

**NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES**

**NEVADA ENVIRONMENTAL COMMISSION**

**HEARING ARCHIVE**

**FOR THE HEARING OF April 3, 1995**

**HELD AT: Reno, Nevada**

**TYPE OF HEARING:**

**REGULATORY**

**YES APPEAL REHEARING (Santa Fe Pipeline Partners)**

**FIELD TRIP**

**ENFORCEMENT**

**VARIANCE**

**RECORDS CONTAINED IN THIS FILE INCLUDE:**

**YES AGENDA**

**PUBLIC NOTICE**

**YES DELIBERATION TRANSCRIPT OF THE HEARING**

**LISTING OF EXHIBITS**

# A G E N D A

## NEVADA STATE ENVIRONMENTAL COMMISSION PUBLIC HEARING

As provided by Nevada Revised Statutes (NRS) Chapter 233B and Nevada Administrative code (NAC) inclusive, a panel of the Nevada State Environmental Commission will consider a petition for rehearing on **Monday, April 3, 1995** beginning **2:30 p.m.** at the Division of Wildlife, Conference Room A, located at 1100 Valley Road, Reno, Nevada.

The agenda has been posted at the Division of Wildlife and the Washoe County Library in Reno, Nevada and Division of Environmental Protection Office in Las Vegas, Nevada, and Division of Environmental Protection Office in Carson City, Nevada.

The following item will be discussed and acted upon.

### **I. Petition for Rehearing - \* Action**

- A. Consider the petition of Santa Fe Pacific Pipeline Partners, Ltd., 888 South Figueroa St., Los Angeles, CA 90017; Unocal Corporation, Union Oil Center, Los Angeles, CA, 90017; Southern Pacific Transportation Company, One Market Plaza, San Francisco, CA, 94105; Shell Oil Company, P.O. Box 4848, Anaheim, CA, 92803; Berry-Hinkley Terminal Inc., 147 South Stanford Way, Sparks, NV, 89431; Texaco Refining and Marketing Inc., 10 Universal City Plaza, Universal City, CA, 91608; Time Oil Company, P.O. Box 24447, Seattle, WA, 98124; and Chevron U.S.A. Inc., 575 Market St., San Francisco, CA, 94105 for rehearing regarding the decision of the State Environmental Commission issued on March 3, 1995 regarding NPDES permit No. NV0020893 (Helms Pit Dewatering).

The Environmental Commission panel will consider whether to approve the petition for reconsideration and rehearing, pursuant to Nevada Revised Statutes 233B.130 (4).

The hearing scheduled for Monday April 3, 1995 may be continued to a later date to be determined by the Commission.

The petition for rehearing is available at the State Environmental Commission's offices located at 333 W. Nye Ln, Room 128, Carson City, Nevada, 89710 for inspection and copying by members of the public during business hours (8:00 am to 5:00 pm). A reasonable fee maybe charged for copying.

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify the Executive Secretary in writing, Nevada State Environmental Commission, 333 West Nye Lane, Room 128, Carson City, Nevada, 89710, facsimile (702) 687-5856, or by calling (702) 687-4670 extension 3118 no later than 5:00 p.m., March 29, 1995.

HEARING  
PETITION FOR RECONSIDERATION AND REHEARING  
OF THE STATE OF NEVADA ENVIRONMENTAL COMMISSION'S  
DECISION IN THE MATTER OF THE  
APPEAL OF NPDES PERMIT NO. NV0020893

DIVISION OF WILDLIFE CONFERENCE ROOM - RENO, NEVADA  
APRIL 3, 1995

APPELLANTS:

Santa Fe Pacific Pipeline Partners, Ltd.	Unocal Corporation
Southern Pacific Transportation Company	Shell Oil Company
Berry-Hinckley Terminal, Inc.	Texaco Refining and Marketing, Inc.
Time Oil Company	Chevron U.S.A. Inc.

