Fax Transmittal Cover Sheet

MODRALL SPERLING

Page 1 of 3
Date: February 4, 2003
Client/Matter #: 14993-0179

Modrall Sperling
Roehl Harris & Sisk, P.A.

Bank of America Centre
Suite 1000
500 Fourth Street NW
Albuquerque,
New Mexico 87102

PO Box 2168
Albuquerque,
New Mexico 87103-2168

Tel: 505.848.1800
Fax: 505.848.9710
www.modrall.com

Please deliver the following pages to:

Name:	**Carol Leach**	**505-476-3220**
cc:	**Tom Kellahin**	**505-982-2047**
	William Carr	**505-983-6043**
	Stephan C. Ross	**505-476-3220**

From: **LARRY AUSHERMAN**

Comments:

If you have any problem receiving our fax, please call 505.848.1800 Ext. 1619

MODRALL SPERLING
LAWYERS

RECEIVED
FEB 05 2003
EMNRD-LEGAL

February 5, 2003

VIA FACSIMILE 505-476-3200

Carol Leach
NM Energy, Minerals and Natural Resources Dept.
1220 S. St. Francis Dr.
Santa Fe, NM 87505-4000

Re: In the Matter of the Application of Richardson Operating Company to Establish a Special "Infill Well" Area Within the Basin-Fruitland Coal Gas Pool as Provided by Rule 4 of the Special Rules for this Pool, San Juan County, New Mexico; De Novo Review by the Secretary of OCC Case No. 12734 (De Novo); Response of San Juan Coal Company to Motion for Clarification

Dear Ms. Leach:

Enclosed for filing is the Response of San Juan Coal Company to Richardson's Motion for Clarification.

Very truly yours,

Larry P. Ausherman

LPA/cc

Enclosure

cc/encl: W. Thomas Kellahin (fax: 505-982-2047)
William Carr (fax: 505-983-6043)
Stephen C. Ross (fax: 505-476-3462)

Modrall Sperling
Roehl Harris & Sisk, P.A.

Bank of America Centre
500 Fourth Street NW
Suite 1000
Albuquerque,
New Mexico 87102

PO Box 2168
Albuquerque,
New Mexico 87103-2168

Tel: 505.848.1800

www.modrall.com

DRAFT 2/5/03

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF RICHARDSON OPERATING COMPANY TO ESTABLISH A SPECIAL "INFILL WELL" AREA WITHIN THE BASIN-FRUITLAND COAL GAS POOL AS PROVIDED BY RULE 4 OF THE SPECIAL RULES FOR THIS POOL, SAN JUAN COUNTY, NEW MEXICO.

De Novo Review
By the Secretary of
OCC Case No. 12734 (De Novo)

SAN JUAN COAL COMPANY'S RESPONSE TO RICHARDSON OPERATING COMPANY'S MOTION FOR CLARIFICATION

San Juan Coal Company ("San Juan") submits that Richardson Operating Company's ("Richardson") Motion for Clarification is akin to asking a judge what her decision will be before a trial or hearing has been held. Clearly, this proceeding is on a fast track as a consequence of the provisions of NMSA 1978, §70-2-26. However, that fast track and the Secretary's Orders to date do not create the due process violations of which Richardson complains. Richardson's Motion for Clarification should be denied, and it should be compelled to follow the scheduling order.

"PUBLIC INTEREST" CONSIDERATIONS ARE NOT NEW IN THESE PROCEEDINGS.

For over a year, San Juan has advanced the importance of the "public interest" in the prior proceedings before the Oil Conservation Division and the Oil Conservation Commission, beginning at least on December 13, 2001, when it filed the Memorandum Brief of San Juan Coal Company Concerning Jurisdiction, Standing, and Response to Richardson's Motion to Dismiss with the New Mexico Oil Conservation Division. Consequently, "public interest" considerations

are not new here, and cannot be considered a surprise to Richardson. Rather, Richardson (along with the Commission and the Division) apparently chose not to address, research or investigate the "public interest" in those proceedings.

More recently, as the Secretary knows, in advance of San Juan's Application for Review, counsel for Richardson and San Juan met with Department representatives on January 9, 2003 to discuss how a hearing might be handled were San Juan to seek review and the Secretary were to grant a hearing under Section 70-2-26. Counsel for Richardson did not raise any due process or other constitutional concerns at that time. Only after San Juan filed its Application did the litany of alleged violations of constitutional rights begin, although the argument that Richardson has insufficient information with which to prepare for the hearing is a new one.

