

Appeal from a decision by the Montana State Director, Bureau of Land Management, affirming approval of the Antelope East and Bakken Unit agreements and the establishment of participating areas within each unit. NDM 68633X and NDM 68713X.

Affirmed as modified.

1. Oil and Gas Leases: Unit and Cooperative Agreements

A unit agreement is a contract between the United States and participating parties for joint development and operation of an oil and gas field where substantial amounts of public lands are involved. The owners of any right, title, or interest in the oil and gas deposits to be unitized are regarded, under 43 CFR 3181.3, as proper parties to a proposed agreement and, as such, they must be invited to join the agreement.

2. Oil and Gas Leases: Unit and Cooperative Agreements

Where the unit operator is the lessee of private mineral interests under a lease containing a unitization clause, which allows the lessee at its sole discretion to commit the mineral interest to the unit, the lessee may commit both the mineral working interest and the mineral royalty interest of that lease to the unit.

3. Oil and Gas Leases: Unit and Cooperative Agreements—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Timely Filing

For purposes of 43 CFR 3165.3, receipt by the unit operator, or its agent, of notice by BLM approving a unit or approving a participating area constitutes constructive service on all parties who have joined the unit and BLM has no obligation independently to notify any working interest or royalty interest owner. Any request for review of such an approval is untimely if it is not filed within 20 business days of the date the approval was received by the unit operator, or its agent.

4. Oil and Gas Leases: Unit and Cooperative Agreements–Rules of Practice: Appeals: Dismissal–Rules of Practice: Appeals: Timely Filing

Where a royalty interest owner has not joined a unit, BLM is not required to notify such an owner of unit or participating area approval. Such a royalty interest owner is not adversely affected by those BLM actions and, thus, has no right to administrative review thereof.

5. Res Judicata–Rules of Practice: Appeals: Effect of

Under the doctrine of administrative finality, when a party has had an opportunity to obtain review within the Department and no appeal was taken, the decision may not be reconsidered in later proceedings, except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

Chevron U.S.A., Inc., 111 IBLA 96 (1989), overruled in part

APPEARANCES: Kathleen Key Imes, Esq., Williston, North Dakota, Ronald H. McLean, Esq., Fargo, North Dakota, for appellants; John W. Morrison, Esq., Bismarck, North Dakota, for Edwin L. Cox and Berry R. Cox; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

#### OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Orvin Froholm, et al. <sup>1/</sup> (Froholms) have appealed from a February 5, 1993, decision by the Montana State Director, Bureau of Land Management (BLM), affirming approval of the Antelope East and Bakken Unit agreements and the establishment of participating areas within those units. The Antelope East and Bakken Unit agreements, embracing lands in McKenzie County, North Dakota, were approved by BLM on June 25, 1985, and January 29, 1986, respectively.

In 1984, the Froholms owned oil and gas interests in various lands in McKenzie County, North Dakota, which they leased to a company, which thereafter assigned them to Edwin L. Cox and Berry R. Cox (hereinafter referred to collectively as Cox). The Froholms retained fractional royalty interests in those leases.

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<sup>1/</sup> The other appellants are Evelyn Froholm, Carl O. Froholm, A. Caroline Cook, Patrick Cook, Doris J. Bickel, Carl G. Bickel, Gordon Erstad, Janet Lee Schreiner, James Westdal, and Marilyn Jean Yantorno.

On April 18, 1985, Cox filed with BLM an application for designation of a proposed unit area, the Antelope East Unit. On May 23, 1985, BLM designated the lands as a logical unit area. BLM approved Cox's June 4, 1985, application for approval of the unit effective June 25, 1985. On January 21, 1986, BLM designated land proposed by Cox as a logical unit area for the Bakken Unit. On January 27, 1986, Cox filed an application for approval of the unit and BLM approved it effective January 29, 1986.

Following unitization, Cox drilled a unit well on each of the units and applied to BLM for designation of initial participating areas. BLM approved the participating area for the Antelope East Unit on April 4, 1986, effective December 19, 1985, and the participating area for the Bakken Unit on May 7, 1986, effective March 28, 1986.

