators in New Mexico have done for 40-plus years.

They're following exactly the same procedures and -- everyone's followed, and whether or not we're going to start a course of action, if one party to a unit agreement is dissatisfied with a determination by the BLM that it's a predominantly federal unit and he goes to the OCD and asks for a hearing, we're going to be in for a long period of confusion, where the parties do not know their rights under the -- that.

Enron has a perfect way of raising their questions of due process before the Interior Board of Land Appeals and before the federal courts and to see if the evidence sustains the determination by the BLM.

As a matter of fact, the BLM points out in its

decision that the data submitted by both Enron and Bass, Which Enron claims it hasn't seen, are substantially the same as the reservoir calculations, and it is the interpretation of this data that Enron and Bass disagree, and that the BLM confirms that it agrees with Bass's interpretation.

Thank you.

(Off the record)

EXAMINER STOGNER: Mr. Losee, I have a question.

MR. LOSEE: Okay.

EXAMINER STOGNER: On the February 8th document that was approved by the Division, if the Division at that time would have not approved it, what would have been Bass's course of action?

MR. LOSEE: If they submitted the data and Bass turned the data down, we might not have had a revised participating area. I think it requires approval of all three agencies.

EXAMINER STOGNER: So Bass would have dropped it at that time?

MR. LOSEE: I cannot respond to that because that's --

MR. McCREIGHT: May I can respond. I'm Frank McCreight here on behalf of Bass.

I think we would have gone back and tried to find

out why it was -- what the problem with the submittal was, had there not been concurrent approval.

And, you know, we did that once, as a matter of fact, in this proceeding. We went before the BLM once with a proposal that Enron objected to, and they sent us back to the drawing board.

EXAMINER STOGNER: Okay, but I'm talking about the approval down here at the bottom.

MR. McCREIGHT: Yes, sir, I understand.

EXAMINER STOGNER: So I'm gathering from what your answer would have been, then, you would have sought reasons why, regardless if it would have been further administrative action or the Division would have set it to hearing?

MR. McCREIGHT: Well, I think my understanding of that would have been that the BLM wouldn't have approved it either, had there not been all three parties approve the -- I mean, historically, we haven't gotten approval back from all three agencies until they all three have communicated amongst themselves and decided they're going to approve this.

And had the BLM told us that, well, the OCD has a problem with this application, we would have said, Okay, where do we go from here, what do we need to do?

EXAMINER STOGNER: Mr. Losee, anything further?

MR. LOSEE: No, I think that's correct. If there's not an approval, then we have to go back and see what will satisfy all three agencies. And because it is a federal unit and 90-percent of the land is federal, you go back and start with the feds and let them make the submissions, or you make them, to the OCD and the State Land Office.

MR. McCREIGHT: Whether -- My understanding is that we submit it through the BLM, is the proper procedure, and with copies to the other two agencies. And then once we've gotten indication that it's concurrently been approved and that we know from communications with the BLM historically that they communicate with the other agencies as well -- But there would not have been approval without all three agencies approving it. We didn't have final approval until the Land Office and the BLM approved it.

MR. LOSEE: The Land Office waited until after the June hearing --

MR. McCREIGHT: Yeah.

MR. LOSEE: -- when they sent a representative there.

MR. McCREIGHT: And we have no choice but to assume that if there was a problem, that's where the problem lay. So that's -- And that was actually the purpose of the June hearing, to give all parties another

chance to reconsider the application, which is what we did, and that's when Enron put on their technical data.

MR. CARROLL: So you would have asked the OCD to either reconsider or set it for hearing so you could present your --

MR. McCREIGHT: No, I wouldn't have come for a hearing at all, no, sir. We would have gone to the BLM and asked them what was the problem, could they give us some guidance as to why it wasn't approved, and what could we do to get it approved?

That's what we've done on numerous occasions in the past.

MR. CARROLL: And in almost all situations, the OCD would approve an application like this without any conflicting evidence to the contrary. In this situation, the OCD had evidence to the contrary because apparently the parties weren't notified that this was being submitted to the OCD; is that correct?

MR. McCREIGHT: No, sir, I don't think so. I'm sorry, could you clarify the question?

MR. CARROLL: The OCD, when it only hears one side of the story, is inclined to approve an application. If parties that would object weren't receive notice of that application and we don't get the other side of the story, like I said at the beginning, we're inclined to approve the

application.

