

SHARP, McQUEEN, McKINLEY,  
DREILING & TATE, P.A.  
419 N. Kansas - P.O. Box 2619  
Liberal, KS 67905-2619  
(316) 624-2548

-and-

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

FILED  
02 APR 18 PM 2:22  
CLERK OF DISTRICT COURT  
STEVENS COUNTY, KANSAS

**IN THE TWENTY-SIXTH JUDICIAL DISTRICT  
DISTRICT COURT, STEVENS COUNTY, KANSAS  
CIVIL DEPARTMENT**

**OPAL LITTELL and CHERRY RIDER, )  
co-trustee of the Opal Littell Family Trust, )  
and BONNIE BEELMAN, individually )  
and as representative plaintiffs on behalf )  
of persons or concerns similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
OXY USA INC., )  
 )  
Defendant. )**

**Case No. 98-CV-51**

**DEFENDANT'S RESPONSE TO PLAINTIFFS'  
MOTION FOR TRIAL BY THE COURT**

Defendant OXY USA Inc. ("OXY") for its response to Plaintiffs' Motion for Trial by the Court, respectfully shows the Court as follows:

1. This matter is currently pending on the Court's jury docket, and is scheduled to commence jury trial on or about March 31, 2003.

2. On April 2, 2002, Plaintiffs filed their Motion for Trial by the Court, asking that this case be removed from the Court's jury docket and placed on the Court's bench trial docket. Plaintiff claims a bench trial is proper here because the underlying action is one for an equitable accounting, citing Karnes Enterprises, Inc. v. Quan, 221 Kan. 596, 561 P.2d 825 (1977).

3. OXY recognizes that this Court has addressed this same issue in the case of Coulter v. Anadarko, Case No. 98-C-40, where this Court found Karnes controlling and determined that a bench trial was appropriate.

4. OXY respectfully urges that reliance on Karnes is misplaced. Karnes was an accounting case because in Karnes, where the lease required payment to lessor of ten percent of gross restaurant sales, there was no dispute over how the dollar amounts due were to be calculated; the only issue was the amount of the restaurant's gross sales. Unlike Karnes, the Plaintiffs' do not challenge the dollar amount of OXY's sales. Instead, the Plaintiffs assert that OXY is utilizing certain deductions in calculating royalty payments and that the express terms and the implied covenants of OXY's leases do not permit OXY to do so. Thus, the contractual requirements of OXY's leases *are* the dispute here. Any recovery by Plaintiffs will be monetary damages for breach of contract (oil and gas leases), not because OXY failed to account for its total sales.

5. Actions for breach of contract have long been acknowledged as "legal" in nature and not "equitable." See Simler v. Conner, 372 U.S. 221, 223 (1963) (action to enforce a retainer contract "a traditionally 'legal' action."); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479

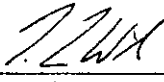
(1962) (“in an action to collect debt for breach of contract between [the] parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any, but also just what the contract is.”); Employers Ins. Of Wausau v. Shell Oil Co., 820 F.2d 898, 900 (7<sup>th</sup> Cir. 1987) (“a claim for breach of contract [was] a ‘legal’ action in 1891 as it is today.”).

### CONCLUSION

Based on the foregoing, OXY USA Inc. respectfully requests that the Court deny Plaintiffs’ Motion for Trial by the Court.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.**

By:   
James C. T. Hardwick, OBA #3845  
Donald L. Kahl, OBA #4855  
T. Lane Wilson, OBA #16343  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

- and -

**SHARP, McQUEEN, McKINLEY,  
DREILING & TATE, P.A.**

Kerry McQueen, SC #06166  
419 N. Kansas - P.O. Box 2619  
Liberal, Kansas 67905-2619  
(316) 624-2548

**ATTORNEYS FOR DEFENDANT  
OXY USA INC.**

**CERTIFICATE OF MAILING**

I, the undersigned do hereby certify that on the 16<sup>th</sup> day of April, 2000, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Thomas D. Kitch  
Gregory J. Stucky  
Charles E. Millsap  
David G. Seely  
Fleeson, Goosing, Coulson & Kitch, L.L.C.  
125 North Market, Ste. 1600  
P.O. Box 997  
Wichita, Kansas 67201

Bernard E. Nordling  
Erick E. Nordling  
Kramer, Nordling & Nordling  
209 East Sixth Street  
Hugoton, Kansas 67951