In November 1986, the Froholms commenced two lawsuits against Cox in state court, alleging, *inter alia*, that Cox had obtained the leases with unitization clauses allowing the formation of the units through fraud; that any unitization authority that Cox may have obtained was not exercised in good faith; and that there was insufficient geological justification for the formation of the units. Following removal to Federal court based upon diversity of citizenship, the U.S. District Court for the District of North Dakota, on March 1, 1988, granted partial summary judgment in favor of Cox finding that the fact that the units were formed contrary to the Froholms' wishes was immaterial because the leases were valid and the unitization clauses in the leases were binding on the Froholms. It further found that good faith on the part of Cox was irrelevant and that the only issue was whether the geological data justified the units.

Following partial summary judgment, the Froholms amended their complaints to allege that Cox had failed to give them notice of the proceedings before BLM. After a trial on the notice issue, the court reaffirmed its earlier summary judgment and dismissed the notice claims as not ripe for judicial review. Froholm v. Cox, Nos. A4-86-225 and A4-86-226 (D. N.D. Jan. 29, 1990).

Essentially, the court in Froholm v. Cox, 934 F.2d 959 (8th Cir. 1991), affirmed these results when it held that Cox did not conceal the fact that the leases contained unitization clauses and that the proper inquiry was not Cox's subjective good faith in unitizing, but whether the geological data justified unitization. The court further stated that although the district court had framed its decision on the notice issue in terms of ripeness, it actually decided the case on the basis of a failure to exhaust administrative remedies. It agreed that there had been a failure to exhaust.

In 1992, the Froholms commenced a new action in the U.S. District Court for the District of North Dakota, naming BLM as a defendant in addition to Cox. Froholm v. Cox and BLM, No. A4-91-205. Therein, the Froholms alleged that BLM had failed to provide them a hearing and that Cox had misrepresented data regarding paying well determinations.

On June 1, 1992, prior to any resolution of that lawsuit, the Froholms filed with BLM "petitions for reconsideration" of the granting of the approval of the Antelope East and Bakken Units and their respective participating areas. On July 13, 1992, the court ordered Froholm v. Cox and BLM stayed pending completion of administrative review of those "petitions" by BLM and this Board. <sup>2/</sup> The court stated that the parties acknowledged that the Froholms were required to furnish BLM with "evidence, available at the time of the original determination, that the unit operator misrepresented the data used in the paying well determination."

On February 5, 1993, the State Director issued the decision in which he adjudicated the Froholms' "petitions for reconsideration." Therein, he reviewed the formation of the two units and participating areas in light of the evidence available at the time of the original determinations. He declined to revoke or modify BLM's original decisions approving the unit agreements and establishing the participating areas within each unit, finding that each had been properly made.

On March 12, 1993, the Froholms appealed the State Director's decision to this Board, and on April 12, they filed a request for oral argument or, in the alternative, for an evidentiary hearing. By order of June 15, 1993, the Board denied the request for oral argument and took the request for hearing under advisement pending a comprehensive review of the case files.

In their appeal brief (Brief), the Froholms propound a number of procedural and due process issues concerning the formation of the units, the paying well determinations, and the establishment of participating areas. Regarding those issues, they assert that BLM denied them an opportunity to conduct discovery, a hearing, and opportunity to cross-examine witnesses, as required by 43 CFR 3165.3, 3585.1, and 4.24. They assert that their Fifth and Fourteenth Amendment rights were violated in that, at the time BLM approved the units, no statutory or regulatory authority was in place for invalidating a unit. The Froholms assert that these due process shortcomings render the State Director's decision "constitutionally deficient" (Brief at 1-3). They also state that the "only substantive issue concerning the Units briefed herein concerns BLM's reliance on the Murray article," a 1968 article by George Murray, published in the Bulletin of the American Association of Petroleum Geologists, which was utilized by Cox

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<sup>2/</sup> In its answer at 2, BLM explained that:

"[T]he Court accepted a stipulated stay so that the BLM could conduct an administrative review of the appellant's claims concerning the creation of the units and participating areas.

"The BLM did not perceive that the review properly fit under 43 CFR § 3165.3. The review would be to reconsider a six year old decision that had been initiated by a party with authority from the Appellants to do so. The BLM conducted the administrative review under an ad hoc process designed to assure the parties procedural due process."

to support formation of the units as proposed (Brief at 2, 12). Further, the Froholms allege that the record clearly shows that Cox misrepresented information to support paying well determinations.