MR. McCREIGHT: I have no argument with that, but I have to assume that you all -- The OCD was aware of the June hearing, obviously, and had another opportunity to reconsider the technical data being presented, and I assume since you all again didn't object or didn't become involved in that hearing that, you know, there wasn't a problem with the application.

We went back -- We agreed to the June hearing at the request of the BLM. We said, Fine, let's have another technical hearing.

MR. CARROLL: Mr. Losee, you mentioned that there's never been a hearing on a revised PA in the history of the OCD?

MR. LOSEE: Not within my knowledge and not within the knowledge of --

MR. CARROLL: Have you been aware of any requests for a hearing on a revised PA?

MR. LOSEE: No, I have not. But I can't tell you that there have or haven't been any requests. All I'm saying is, I have no knowledge of any hearings on PAs, original PAs, or requests for revisions. I can't tell you whether anybody requested them.

I can suggest to you that the procedure that the operators have followed over the years has simply been to

submit them, and if one of the agencies disagreed they would try to determine -- was not willing to approve it, they would try to determine what the agency disliked or disapproved and see if they could revise the presentation to all three agencies again.

There just -- There haven't been any hearings, and --

MR. McCREIGHT: But that is, in fact, exactly the case that Mr. Carr made reference to, where we were involved in a separate matter, submitted it, the agencies -- in that particular case both the OCD and the BLM informed Bass that they didn't approve -- were not going to approve our submittal. So we went back to the drawing board and revised it and went back, and it was concurrently approved by all three agencies.

MR. CARROLL: Now, was that due to any objector or protester providing conflicting evidence?

MR. McCREIGHT: I know in that particular case Enron was not in agreement with our presentation. But we did not have an exchange of data. There was never a hearing contemplated. We submitted a plan, they submitted a plan.

The BLM and I presume the OCD as well both made their own separate determinations that they didn't like our plan. They said go back to the drawing board and resubmit

it, and that's what we did.

I can't speak for what prompted it, but it might very well come about as the result of a protest but --

EXAMINER STOGNER: What is the status of the federal approval at this time? Has it been approved?

MR. LOSEE: Federal approval is on appeal. They've approved the revisions. The State Director has approved it. In December Mr. Carr -- correct me on my dates -- filed a notice of appeal and statement of reasons. Just recently, he filed a supplement statement and requested permission to file another one in March --

EXAMINER STOGNER: And that has been granted?

MR. LOSEE: -- and supplemental -- filed a supplemental statement of reasons.

MR. CARR: And we have requested a stay --

MR. LOSEE: And they've requested a stay --

MR. CARR: -- and that's under consideration.

MR. LOSEE: -- and Bass has objected, for the reasons I mentioned.

MR. McCREIGHT: It's been approved on the local and through the State Director level.

MR. LOSEE: Yes.

MR. McCREIGHT: Okay, and it is pending appeal at the IBLA level.

EXAMINER STOGNER: And how about the process with

the State Land Office?

MR. McCREIGHT: It is approved, and I presume -- Is there a separate procedure there or not?

MR. CARR: No.

MR. LOSEE: Well, they haven't -- If there is any, I don't know of any.

MR. McCREIGHT: I presume they're going to look to the IBLA matter.

MR. LOSEE: The State Land Office approved it after hearing the presentation of technical data in June.

MR. CARROLL: Mr. Carr, can you give us a little more information on the Case 11,019?

MR. CARR: And which is that?

MR. CARROLL: That's the case he referred to where Bass presented testimony or evidence that was in conflict with the evidence presented here.

MR. CARR: I can tell you that in that case a structure or isopach map was presented -- I was not a party to that case -- and that the structure map or the isopach, which I can produce, shows that on the eastern edge of the unit the contours stop and on the Bass exhibit it says, "end of productive reservoir".

And acreage that is now being included extends substantially west of the end of the productive reservoir.

MR. CARROLL: And what was the date of that

testimony?

MR. CARR: Well, it was approximately two years ago. And those exhibits should be in your file. And it's the Bass isopach that has labeled toward the top of a long, long map, "end of productive reservoir".

And what is now being included in the PA is acreage that they believe is being drained, or contend is being drained, is acreage beyond that and also beyond the fault that can be established with seismic data.

EXAMINER STOGNER: What was the call of that case? Do you remember?

MR. CARR: Mr. Stogner, I don't -- I did not bring that with me, but I could provide the whole thing.