While San Juan understands that this is the first hearing of its kind under the Oil and Gas Act, the term "public interest" has not gone unnoticed by the courts of the State of New Mexico. In its Application for Review, as requested by the Secretary, San Juan provided discussion of the treatment of the term "public interest" in the context of a water dispute. See Young and Norton v. Hinderlider, 15 N.M. 666 (1915). While the circumstances here are different (this being a minerals development conflict), and while the meaning of the term "public interest" may depend in part upon the circumstances and the statute in which it is used, existing authority provides the parties sufficient information upon which to prepare for the Hearing on February 10, 2003.[1]

[1] A further irony is that Richardson's filing serves to provide it with an excuse in not serving its Witness List on the schedule provided by the Secretary, thereby depriving San Juan of the opportunity to prepare for the witnesses Richardson may call. San Juan filed its Witness List on a timely basis. It is Richardson that seems to prefer "trial by ambush" here, not the Secretary.

RICHARDSON'S DUE PROCESS AUTHORITY DOES NOT SUPPORT THE PROPOSITION ASSERTED.

Richardson marshals In re Ronald A., 110 N.M. 454, 455, 797 P.2d 243, 244 (1990), for the proposition that "due process is violated if the issues to be addressed, and the standards to be employed in determining those issues, are not set forth with some clarity." See Motion for Clarification, 3-4. A review of Ronald A., however, demonstrates that the case does not support the key proposition Richardson advances. Richardson's main complaint here is that it claims not to know the standards to be employed in determining the issues presented in this proceeding. The New Mexico Supreme Court's opinion in Ronald A., however, says nothing about notice of the standards to be employed in determining the issues presented. Rather, the Court quoted an earlier decision of the New Mexico Court of Appeals, stating "Procedural due process requires **notice** to each of the parties **of the issues** to be determined and opportunity to prepare and present a case on the material issues." Id. at 455 (emphasis added). Nothing in the opinion provides that parties are to be on notice of the "standards to be employed" by the decision-maker. Moreover, when the parties were briefing the question whether the Secretary should grant San Juan's Request for Review, Richardson expressed no concern about any alleged lack of a standard to be employed in determining the issues presented.

Here, Richardson has been on notice for some time of the issues to be determined. They are described in Section 70-2-26. Given the statutory language that the Secretary should consider the Commission's Order contravenes the "public interest" and pay "due regard to the conservation of ...mineral resources," Richardson cannot say that it lacks notice of the issues to be determined. And, that is all that due process requires under Richardson's authority.

RICHARDSON'S MOTION APPEARS INCONSISTENT WITH ITS PREVIOUS FILINGS IN THIS PROCEEDING.

In previous argument to the Secretary, Richardson had no difficulty in addressing the public interest standard. Richardson's Response to San Juan's Application for Review seems to belie the Motion for Clarification. In Point III.C. of Richardson's Response, titled "Public Interest Defined," Richardson states: "Inarguably, San Juan fails to establish that the Commission's Order's (sic) **contravenes** the public interest." Richardson Response, p. 10 (emphasis in original).[2] To make such a strong statement would suggest that Richardson must have known what the term "public interest" meant at that time.

Richardson then argued that because "public interest" is not defined in Section 70-2-26, "the term must be given its ordinary and common meaning." Id. at 11. Richardson then stated: "While there is no uniform understanding of what is meant by "public interest", **there are a few guiding principles.** As a prefatory matter, the very function – the *raison d'etre* – of administrative bodies, like the Oil Conservation Commission, is the protection of public rights. **Indeed, the public interest is an added dimension of every administrative proceeding."** Id. (Citations omitted; emphasis added). Having indicated that the "public interest" is a dimension of every administrative proceeding and that there are guiding principles for understanding its meaning, Richardson's present plea that it does not understand what the "public interest" means is as curious as it is delinquent.

Finally, in its Response to San Juan's Application, Richardson provides argument under the heading, "San Juan's Public Interest Analysis is Too Narrow." Id. at 12. Once again, the headnote and the subsequent argument would suggest Richardson possesses an understanding of

[2] Later in its Response, Richardson presents argument under the headnote, "The Public Interest Is Not Contravened By the Commission's Order." Id. at 14.

the term – or at least did on January 28th when it served and filed its Response to the Application.[3]

THE SECRETARY'S ORDERS TO DATE ESTABLISH AN ORDERLY PROCESS IF THE PARTIES ADHERE TO IT.

Richardson's due process objections should be considered in light of the procedure the Secretary has established for the preparation for and conduct of the February 10-11, 2003 hearing. In accordance with the Secretary's Order, San Juan filed and served (via facsimile) its Witness List on February 3, 2003, seven days prior to the hearing. That Witness List is self-explanatory and serves to provide a description of the testimony San Juan plans to present at hearing. Moreover, earlier in the day on February 3, Mr. Bruce, one of San Juan's counsel in this proceeding, had separate conversations with Mr. Kellahin and Mr. Carr, two of the lawyers working for Richardson on this case, concerning San Juan's plans for the hearing. In those conversations, Mr. Bruce identified San Juan's then planned witnesses, and described that San Juan planned to present a detailed opening statement based on the supplemental testimony described in its Witness List and on the existing record developed before the Oil Conservation Commission in a three day, October 2002 hearing in which Richardson participated, and during which San Juan advanced "public interest" considerations. Having participated in that hearing, and received a briefing from San Juan's counsel and a copy of San Juan's Witness List, Richardson cannot complain that it lacks information or guidance as to what evidence it must meet or choose to address.