Both BLM and Cox have filed answers responding in detail to the Froholms' arguments. Having considered all pleadings in light of the record, we find it unnecessary to reproduce in this opinion the individual counterarguments and contentions. Insofar as pertinent, salient points raised by the parties will be reviewed in our discussion herein.

However, before we address any issues raised by the Froholms in their appeal to this Board, we must comment concerning the "notice" issue, even though it was not discussed in the State Director's decision. On this issue, the circuit court in Froholm v. Cox described the district court's ruling as follows:

The district court found that appellants were given no notice of the creation of the unit and no notice of the filings that led to the establishment of the participating areas. The court declined to consider the issue of whether appellees were required to give notice, however, finding that the administrative decision was not a final decision because appellants had administrative review and appellate procedures available to them.

934 F.2d at 963.

Although the Froholms argued to the circuit court that this was not a proper case for invocation of the doctrine of exhaustion of administrative remedies because the time for them to appeal had long since passed, the court did not agree, citing our decision in Chevron U.S.A., Inc., 111 IBLA 96 (1989). It stated that we held therein that "where notice of approval of a unit expansion was not given to an interested party, such failure resulted in the ability to appeal or challenge a later determination." 934 F.2d at 964.

[1] The Federal regulations governing unit agreements are found at 43 CFR Subpart 3180. A unit agreement is a contract between the United States and participating parties for joint development and operation of an oil and gas field where substantial amounts of public lands are involved. A unit plan may be adopted for an unproven oil and gas field considered suitable for exploration and operation as a unit. "The owners of any right, title, or interest in the oil and gas deposits to be unitized are regarded as proper parties to a proposed agreement. All such parties must be invited to join the agreement." 43 CFR 3181.3. A unit agreement submitted to BLM "shall be approved by the authorized officer upon a determination that such agreement is necessary or advisable in the public interest and is for the purpose of more properly conserving natural resources." 43 CFR 3183.4(a).

The Secretary has broad authority to approve any unit plan he may deem necessary or proper to secure the proper protection of the public interest, to mandate unitization, and to prescribe a plan which will adequately protect the rights of all parties in interest including the United States. See Celsius Energy Co., 99 IBLA 53, 68, 94 I.D. 394, 403 (1987). The Department, as the steward of the public's interest in Federally-owned minerals, has an obligation to ensure that those minerals will be efficiently developed so that optimum recovery will be realized. Thus, BLM has the authority under the Mineral Leasing Act, as amended, 43 U.S.C. § 226(m) (1988), to require unitization when it deems that doing so will conserve the natural resources of the United States.

The Froholms, as royalty interest owners, clearly were "proper parties" to the proposed unit agreements within the meaning of 43 CFR 3181.3. As such, they were required to be invited to join the proposed units. However, their consent was not necessary for formation or approval of the units. The record shows that Cox complied with 43 CFR 3181.3.

In letters dated April 24, 1985, John L. Moore & Co. (Moore), acting on behalf of Cox, informed the Froholms that Cox was "in the process of forming" a Federal unit "designated as the Antelope East Unit Area." The letters invited them to execute attached ratification and joinder agreements. <sup>3/</sup> Moore provided similar notice to the Froholms regarding the Bakken Unit in letters dated January 21, 1986 (See Froholms' Rebuttal Brief at 10). <sup>4/</sup>

[2] Despite this evidence, the district court stated in finding of fact no. 3 at page 10 of its Memorandum and Order in Froholm v. Cox, supra, "[t]hat no notice of the application for the creation of the unit was given to plaintiffs." The court recognized, however, in its next finding on the same page

[t]hat a letter to various plaintiffs implied that their leased acreage could not be included in the pool without the execution of consent forms. That this implication was not factually correct as applied to all those who had signed leases containing

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<sup>3/</sup> In a letter dated May 29, 1985, an attorney for the Froholms informed BLM that the Froholms, as owners of the mineral interests in certain lands, opposed unitization. The attorney did not indicate that the Froholms had executed oil and gas leases for the lands containing unitization clauses. Accordingly, BLM's June 13, 1985, response to that letter related to unleased private mineral interests and stated: "If your clients own the minerals within a proposed oil and gas unit area and do not wish to join the unit, the fact that they refuse to sign the ratifications and joinders eliminates the land in question from participation."