MR. CARROLL: And was that testimony presented to the State Land Office and the BLM?

MR. CARR: No, it was presented to the Oil Conservation Division. It was an OCD hearing.

MR. CARROLL: I mean, was the conflicting evidence presented in that case presented to the State Land Office and the BLM --

MR. CARR: We have no idea. We've asked, and we have no idea, because Bass has refused to let us see what they presented to the BLM. We don't know.

MR. CARROLL: But the State Land Office and the BLM was aware of the conflicting testimony in this case --

MR. CARR: I have no idea, because we have not been allowed to see what they've presented, Mr. Carroll?

MR. CARROLL: Did Enron present that evidence to the --

MR. CARR: Yes, we did, we certainly did.

MR. CARROLL: How did Enron finally receive notice of the OCD approval --

MR. CARR: There was a telephone conversation between a landman at Enron and a BLM employee, and he was advised that it had been approved, and it was at that time that he contacted me and we discovered that the OCD had already approved it. That was March the 10th, something like that, last year, and it was a day or two later that we filed a written protest and requested the hearing.

MR. CARROLL: And when did Enron receive the notice that was required by the BLM?

MR. CARR: The BLM in April agreed -- and the State Director has since differed with this -- but agreed that notice was required under Section 25. And so Bass said, Okay, here's your notice, and sent us notice. But this was after the approvals of two of the three agencies had been obtained.

MR. CARROLL: Mr. Carr, are you aware of any hearings on revised PAs in the OCD history?

MR. CARR: I'm never aware of anyone having been

in this situation requesting one.

EXAMINER STOGNER: Mr. Carr, I have a question for you. The unit agreement, Section 11 --

MR. CARR: Yes, sir.

EXAMINER STOGNER: -- page 12, about midway down, it talks about whenever it is determined, subject to the approval of the Supervisor -- and that refers to the Supervisor of the United States agency -- as well as on federal lands, the Commissioner -- in this case, the Commissioner of Public Lands as to wells on state land -- and the Commission as to wells on private owned lands, that a well drilled under this agreement is not capable of production in paying quantities and inclusion of the land of which it is situated and participating areas unwarranted -- how does that fall in this argument today, this --

MR. CARR: Well, it talks about individual agencies and their individual areas of responsibility.

But I think you can't look just at this. You must look at Article 11 where you're given a significant role in the expansion of PAs.

You have to look at Section 25 where notice is required, and you also have to recognize that since you must approve a PA expansion before it can become effective, that those operators who have committed their interest to a

unit where you're going to exercise -- continuing to exercise your jurisdiction, they have a right to assume that you will do so and that in doing so you will protect correlative rights and do the exercise of that authority according to law, which requires that we have due process, which in turn requires a hearing.

MR. CARROLL: And Mr. Losee, did I understand you correctly that if a contract doesn't provide a right to a hearing, a party doesn't have a right to a hearing before the OCD? The OCD is bound by a contract entered into by the parties?

MR. LOSEE: It's bound -- it consented to the contract entered into with the parties. And as a result, as far as whether or not it is or isn't entitled to -- a party entitled to a hearing is dependent upon the terms of the contract.

MR. CARROLL: Didn't -- Mrs. Uhden signed a lease; she didn't get a right to a hearing under that lease agreement, but the Supreme Court still gave Mrs. Uhden a right to a hearing before the OCD.

MR. LOSEE: Well, the distinction between that case and this case is that the express rules of the Commission provide for a hearing in Mr. Carr's *Uhden* case. The express rules of the Commission, or the contract, do not provide for a hearing when the Commission is solely

called upon to consent, to approve or disapprove. They can't rewrite the unit operator's proposal for a participating area.

If they disapprove, then the unit operator has to look at his proposal, see what would satisfy, whether it would be the OCD, the BLM or the State Land Office.

MR. CARROLL: You're aware that --

MR. LOSEE: Until all three of them agree, there can't be a revision. No question about that

MR. CARROLL: Well, you're aware that if the OCD heard the case it would just be a thumbs-up or a thumbs-down. We wouldn't be drawing the line of a participating area.

MR. LOSEE: Well, I think that's -- Well, I don't know what the OCD would be doing. They've not had a hearing, Mr. Carroll, in 40-plus years on the participating areas. And I extend to you that the reason they haven't is because no one has thought it made any sense to have two regulatory agencies, or maybe three, all have separate hearings to determine whether or not a PA should be approved.