STATE ENVIRONMENTAL COMMISSION PANEL:

Russell Fields, Chairman  
R. Michael Turnipseed  
Fred Gifford

Jean Mischel, Deputy Attorney General  
David Cowperthwaite, Executive Secretary  
LuElla Rogers, Recording Secretary

DELIBERATION OF PANEL

Chairman Fields:

At this point I would like the panelist to discuss the issue that is before us, that is the Petition for Reconsideration and Rehearing. We will feel free to talk amongst ourselves and also with Counsel for the DEP and for the petitioners. We had a hearing on March 3 that developed a record, I don't know if you guys have had a chance to go through the packets for this meeting in detail, reading the transcript, etc., and I have. I, for one, am comfortable that the transcript do match the Findings of Fact, the Conclusions of Law. I, for one, believe that the issue, as to whether the water that is currently in the Helms Pit, the water that is groundwater coming from up-gradient, can be argued a number of different ways, but we had very clear evidence in the record saying that that was a different body of water than the Truckee River.

Commissioner Turnipseed:

Mr. Chairman, with your indulgence, I would like to go through the Findings of Fact that Ms. Mischel thought were at issue or subject to appeal and include the one that Mr. Zeppetello added,

also, the Conclusions of Law and go through them one-by-one and state, for this record, why we did what we did.

Starting with Finding of Fact # 12 where Mr. Ball testified that "some attenuation of nitrogen, phosphorous and total dissolved solids would occur within the Helms pit diversion of the ground water through dilution and uptake by plants coming into contact with the pollutants but predicted that the pollutants would reach the Truckee River in the "same order of magnitude" over a much longer period of time without the diversion."

Let me first begin by saying that I assume the legislature set the make-up of this Commission with technical people that understand what an order of magnitude is, and that could mean anywhere from the 9 times less to 9 times more, it would still be in the same order of magnitude and it is just inconceivable to me that the EPA or the Federal Congress, when it drafted the Code of Federal Regulations would allow pollutants up to 9 times more without a discharge permit. I think that Finding of Fact 12 is good, it reiterates what Mr. Ball's testimony was, whether the transcript is wrong or not does not really matter to me because we made our decision on what he actually said and not what the transcriber put in the transcript.

As far as Finding of Fact # 13, it states that "Without the ground water diversion through the Helms pit area, the ground water would eventually flow through a non-point source to the Truckee River."

I think that is a factual statement. I have some familiarity with this area before the pit existed and it is described on the Plain Table Survey Maps that were done in mapping the Truckee River and all of the water rights down the Truckee River and this area was called a Tule Swamp and I think there would have been a fair amount of up-take of nitrogen and phosphorus by those plants in the Tule Swamp before the pit was ever created. Therefore, I think that the creation of the pit and the ground water that seeps into the pit and the discharge of those waters into the waters of the United States does constitute pollutant loading.

Finding of Fact added by Mr. Zeppetello was # 15. "The Ground water source up-gradient water to the Helms Pit is not the "waters of the United States" and is not subject to regulation until it becomes a point source in Nevada."

I think that is a factual statement, that is true. We have lots and lots of mines, as the Chairman knows, that are dewatering in this State, at least 10 of them in the Humboldt drainage that are either presently below the water table or planning to go below the water table and we have always considered that ground water. We have thermal waters, we have selenium in the water, we have arsenic in the waters and they all are regulated by NPDES permits at the

point of discharge.

Finding of Fact # 17: According to appellant's expert witness the "ground water flow was historically slow in the area of the Helms pit were it not for the diversion and was quantified at feet per year.

The Helms pit increased the gradient and therefore increased the ground water flow for a number of miles surrounding the pit."

I think that correctly characterizes Mr. Ball's testimony and I believe it is a factually correct statement.

On the Conclusions:

Since the Commission is made up of technical people and not lawyers, I agree with Mr. Hanson in that we are more capable of interpreting factual data than we are interpreting case law but non-the-less, the cases that were presented to us in the hearing in March dealt with hydropower dams where they had incoming waters, they flowed into a lake created by a dam and then they were discharged out of a conduit through a hydro-power plant, and those are clearly distinguishable to me from this case, where we have a man-made pit and the water comes in the pit walls, accumulates in the bottom of the pit, and then they are pumped to the Peoples Drain.