<sup>4/</sup> In a letter to Moore, dated February 5, 1986, an attorney for the Froholms stated that they had "been advised not to sign" the ratification and joinder.

the quoted unitization clause, as no further consent or notice was required. [5/]

Thus, the Froholms were aware, on the basis of the unitization clauses in their leases, that the lessee had the authority to unitize the mineral estate at any time, when in the lessee's judgment it was advisable or necessary. 6/ The district court found that the letters to the Froholms inviting ratification and joinder implied "that [the Froholms] leased acreage could not be included in the pool without execution of consent forms." However, it specifically found that "no further consent or notice was required." (Emphasis added). Those letters, while possibly misleading under the circumstances, were all that was required of Cox by 43 CFR 3181.3.

BLM communicated its approval of the unit agreements to Moore, who acted on behalf of Cox in the unit filings. Although BLM stated in each of its approval letters to Moore that "[y]ou are requested to furnish all interested parties with appropriate evidence of this approval," the regulations imposed no duty on BLM to notify the Froholms, as royalty interest owners, of the approval of the units. Nor is there any regulation that required BLM to provide the Froholms with notice of its approval of participating areas.

The district court's determination in Froholm v. Cox that the case was not ripe for judicial review was based on its conclusion that the Froholms "had administrative review and appellate procedures available to them" because the "Code of Federal Regulations provides the procedure for obtaining BLM approval of a unit agreement," citing 43 CFR 3180.0-1 through 3183.7, and "[s]ection 3185.1 provides that a technical and procedural review may be requested or an appeal may be taken from any order or decision issued under these regulations" (Memorandum and Order at 12).

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5/ The "quoted unitization clause," sec. 12 of the Froholm oil and gas leases, provided in pertinent part that the "[l]essee, at its option, is hereby given the right and power at any time \* \* \* to pool or unitize the leasehold estate and the mineral estate covered by this lease \* \* \* when in the Lessee's judgment it is necessary and advisable to do so."

6/ As the circuit court stated in Froholm v. Cox, 934 F.2d at 961-62:

"The Froholms had the opportunity to and did read the leases and were given ample time to learn the terms of the leases before they executed them. The appellees did not engage in any misconduct in getting the Froholms to sign the leases and, as was noted by the district court, the Froholms were familiar with oil and gas leases and were successful in obtaining separate leases for each quarter section of land."

Thus, the district court dismissed to allow the Froholms to pursue available administrative remedies. <sup>7/</sup>

[3] It is true that 43 CFR 3185.1 (1987) provided that "[a] technical and procedural review may be requested pursuant to 3165.3 of this title and/or an appeal may be taken as provided in Part 4 of this title from any order or decision issued under the regulations in this part." <sup>8/</sup> However, in accordance with 43 CFR 3165.3:

Any adversely affected party that contests \* \* \* an instruction, order, or decision of the authorized officer \* \* \* may request an administrative review, before the State Director, either with or without oral presentation. Such request, including all supporting documentation, shall be filed in writing with the appropriate State Director within 20 business days of the date such \* \* \* instruction, order, or decision was received, or considered to have been received and shall be filed with the appropriate State Director. [Emphasis added].

In Global Natural Resources Corp., 121 IBLA 286 (1991), the unit operator of a joint Federal/state unit agreement determined that a unit well

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<sup>7/</sup> Earlier in its Memorandum and Order, the court stated:

"The deposition of Mr. [Dean] Elliot, the supervising petroleum engineer for the BLM, outlines an administrative remedy process which appears specifically tailored for the complaints of the plaintiffs. In substance, if the well proves not to be as good as thought, then the Bureau may by order shrink the entire unit back to an appropriate participating unit in size. If the well is not economically sufficient to sustain an area greater than state established spacing for a single well in the formation involved, then even the participating unit is declared dissolved by the Bureau and the well reverts to a spaced well under the appropriate spacing order.

"Elliot's testimony indicates that such an administrative procedure may be initiated at the request of any working or mineral interest holder, or by representatives of the Bureau \* \* \*.

"The plaintiffs chose to sue rather than use the administrative process \* \* \*." (Memorandum and Order at 8-9).