The idea behind this federal unit agreement, which has been in existence for 40-plus years, is, the operator has the responsibility of gathering their data and submitting a proposal for revision of the participating

areas.

MR. CARROLL: Are you aware of the BLM having any problem with the OCD holding a hearing?

MR. LOSEE: I haven't asked the BLM one single thing. All I'm simply saying is that if the OCD held a hearing and arrived at a different conclusion, with the MMS asking for royalty based upon the third and fourth revisions, what position is the unit operator going to be in? Or, for that matter, any working interest owner who has obligations to its override owners?

There's been an order, there's been a third and fourth revision of the James Ranch participating area, approved by all three governmental oversight agencies. There's no stay of the order, there's no stay of the BLM order. They are required by law to compensate for royalty and over ride.

As a matter of fact, if you will look back there at the paragraph, the working interest owners can do what they want to, but --

MR. CARROLL: Well, Mr. Losee, it appears to me an accounting mess any way we go. I mean whether you ask royalty owners for refunds or whether you're asking Enron for refunds, there's going to be a recalculation of who gets what.

MR. LOSEE: Well, the distinction is that,

dealing with the federal government, they have penalties they enforce, and it's no excuse that you're holding a hearing before the OCD or that the OCD has arrived at a different conclusion. MMS is still going to seek the penalties for failure to pay.

MR. CARROLL: You know, I called the BLM and they agree it's a three-headed monster, but they agree that all three agencies, you know, have a say in it, and if any agency decides to disapprove then it's disapproved.

MR. LOSEE: I don't disagree with that at all. I've been trying to say that, Mr. Carroll, all along.

MR. CARROLL: But the hearings have been held regarding the State Land Office and BLM decisions, but the OCD hasn't held a hearing. So why shouldn't the OCD also hold a hearing, since the other two agencies held a hearing regarding their earlier decision?

MR. LOSEE: Mr. Carroll, I don't believe the State Land Office has held a hearing. I believe the State Land Office attended the technical presentation of evidence by Enron before the BLM in Santa Fe on June the 19th, or some day in June, and also on October the 28th. They did not hold a separate hearing. They simply attended the hearing where Enron -- and at the same time, separate time, Bass presented its technical evidence.

MR. CARROLL: Uh-huh.

MR. LOSEE: And as I understand, and I obviously can't tell that, Mr. Ferguson with the BLM advised that he had notified the OCD that they were going to have this hearing.

The BLM stopped the process when they got Enron's protest. And the way they stopped it, they had already approved it, as had the OCD. They wrote and told the State Land Office to suspend their procedures until Enron had a chance to present its technical evidence, which was done in June.

And after that technical evidence was presented -- and as I understand, the OCD was given an opportunity to be present, but I can't agree or -- you know, that's completely hearsay with me here. But after that hearing, the State Land Office approved the revisions. And what the BLM did was simply affirm their prior approval.

MR. CARROLL: I guess, getting back to Mr. Stogner's question, Mr. Carr, on that section in -- that paragraph in Section 11 --

MR. CARR: Uh-huh.

MR. CARROLL: -- where it seems, you know, the OCD approved this agreement and it seemed that we'd defer our determination as to wells on federal land to the BLM and defer to the State Land Commissioner on wells on state land, what's there left for the OCD to look at then?

There's no wells on private land.

MR. CARR: I don't think that's the issue. I mean, I think you have a definite role if there is a tract, a fee tract, and a well on it. But there never was.

And you approved this because of your jurisdictional mandate to protect the rights of all interest owners, and it's a unique jurisdictional basis. And you agreed in your order to continue to supervise.

And if I'm Bass or Enron or a predecessor, or just Bill Carr, and I have a unit agreement that says you're going to continue to supervise this to assure me that correlative rights are protected, whether the well is on fee land and if there are no fee tracts and I just have interest in state tracts, it still is a situation where I have an extra level of protection, and it's part of the agreement that I would want.

And I think you need to keep in mind here that the right to the hearing in these cases doesn't spring from OCD rules under *Uhden*; it springs from the nature of the property interest. And the property interest is an oil and gas interest that's Constitutionally protected.

That doesn't say from a state tract or a federal tract; it says an oil and gas interest. And a contract that -- Maybe we shouldn't have had three agencies involved, but we do. And each one must approve.