Conclusions of Law # 2: "Appellants have similarly failed to demonstrate that the background levels of nitrogen, phosphorous and TDS would be the same if they had not reached the Truckee River without the Helms pit diversion and point source discharge."

I believe that is a correct statement, the way that I interpret the evidence that was before us on March 3, and the testimony that was taken on March 3.

Conclusion of Law # 3: "The intake water is not drawn from the same body of water into which the discharge is made."

I think that is factually correct. I will leave it whether it is legally correct up to the lawyers.

Conclusion of Law # 4: "There is substantial evidence in the record that the background levels of nitrogen, phosphorus and TDS would not be the same and that the loading of pollutants would be lessened without the Helms pit diversion and the point source discharge".

I believe that is a correct statement the way I remember the testimony of March 3.

Conclusion of Law # 5: "The discharge of pollutants occurs not at the point at which a pollutant enters the water but at the point at which it is discharged through a point source to the waters of the United States".

There again, I believe that correctly articulates the situation we have here, where there are some constituents in the water, in the ground water as it flows through the Truckee Meadows, and they become a pollutant at the point at which you discharge them into

the Peoples Drain which is a tributary of the Truckee River and I agree with you that we have heard nothing new today that could not have been presented at the hearing on March 3. Those are my views on the Petition for Reconsideration. I have, by the way, read the petition, read the transcript and read the affidavit of Mr. Ball.

Chairman Fields: Thank you, Mr. Turnipseed.

Counsel Jean Mischel: Mr. Chairman, for the record, the hearing took place on February 8 and the findings were issued on March 3.

Commissioner Turnipseed: I am sorry, my mistake.

Chairman Fields: That should be the Findings of March 3 and the hearing of February 8.

Kent Hanson: If I could for the record, as well, I believe Mr. Turnipseed, you were running rather fast through Conclusion of Law # 2, I believe you inserted a "not" at one point that did not belong there so for the record lets go through that: "Appellants have similarly failed to demonstrate that the background levels of nitrogen, phosphorous and TDS would be the same if they had reached the Truckee River without the Helms pit diversion and point source discharge." I think I read that correctly, is that what you understand the record to be?

Commissioner Turnipseed: That is correct.

Commissioner Gifford: Mr. Chairman, if you will bear with me, I felt like this was important enough that I needed to try to articulate the position of the appellants and also my position and I wrote those thoughts down and if you will bear with me I would just like to wade through them for the record here. The position of the appellants, and let me go through that, the appellants in this case argue that the surface waters in the bottom of the Helms pit are waters of the United States under the Clean Water Act, and I have got citations here from their petition but I won't give those. They also argue that because of the up-gradient ground water is hydrologically connected to the Truckee River as well as to the surface waters in the Helms pit, such ground water may also be waters of the United States. They state that the Commission's current holding appears to be based largely on its findings that the ground water up-gradient to the Helms pit is not waters of the United States. Based on EPA and Army Corps of Engineers definitions of waters of the United States, and what the appellants believe to be appropriate governing case law, they argue that surface waters that collect in the bottom of the Helms pit, as a result of the de-watering activities, fall within the regulatory definition of waters of the United States because the use, degradation or destruction of such waters affects interstate commerce. They state that the waters of the Truckee River are waters of the United States used in inter-state commerce including irrigation of crops and other purposes. Since the Helms pit discharge flows to and affects the Truckee River by Peoples Drain