<sup>8/</sup> The Board interpreted that regulation as first requiring administrative review by the State Director prior to filing an appeal with this Board. Utah Chapter, Sierra Club, 114 IBLA 172, 176 (1990). In 1993 the Department amended the regulation consistent with that interpretation:

"Any party adversely affected by an instruction, order, or decision issued under the regulations of this part may request administrative review before the State Director under § 3165.3 of this title. Any party adversely affected by a decision of the State Director after State Director review may appeal that decision as provided in part 4 of this title." 58 FR 58633 (Nov. 2, 1993).

was not capable of producing unitized substances in paying quantities. The unit operator provided BLM with notice of its determination and BLM notified the unit operator by letter dated November 29, 1988, that it accepted the notice for the record. On February 27, 1989, one of the working interest owners filed for State Director review of BLM's action under 43 CFR 3165.3. The State Director dismissed the appeal as untimely. In affirming, the Board held at 289 that since the determination of whether or not a completed well was within the scope of authority of the unit operator under the unit agreement, receipt by the unit operator "of notice of BLM's action relating thereto constituted constructive service by all parties signatory to the unit."

[4] Thus, in this case, receipt by Moore, for Cox, of the unit approvals constituted constructive service on all interest owners who had joined the units. In addition, BLM's approvals of the participating areas for each unit also must be considered as constructively served on all joined interest owners on the date those approvals were received by Cox. Dean Elliot, a BLM petroleum engineer, testified in a deposition taken Dec. 11, 1987, in Froholm v. Cox, *supra*, that when a unitization clause like that in the Froholm leases exists, BLM considers that the lessee, through the unitization clause, has committed both the working interest and the royalty interest to the unit (Deposition Transcript at 123-24; 183). Under such an interpretation, the Froholms were constructively served with BLM's approvals upon receipt by Moore, in the case of unit approvals, or Cox, in the case of participating approvals. Under 43 CFR 3165.3, any appeal had to be filed within 20 days of such receipt. The Froholms never filed any timely administrative appeal of those initial approvals.<sup>9/</sup> Moreover, a timely appeal would have been subject to

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<sup>9/</sup> In letters dated Feb. 27, 1990, an attorney for the Froholms inquired of BLM concerning the participating areas for the units. In a response dated Mar. 27, 1990, BLM explained its procedure in making a paying well determination and in establishing participating area boundaries. It also stated: "According to our records, your clients' interests were committed to the two units by their lessees, through paragraph 12 of the individual lease instruments. This paragraph gives the lessee the right to pool or unitize the leased lands." In notices of appeal dated June 29, 1990, copies of which were forwarded to BLM with a cover letter dated July 27, 1990, and received by BLM on July 30, 1990, the attorney sought to appeal to this Board BLM's Mar. 27, 1990, letter, as well as BLM's Apr. 4, 1986, and May 7, 1986, participating area determinations. In a letter dated Aug. 8, 1990, BLM informed the attorney that appeals to the Board of Land Appeals are required to be filed within 30 days after date of service; he had received the Mar. 27 letter on Apr. 12, 1990; and it was closing the case files, in accordance with 43 CFR 4.411(c), because the appeals were untimely.

dismissal because, as royalty interest owners only, they arguably were not adversely affected by those approvals.

Even if there were no constructive service on the Froholms because they never actually signed the unit agreements, we expressly hold that they were not entitled to notice from BLM of any of the approvals. More importantly, as mere royalty interest owners who had not joined the unit, they were not adversely affected by BLM's approvals and, thus, had no right to administrative review of any of those determinations by BLM.

The Board case cited by the circuit court, Chevron U.S.A., Inc., does not require a different result. In fact, the language relied on therein by the court was effectively overruled in Global Natural Resources, which was issued subsequent to the court's decision. We expressly overrule that language herein.

In Chevron, a unit operator received approval from BLM for proposed expansion of a unit. The unit operator then notified the working interest and royalty interest owners of the proposal. Chevron, a working interest owner, objected. Nevertheless, the unit operator applied to BLM for final approval of the expansion, noting various noncommitted interests, including Chevron. BLM approved the expansion on July 17, 1986, and in an August 14, 1986, decision BLM directed Chevron to execute ratification and joinders to the expansion. In accordance with 43 CFR 3165.3, Chevron requested a technical and procedural review of the August 14 decision. In his decision, the State Director found that a number of Chevron's arguments related to expansion, rather than forced joinder, and that the time for challenging expansion had expired. He affirmed the determination requiring forced joinder.