And your role isn't meaningless. The BLM doesn't think so. No one does. Don't just -- You're not just to be cast aside, because you have specific duties, and whether it's a state tract or a federal tract or a fee tract, I have an oil and gas interest and I have correlative rights, and the contract which we entered and which you approve says you'll protect those things.

EXAMINER STOGNER: I thought this was 100-percent federal land?

MR. CARR: No, state. And in fact, even --

MR. CARROLL: This is a hypothetical.

EXAMINER STOGNER: I'm talking -- I'm being hypothetical at this point.

MR. CARR: All right.

EXAMINER STOGNER: If it was 100-percent federal land involved?

MR. CARR: I don't believe you'd be involved.

EXAMINER STOGNER: How about if one party perceived a correlative-rights violation somewhere?

MR. CARR: I don't -- I think the distinction is, federal units that are all federal don't come here, I don't believe.

EXAMINER STOGNER: But is it the federal's mandate to protect correlative rights? Is there anything in --

MR. CARR: They protect the public interest.

EXAMINER STOGNER: Does that include correlative rights?

MR. CARR: I think that they're different, because public interest is one thing; correlative rights is defined as the interest of each individual property owner. We can speculate on what another agreement might provide, but we're talking about what the James Ranch Unit does provide, what was approved by you and what you agreed to do and what the Supreme Court has said, when you commit these, you're required to do.

MR. CARROLL: Mr. Losee, did I hear you right, you don't think this case is adjudicatory in nature?

MR. LOSEE: Not at this stage in the proceeding, no.

MR. CARROLL: And why is that?

MR. LOSEE: Simply because it's -- The agencies are oversight agencies. They merely approve or disapprove. There is no procedure set up for adjudication. There has been no adjudication over all these years. I'm basing it on precedent as much as anything else, Mr. Carroll.

But it is clearly designed that you're not going to have separate hearings of all three oversight agencies. That just -- you know --

MR. CARROLL: Where is that set forth, that

there's no hearing?

MR. LOSEE: Well, I don't think it's set forth, but it doesn't make any sense to do so, because then you have three separate proceedings going up. It wastes administrative time, it wastes -- it's an expensive procedure, and it would create chaos.

MR. CARROLL: Hence the term three-headed monster.

MR. LOSEE: Well, you're correct, that's a good definition.

But you can't let forum shopping go along. We're dealing with a case in which the three agencies were asked to consent, and after some presentation by Enron, objecting to it, Bass's, they have consented.

If they had not consented, then Enron -- Bass would have gone back to the BLM -- as a matter of fact, the OCD that they've requested and the State Land Office, and with a different proposal, or at least to try to find out what didn't satisfy the agency or agencies that didn't approve, just like they did in the example Mr. Carr gave with the 320 acres or the 640.

EXAMINER STOGNER: Mr. Losee --

MR. LOSEE: Yes.

EXAMINER STOGNER: -- are you saying that we do or we do not have jurisdiction in this matter?

MR. LOSEE: Well, my statement about jurisdiction was to determine whether due process was granted by the BLM.

I think you do not have jurisdiction to make that determination. I don't think it's within the statutory mandate of the OCD to determine whether a federal agency did or did not --

MR. CARROLL: We're not going to determine whether the procedures followed by the feds followed due process.

MR. LOSEE: Okay.

MR. CARROLL: We're going to determine whether due process is followed before the OCD.

MR. LOSEE: Well, I guess really the question, are you going to say that you haven't followed due process for 40 years and that your precedent is wrong?

MR. CARROLL: Follow up with that. What do you mean by that?

MR. LOSEE: Well, I mean simply that Bass in this case did the same thing, Mr. Carroll, gave this presentation the same way that operators have done it for 40-plus years.

MR. CARROLL: If we've never had a request for a hearing in 40 years, how are we supposed to hold a hearing?

MR. LOSEE: Well, maybe there have been

disagreements, just like there was a disagreement in the Enron case that Mr. Carr raised. And that got solved. There wasn't any request for a hearing, the parties -- Somebody just said there was some disagreement. And the oversight agencies agreed, agreed, as a matter of fact, with Enron's position, and Bass went back and redrew its proposal.

But they didn't have a hearing to arrive at that conclusion. That was a resubmission before any approval had been...

In this case, the IBLA and the federal courts are the watchdog. This appeal has reached Washington. They've got all three regulatory agencies' oversight approving it, and they're going to make these determinations, whether the data submitted supported the methodology of correlative rights set forth in this private contract, and in all other federal units, I might add; the standard is exactly the same.