Ditch the use or degradation of the surface waters that collect in the Helms pit also affect interstate commerce. Therefore, it is argued, the surface waters that collect in the Helms pit are waters of the United States. The appellants further state that the hydrologic connection of surface waters in the bottom of the Helms pit with the up-gradient ground water and especially the Truckee River, establishes that surface waters that collect in the bottom of the Helms pit are waters of the United States and consequently the pollutants occurring in such waters are not subject to NPDES permit requirements. They are saying, further, because of these hydrologic connections, and the fact that degradation of the up-gradient ground water has an impact on the water quality in the Truckee River the up-gradient tributary ground water may constitute waters of the United States under the Clean Water Act. It is stated that there is no question that if de-watering of the Helms Pit were terminated the up-gradient tributary ground water would return to a natural hydraulic gradient and flow directly to the Truckee River. And again, because the pollutants found in the up-gradient ground water has, or will have, an impact on the Truckee River the up-gradient tributary ground water may be classified as waters of the United States. Other statements that argue that the decision mis-interprets portions of the testimony of the petitioner's expert witness and that is what I feel like their position is and I reviewed everything in the packet several times and the position that I have come down to is that I still do not agree that up-gradient ground water and surface waters in the Helms pit are waters of the United States. I do not disagree with the conceptual model that up-gradient water, degraded or not, normally might contribute, to some extent, to the flow of the Truckee River. Some of that ground water flow, because of the hydraulic gradient established the presence of the Helms pit, now flows to the Helms pit. If the Helms pit were not pumped it would gradually fill to the point that the hydraulic gradient would be reversed back towards the Truckee River and Helms pit would simply assume the role of a lake, the level of which would closely approximate nearby ground water levels. It is also evident that water from the lake would not flow as surface water to the Truckee River, that it would simply be a system allowing seepage out of the lake, on the down-gradient side or sides, while seepage entered the system on the up-gradient side. Though the up-gradient ground water, including any lake that might be formed, may contain nitrogen, phosphorus and total dissolved solids, the exact source of those pollutants is cause for speculation and at this point simply contribute in some un-known way to the quality characteristics of the Truckee River as a diffuse source. Other sources contributing to the quality characteristics include natural rainfall, natural flow

from Lake Tahoe, flow from reservoirs and diffuse ground water flow at numerous locations along the river.

The current situation is one requiring de-watering of the Helms pit because of the presence of a variety of hydro-carbons in association with the ground water table. The pit creates a favorable ground water gradient and intercepts the contaminated ground water, ground water that also contains nitrogen, phosphorus and total dissolved solids. That water is eventually harvested and pumped to the Truckee River, the Peoples Drain Ditch. At this point it becomes a point source and is subject to permitting. The discharge becomes a known product, both in quantity and quality, and it has a direct impact on waters of the United States. In the case of the nitrogen, phosphorous and total dissolved solids there is no evidence of a point-source discharge of these pollutants to the ground water that eventually flows towards the Truckee River which is the argument, to the extent that I can decipher it, is the argument used by the appellants for regulation of the ground water under the Clean Water Act. This is simply a case of intercepting some of the local ground water that may, or may not, end up in the Truckee River and discharging that water then, is a point source directly into the Truckee River by the Peoples Drain Ditch. Therefore, what I have come down to, is that the permit standards do apply and I would concur with what Mike has said and what you've said.

Chairman Fields:

O.K. Thank you, Dr. Gifford.

The basis for our decision today, whether to reconsider and rehear this matter are, as our Counsel has advised us, mis-apprehension of law for facts or new evidence, substantive evidence, that has come to light that for some reason, and some good reason, wasn't offered at the hearing on February 8. Is that -

Counsel Jean Mischel:

Yes, those are guidelines.

Chairman Fields:

Those are the guidelines that we need to stay within. As both Mr. Turnipseed and Dr. Gifford have outlined, as I understand it, and my own feelings after going through this in some pretty high degree of detail, I don't think that I have, at least, misapprehended the facts that were presented to us. The Conclusions of Law that are listed in the Findings of Fact and Conclusions of Law are indeed consistent with the testimony and the evidence that we had in the record developed on February 8. The only other question that I think I would like to talk a little bit more with my fellow panelists is, have you heard anything today that would suggest that there is new evidence that should be further heard in a hearing so that we can base a decision on even more evidence than we have already received?

Commissioner Gifford:

I haven't.

Commissioner Turnipseed:

No, I haven't either. And furthermore, I guess I need to ask our



counsel, but the reviewing court is reviewing everything that we heard and reviewing the decision and is there a standard there, is it the same as in my process, if there is substantial evidence in the record to draw the conclusions that we did, then the decision is affirmed.

Counsel Jean Mischel: Right, and there are other grounds for over-turning, including errors of law, arbitrary and capricious decision making.