On appeal, Chevron argued that it did not appeal expansion because it believed its recourse for an unreasonable expansion was to refuse to join. BLM argued that Chevron was actually objecting to BLM's July 16, 1986, letter to the unit operator approving the expansion proposal, rather than the August 14, 1986, decision, and that, as such, the appeal should be dismissed.

The Board found that the intent of the July 16, 1986, letter was to inform the unit operator of the approval; that there was no indication that the letter "was delivered to Chevron;" that Chevron was "not adversely affected" by the letter; and that because the letter did not inform "Chevron, or any other working and royalty interest owner of any appeal rights," BLM did not regard the letter as appealable. 111 IBLA at 100. 10/

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10/ Of course, we have held on a number of occasions that whether or not BLM includes appeal information in a letter or decision is not determinative of whether or not the BLM action is appealable because the Board of

The Board then stated that Chevron had filed a timely and proper appeal of BLM's August 14, 1986, decision requiring joinder. However, despite its finding that Chevron was not adversely affected by BLM's July 16, 1986, letter, the Board reversed the State Director's determination that Chevron had not timely appealed the July 16, 1986, letter. The Board provided two reasons for that action: "1) BLM did not inform Chevron, or any other working and royalty interest owner of their appeal rights, thus failing to treat the July 16, 1986, decision as an appealable action; and 2) the date of service upon Chevron cannot be determined from the record transmitted with the appeal." Id.

The Board's ruling regarding the July 16, 1986, letter is erroneous for two reasons. First, and most importantly, Chevron had no right to State Director review and subsequent appeal to this Board of the July 16, 1986, letter because, as the Board found, Chevron was not "adversely affected" by BLM's July 16, 1986, letter. Both 43 CFR 3165.3(b) and 43 CFR 4.410 restrict review to those parties who are "adversely affected." That letter merely notified the unit operator of the approval of unit expansion. As Chevron indicated in its appeal to the Board, it did not even attempt to appeal that letter because it believed that refusal to join protected its interest

Second, BLM was not required to serve Chevron with a copy of its July 16, 1986, letter. As we held in Global Natural Resources Corp., supra, receipt by the unit operator of notice of BLM actions regarding general unit operation constitutes constructive receipt by all parties signatory to the unit. BLM's only obligation is to serve the unit operator and that service is considered constructive service on all unit signatories. Interest owners who have not joined the unit are not entitled to any notice from BLM regarding general unit operation actions and they cannot be considered adversely affected by them. To the extent Chevron may be read to conclude otherwise, it is expressly overruled. 11/

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fn. 10 (continued)

Land Appeals is the sole arbiter of its jurisdiction and employees of BLM may not create the right of appeal where it does not exist nor deny that right where it does exist. Idaho Department of Fish and Game, 112 IBLA 72, 75 n.2 (1990); Oregon Natural Resources Council, 78 IBLA 124, 127 (1983); Phelps Dodge Corp., 72 IBLA 226, 229 (1983).

11/ As noted, supra, the circuit court characterized Chevron as holding that "where notice of approval of expansion was not given to an interested party, such failure resulted in the ability to appeal or challenge a later determination." Froholm v. Cox, 934 F.2d at 964. In Chevron, the company's ability to appeal the forced joinder decision related directly to its being adversely affected by that decision. The fact that Chevron did not receive notice of the approval of expansion is not relevant because it was not entitled to individual notice, and it was not adversely affected by expansion itself.

Thus, we conclude that the Froholms had their interests committed to the units by Cox and, therefore, had constructive notice of the initial unit and participating area approvals dating from receipt thereof by Moore or Cox and failed to file any timely appeals thereof. Further, any timely appeal would have been subject to dismissal because, as mere royalty interest owners, they arguably were not adversely affected by BLM's approvals. Alternatively, we conclude that if their royalty interests were not committed to the units, they were not entitled to any notice from BLM, and they were not entitled to any administrative review because they were not adversely affected by them. <sup>12/</sup>

[5] Under the doctrine of administrative finality, when a party has had an opportunity to obtain review within the Department and no appeal was taken, the agency decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent injustice. Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308, 97 I.D. 109, 114 (1990). That BLM acquiesced in an "ad hoc process" to entertain "petitions to reconsider" its initial approvals in this case does not mean that the Froholms were denied any rights available to them. In fact, by reviewing those "petitions for reconsideration," BLM undertook a task that was not required by any applicable administrative procedures. Rather, it appears that BLM's review was precipitated by the court's stay order.