EXAMINER STOGNER: Do you know if back when Case Number 472 was heard in 1953, whether the matter of the Conservation Commission at that time's jurisdiction was in question?

MR. LOSEE: I don't even know what case 472 was, Mr. --

EXAMINER STOGNER: Okay, Case Number 472 in which

Order Number R-279 authorized the James Ranch Unit agreement by the New Mexico Oil Conservation Commission --

MR. LOSEE: Sure I'm aware of that case, sure. I'm aware of the decision. They approved the unit.

EXAMINER STOGNER: And one of the findings in there -- and this is a finding -- that the Commission, now henceforth known as Division, has jurisdiction over this case and the subject matter thereof.

MR. LOSEE: I don't think there's any question you've got oversight jurisdiction. But as far -- That jurisdiction is limited to compliance with the terms of the private contract between parties, which I don't think the agencies are authorized to do or should rewrite.

MR. CARROLL: But isn't the OCD supposed to approve any revised participating areas?

MR. LOSEE: Oh, no. No, I'm not saying -- The OCD, if they didn't like the data that was submitted, they should have expressed that opinion at the time. They could have gone to the -- Enron's presentation and see if they agreed with that in June. They could also have gone to that presentation in October.

MR. CARROLL: But Mr. Losee, the approval that was granted on February 22nd was after just listening to one side of the story.

I mean, if two little boys are having a fight and

I just hear one side of the story, I'm going to agree with him. If I hear both sides of the fight, argument, then I might decide differently. And in this case, the February 22nd approval was after just listening to one side.

MR. LOSEE: Well, I do not know what presentation was made to the Division. I'm satisfied what you're saying is correct. The same presentation -- The same submittal was made to the State Land Office, and the OCD could have simply said, Well, we'll wait till it's approved by the BLM, and we'll -- and the State Land Office.

And then if it developed there was a question, the same presentation that was made by Enron in the June hearing, and OCD could have made the determination of whether they should approve it or not.

MR. McCREIGHT: I have a theoretical question, for whatever it's worth.

If the policy is that we should entertain hearings, I mean, is that the new adopted procedure, that we should concurrently submit -- The unit operator is charged by the operating agreement to submit the data to the BLM and the accompanying agencies. Should we just automatically docket a hearing? Because I mean, think that's where we're headed, if that's what we're going to do.

MR. CARROLL: Well, it seems to me it could have

been cured in this instance by notice. And if you didn't get notice -- I mean, if you didn't get an objection in response to your notice, then there would be no hearing, you wouldn't have to docket it for a hearing.

MR. McCREIGHT: The notice issue is a matter of some debate. As a matter of fact, the BLM has informed us that the only notice that was required was to simply inform them that a PA application had been filed, which they were already aware of.

But they asked us as a matter of record to resubmit a letter of notice, which we did to basically accommodate all parties involved that, okay, fine, here's your formal letter that says an application has been filed.

MR. CARROLL: Well, getting back to the *Uhden* case, if Amoco would have approached the OCD and asked the OCD what notice was required, we would have said you don't have to notify Mrs. Uhden.

MR. LOSEE: I don't think that's the *Uhden* case, is it? Yeah, I guess it is. Mr. Bruce is still here.

(Off the record)

MR. McCREIGHT: I guess what I was saying, Mr. Carroll, is, the State Director tells us that no notice is required. So we're --

MR. CARROLL: State Director of the BLM.

MR. McCREIGHT: Yeah. So we're in a little bit

of a quandary --

MR. CARROLL: For BLM purposes?

MR. McCREIGHT: I guess that's correct. We're a little bit at a loss as to how to proceed, though, I guess is what I'm trying to say. We're bound by the agreement in one respect.

MR. CARROLL: Well, were you aware that Enron would object to it if they did receive notice?

MR. McCREIGHT: Not necessarily, no. I mean, we were already in a debate about the pending formation of a PA in the Atoka, so I knew we were going to be at odds, they knew we were going to be at odds.

MR. CARROLL: But you didn't send them a copy of the applications?

MR. McCREIGHT: No, because we weren't required to do so. The State Director has told us that, so...

Our intention was to simply follow the rules as best we could, and then the State Director's opinion, he says that -- He says, and I quote, Bass is not required by the unit agreement to notify interested parties in fulfilling their obligation to revise participating areas.