Commissioner Turnipseed: Well I don't think we were arbitrary and I don't think we were capricious and I think there was evidence in the record that support the decision and I don't feel like we need to supplement the record in order for the decision to be affirmed. Both sides gave it their best shot and we drew the conclusions out of what we heard and I don't think there is any reason to re-hear it.

Chairman Fields: There is one other matter that has been brought up. If there is a need for any corrections to the transcript, we should get those presented to the Commission so that those may be corrected and I think the kinds of things we are talking about, for example, in George Ball's testimony, in the transcript, I think the word "attenuation" was not used and the word "continuation" was used, on page 48 of the transcript.

Marc Zeppetello: That is one of the corrections.

Chairman Fields: And as I read that, with my knowledge of the hearing and the knowledge of the language as it was being applied here, I knew that was to be attenuation but I suppose that is the kind of thing that should be corrected for the record.

Counsel Jean Mischel: What line is that?

Chairman Fields: That would be just below the middle of the page, George Ball says "I believe there would be little, if any, continuation of the nitrogen and phosphorus". That is an example of the kind of thing that perhaps we would be looking at. And finally, I conclude from your comments, Mr. Turnipseed, that you see no need to enter the declaration from Mr. George Ball that was submitted with the petition into the record?

Commissioner Turnipseed: No, I don't think we need to supplement the record with the affidavit.

Chairman Fields: O.K. - may I have a motion.

Commissioner Turnipseed: I move that the petition be denied.

Commissioner Gifford: Second.

Chairman Fields: Any further discussion? All those in favor?

Commissioner Turnipseed: Aye.

Commissioner Gifford: Aye.

Chairman Fields: Aye.

Petition is denied. Thank you very much.

Kent Hanson: I would like to request some clarification of what the record consists of at this point in time. There has been essentially a brief filed along with a

Motion for Reconsideration and Rehearing. Attached to that, a Declaration of George Ball. In anticipation that in fact the petitioner's are likely to be taking this case up on judicial review, are those items considered to be a part of the record of the original case or are they separate?

Counsel Jean Mischel: The petition itself would become part of the record. And this transcript of this reconsideration motion would be part of the record, but the declaration, because it contains additional evidence, was not admitted, that would not be part of the record, that would be stricken from the petition for the purposes of transmitting the record to the court and the rest of the record, would include of course, the transcript from the February 8 hearing, any briefs that were filed before that hearing, all of the agendas and notices and all of the exhibits that were entered on the 8th.

Kent Hanson: I have a concern that the petition and the brief attached to the petition quote from Mr. Ball's declaration and rely upon statements in that declaration in making the arguments that they do and so I would move that all of those issues be stricken from the record as well.

Chris Wicker: Could I perhaps address that?

Counsel Jean Mischel: Sure.

Chris Wicker: Normally, well not with the Environmental Commission, but normally, something like this, a proffer of proof, would go up and it would be clear that this is not part of the evidence that the Commission relied on and was never admitted but it would still go up as a proffer of proof by the appellants as what they wanted to add to the motion for re-consideration. It would clearly not be part of the evidence relied upon by the Commission and would not be considered by the reviewing court as evidence, but normally I think it would be part of the record that goes up to the reviewing court.

Nicholas Frey: May I add something else?

I have handled probably 70 or 80 appeals over the years and that has always been the case when there is a proffer of proof in this manner, whether it has been made before an administrative agency or court. I don't think there would be any confusion for the next court to understand the fact, as Mr. Wicker just said, that this is simply evidence proffered and rejected by the Commission.

Chairman Fields: I think for the Commission's purposes this is becoming a pretty legal argument which we understand we are -

Kent Hanson: With that on the record, I would withdraw my motion.

Chairman Fields: O.K. The only point I was going to make is that our decision was based on the information that was presented to us in the first hearing, we did not consider the new evidence. Thank you very much.

Marc Zeppetello: I would like to thank the Commission, on behalf of all the petitioners, for considering the Petition for Reconsideration.

Chairman Fields: Thank you, Mr. Zeppetello.

We stand adjourned.