Accordingly, in order to provide a complete record in this case for the district court, we will also briefly review the merits of the State Director's decision. As related in the State Director's decision, approval of the Antelope East and Bakken Units came about as follows:

#### Unit Approval

##### Antelope East Unit

Cox originally came to this office with its proposal for unitization of the Antelope East area on April 18, 1985. Cox relied upon a 1968 paper by George Murray, published in the "Bulletin of the American Association of Petroleum Geologists" (Enclosure 3), to develop its prospect. Murray hypothesized that the Mississippian-Devonian Bakken Formation would be fractured along the steeply dipping monocline on the east flank of the Antelope Anticline.

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<sup>12/</sup> The Froholms' administrative remedy was to seek, under section 11 of the unit agreements, revision of the participating areas and/or reclassification of the unit wells. See Froholm v. Cox, 934 F.2d at 964. As the district court stated in its Memorandum and Order at 8, regarding such a remedy, it "appears specifically tailored for the complaints of the plaintiffs." See note 7, *supra*.

It was believed that this fracturing would enhance the generally poor intergranular porosity of the Bakken and increase its permeability, thus allowing the flow of hydrocarbons to a well bore. The target of the Antelope East Unit obligation well was the Bakken Formation. It was located so as to test the Bakken in an area of probable fractures, along the upper portion of the slope break on the flank of the anticline. The geologic summary for the proposed unit (Enclosure 4) was submitted at the unit meeting on April 18, 1985. Cox also supplied geologic cross-sections that trended generally east-west across its prospect.

The proposed unit boundaries were based upon Murray's model. The east and west boundaries were structural contours at the top and bottom of the slope break. The north boundary was based upon loss of well control and Cox did not want to include land for which there was no direct indication of potential. Also, the proposed north boundary was close to the high water mark of the Garrison Reservoir, and may not have been physically accessible to a well. The south boundary was established to eliminate past development, which may have drained the Bakken reservoir south of the unit area.

The BLM geologist prepared a geologic report recommending designation of the Antelope East Unit in May 1985 (Enclosure 5). The BLM designated the Antelope East area as logically subject to unitization on May 23, 1985 (Enclosure 6). The Antelope East Unit was approved on June 25, 1985 (Enclosure 7).

#### Bakken Unit

Cox originally came to this office with its proposal for unitization of the Bakken area on January 16, 1986. The Bakken Unit is contiguous with the east boundary of the Antelope East Unit. The prospect was also based upon proposed fracturing along the steeply dipping east flank of the Antelope Anticline. The target of the Bakken Unit obligation well was the probable fractures located along the lower portion of the slope break on the flank of the anticline. The north and south boundaries of the Bakken Unit were established similarly to those of the Antelope East Unit. The enclosed geologic summary (Enclosure 8), prepared by Cox, was submitted at the unit meeting on January 16, 1986.

The BLM geologist prepared a geologic report recommending the designation of the proposed Bakken Unit on January 17, 1986 (Enclosure 9). The BLM designated the Bakken area as logically

subject to unitization on January 21, 1986 (Enclosure 10). The Bakken Unit was approved on January 29, 1986.

We examined the available record, as well as information submitted by the Plaintiffs and Cox. We find that there was sufficient geological justification for formation of the Antelope East and Bakken Units; the boundaries of the two units were logical, and based upon a consistent interpretation of available data; the obligation wells were located so as to test the hypothesis that the Bakken Formation would be fractured along the steeply dipping east flank of the Antelope Anticline.

(Decision at 2-3).

With regard to the "substantive issue" identified by the Froholms relating to the Murray article, the Froholms stated at page 13 of their Brief: "Prior to receipt of the State Director's Decision, the Froholms had never heard of the Murray Article, much less had an opportunity to rebut it." Had they had such an opportunity, the Froholms contend that they "would have presented the evidence that the geology did not support the Units or the theory, as set forth in the Supplemental Affidavit of Douglas E. O'Neil," a professional petroleum engineer (Brief at 14).