I don't know -- We don't know what else to do but to try to --

MR. CARROLL: But you're telling me you were in negotiations with Enron regarding this revised

participating area --

MR. McCREIGHT: No, there was no negotiation.

MR. CARROLL: But you were --

MR. McCREIGHT: The factual background, Enron -- A well was drilled, Enron wrote us a letter and informed us that they intended to -- or they were anticipating an expansion of the PA that would include this new well, which happened to be a Bass-operated well.

We submitted a PA around that single individual well. We didn't feel like Enron should have participation in that well. It was four miles from the existing PA boundary. In other words, the original PA was four miles removed from the location of this well.

We submitted a PA around that individual well, which was rejected by the BLM, and they sent us back to the drawing board and said, No, there's going to be a larger PA created. And that's where we proceeded on into the situation that got us here today.

So yes, I was aware there was a difference of opinion about what the PAs were going to look like, but our intent was to simply follow the letter of the law with what we thought was the unit agreement and the proper procedure. And we were counseled along the way by the BLM and obviously assumed we were doing things right by all parties' rules when we got the concurrent approval of the

OCD and ultimately the Land Office.

MR. CARROLL: Well, apart from the strict letter of the law, as a matter of courtesy, you didn't provide any notice.

MR. McCREIGHT: Yes, we did. When the BLM came back and asked us to provide them notice, that's exactly what we did.

MR. CARR: And that was months after the approval had been obtained.

EXAMINER STOGNER: I think it was in March.

MR. McCREIGHT: One month, actually.

MR. CARR: One -- After the approval had been obtained.

MR. LOSEE: But the State Land Office --

MR. McCREIGHT: Not the State Land approval, not the State Land approval. And four months prior to the technical hearing in June.

MR. LOSEE: If the OCD at that time had said, Well, gee, we've got a protest here, we might just hear what's going to happen -- The BLM was saying, We're going to let Enron have its day, Land Office, you wait.

MR. McCREIGHT: I'd like to point out that we certainly didn't get any notice of Enron's appearances before the BLM when they pitched their original ideas about what the PA should look like either, and that's reflected

in the correspondence and the records that go back with the BLM and that went into the original decision.

So I mean, it is a three-headed monster, there's no doubt about it.

EXAMINER STOGNER: Okay. After hearing all this, I'm going to grant the motion to dismiss the approval of the BLM -- I mean, I'm sorry -- yes, of the OCD approval on February 11th -- Okay, I'm sorry, grant the motion to rescind that order, so that order is now rescinded, and to continue this process at a Division Examiner's hearing at this time scheduled before me on October -- I'm sorry, April -- March 6th, March 6th. I believe that's right.

With that, then, this prehearing --

MR. LOSEE: I have a problem with the March 6th order -- March 6th date. I'm not going to be in the office for the month of March. Mr. Carroll is tied up with the IBLA. There may be a week in which he isn't tied up, because -- I don't know whether they're still going to -- Ernest, are they still going to alternate weeks?

MR. ERNEST CARROLL: We're going to alternate weeks, but the week I have in March has already probably been -- and I've got so many courts after my hide right now.

I think the only way I -- The first available time would probably be in the month of April, before I

would be able -- one, also preparation times. The case that I'm in is drawing to a close and is going to take a lot of my time.

MR. CARR: Mr. Stogner, as long as the order is rescinded, we can accommodate the Losee firm schedule. I mean, we would prefer --

EXAMINER STOGNER: Okay, with that --

MR. CARR: -- we would prefer to be heard in March, but we're not trying to create a problem in Bass having the counsel they desire.

EXAMINER STOGNER: Okay. With that, then, I want to have Mr. Carr and Mr. Losee tell us what date is appropriate.

MR. CARR: Yes, sir.

EXAMINER STOGNER: You can even work with me on a special date; I'm amenable to that.

MR. CARR: Thank you.

EXAMINER STOGNER: April is pretty well tied up for me also. So we'll work together on that.

With that, this hearing is adjourned.

(Thereupon, these proceedings were concluded at 4:52 p.m.)

I do hereby certify that the foregoing is a complete record of the proceedings in the Examiner hearing of Case No. 11602 and 11603 heard by me on 12-26, 1997.

Examiner
Oil Conservation Division

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 Division 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 February 22nd, 1997.

STEVEN T. BRENNER
CCR No. 7

My commission expires: October 14, 1998