As pointed out by Cox in its Answer on appeal at page 10: "This is frankly incredible. In the trial conducted in January 1990, the [Murray] article was offered and received as Exhibit D-46 in Civil No. A-4-86-225 and D-64 in Civil No. A-4-86-226. See, Trial Transcript, pp. 167-170, attached hereto as Attachment B." Cox noted, as well, that the district court judge expressly referred to the article in his Memorandum and Order at 3. <sup>13/</sup> Moreover, even if the Froholms had not had the opportunity to rebut the Murray article, the information contained in the O'Neil supplemental affidavit does not establish any error in BLM's unit determinations. At best, the O'Neil affidavit merely represents a difference of opinion.

In determining whether conditions favorable to the establishment of a unit exist, the Secretary is entitled to rely on the reasoned opinion of his technical experts. Benson-Montin-Greer Drilling Corp., 118 IBLA 8, 12 (1991). Thus, a decision to approve a unit agreement will not be set aside in the absence of a definite showing that the decision was in error. A difference of opinion concerning the interpretation of available information does not establish such error. We find no error in the State Director's decision regarding BLM's unit determinations. Geological justification for those units clearly existed.

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<sup>13/</sup> In a brief filed in rebuttal to the BLM and Cox answers, the Froholms did not renew their claim to lack of opportunity to rebut the Murray article.

The State Director also discussed the paying well and participating area determinations. He stated that following his review of the evidence submitted by Cox in support of the paying well determinations, he found no evidence that Cox misrepresented any data. He also reviewed the participating area determinations and found them to be reasonable based on the information available at the time.

The Froholms charge that the State Director did not consider their materials and the affidavits of their petroleum engineer in making his determination. To the contrary, the State Director expressly stated that the Froholms had failed to provide any evidence that the unit operator knowingly misled or misrepresented data in the paying well determination. Failure to accept the interpretations proposed by the Froholms does not equate to a failure to consider.

We agree with Cox's assessment in its answer at 19 when it states:

In short, Froholms suggest that the BLM and Cox both erred in not accurately predicting what would happen in the future. With the benefit of hindsight, Froholms are able to suggest how the data available at the time the part Cox nor the BLM have the benefit of hindsight.

As Cox points out "the entire concept of a federal exploratory unit requires the determination of a paying well status and establishment of a participating area upon completion of a well. Actual production is not necessary to determine whether a well is capable of producing in paying quantities \* \* \*." Id.

The fact that there are differences in approach and methodology for assessing the hydrocarbon potential of an unproven area is not tantamount to a demonstration that the methods utilized by Cox and endorsed by BLM's geologist were unacceptable or otherwise flawed. The Froholms have alleged, but submitted no evidence, that Cox employed unacceptable engineering practices. Nor do the Cox projections rise to the level of misrepresentation merely because experience shows them to have been optimistic.

In his July 13, 1992, stay order, the district court judge stated that "the Plaintiffs [Froholms] must furnish evidence, available at the time of the original determination, that the unit operator misrepresented the data used in the paying well determination." The Froholms have provided no such evidence. The State Director properly declined to modify or revoke the prior determinations.

While the Froholms' disappointment with the outcome of the State Director's decision may be understandable, its claims raised on appeal to this Board relating to denial of procedural rights are all lacking

in merit. <sup>14/</sup> In addition, although the Froholms have provided interpretations of various data which differ from those of BLM, they have not produced evidence contrary to that relied upon by BLM which would necessitate a hearing that might lead to a different result. Consequently, the request for a hearing is denied. Benson-Montin-Greer Drilling Corp., *supra* at 12.

Finally, in refusing to modify or revoke the earlier determinations and affirming the results thereof, the State Director essentially denied the "petitions for reconsideration." In affirming the State Director's denial, we modify it to embrace the doctrine of administrative finality as a basis for doing so. Because there is no evidence of any violations by BLM of the basic rights of the Froholms or of any need to reconsider BLM's initial determinations to prevent injustice, the doctrine of administrative finality is applicable.

To the extent not specifically addressed, all other contentions of the Froholms have been reviewed and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

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Franklin D. Arness  
Administrative Judge

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<sup>14/</sup> With respect to the Froholms' assertion that they have been deprived of basic rights including constitutional due process, we point out that the Office of Hearings and Appeals is not the proper forum to decide constitutional issues. Slone v. OSM, 114 IBLA 353, 358 (1990). In addition, we have held that an appeal to this Board satisfies due process requirements. Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