[3] Richardson, however, mischaracterizes San Juan's position about the appropriate public interest considerations here. San Juan's position is not premised solely on its own economic interests. San Juan submits that the economic interests of the State, the County of San Juan, the City of Farmington, the residents of those areas, San Juan's employees, among others are important components of the "public interest" inquiry as well. In addition, certainly mine safety considerations are important – that is why San Juan seeks to stop the fracturing of the coal seam.

THE SECRETARY HAS THE AUTHORITY, AS DOES THE OCC, TO CONSIDER THE "PUBLIC INTEREST" AS TO FEDERAL PUBLIC LANDS.

Contrary to the suggestion in Richardson's filings with the Secretary, the Secretary has the authority to consider the public interest as to lands administered by the United States Bureau of Land Management. Once again, Richardson's position is a curious one. To date, Richardson's conduct in the proceedings below is consistent with the appropriate view that the Oil Conservation Division and the Oil Conservation Commission have jurisdiction to rule on in-fill well applications for wells that would be drilled on the federal public domain. Now, without reference to any authority, Richardson suggests that the Secretary, on review of those decisions, does not have the authority that the Commission and Division did as it relates to federal lands. See Motion for Clarification, _.

There is no question but that the Secretary has the authority, and indeed the responsibility, to consider the public interest in this proceeding as it relates to both lands administered by the New Mexico Commissioner of Public Lands **and** lands administered by the United States Bureau of Land Management. In the process of making the newly fabricated argument that the Secretary has no business considering issues affecting federal public lands, Richardson would appear to misapprehend both the purpose of the hearing provided by the legislature under Section 70-2-26 and the relationship between the Secretary and the Energy, Minerals and Natural Resources Department and the Commissioner of Public Lands (and the State Land Office).

The Secretary has a similar interest in the administration of federal lands to her interest in the administration of State lands. In fact, an argument could be made that the Secretary may have an even greater interest in federal lands administration given the State of New Mexico's royalty interest in federal lands. As the Secretary knows, under the federal Mineral Leasing Act

of 1920, amended, the State of New Mexico is entitled to a 50% share of the royalties derived from mineral leases on federal lands. See 30 U.S.C. § 191. In that Section, Congress also provided in part: "said moneys...to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions socially and economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service...." Id. Suffice it to say that the "public interest" does not stop at the boundary of federal lands.

RICHARDSON SHOULD BE COMPELLED TO ABIDE BY THE SECRETARY'S SCHEDULING ORDER

Richardson's strategy to ignore the Secretary's Scheduling Order of January 30 (the subject matter of which was described first in the January 13, 2003 letter of Carol Leach) puts San Juan at a distinct disadvantage at hearing. If San Juan is the only party complying with the disclosure obligations, Richardson will be rewarded for its violation of the Order by reaping the benefit of San Juan's disclosures while refusing to play by the same rules. Under this scenario, it is San Juan, not Richardson, whose due process rights are implicated. The Secretary should compel Richardson to decide today whether it desires to present witnesses at hearing. If it does, it should be compelled to file a witness list today. Likewise, if it chooses to present exhibits and arguments, its prehearing statement and exhibit list should be filed on schedule tomorrow. San Juan cannot continue to be the only party complying with the Scheduling Order.

CONCLUSION

For the reasons stated, Richardson Operating Company's Motion for Clarification should be denied and Richardson should be compelled to abide by the Secretary's Scheduling Order.

Respectfully Submitted,

By: _____

James Bruce
Post Office Box 1056
Santa Fe, New Mexico 87504
(505) 982-2043

-and-

Larry P. Ausherman
Walter E. Stern
Modrall, Sperling, Roehl, Harris, & Sisk, P.A.
Post Office Box 2168
Albuquerque, New Mexico 87103-2168
(505) 848-1800

-and-

Charles E. Roybal
San Juan Coal Company
300 W. Arrington, Suite 200
Farmington, New Mexico 87401
(505) 598-4358

ATTORNEYS FOR SAN JUAN COAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following counsel of record via fax and first class mail this 5th day of February, 2003:

W. Thomas Kellahin
Kellahin & Kellahin
P.O.Box 2265
Santa Fe, NM 87504
Fax No. (505) 982-2047

William F. Carr
Robert J. Sutphin, Jr.
Holland & Hart
P.O. Box 2208
Santa Fe, NM 87504-2208
Fax No. (505) 983-6043

Stephen C. Ross
Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, NM 87505
Fax No. (505) 476-3462

Carol S. Leach
NM Energy, Minerals & Natural Resources Dept.
1220 S. St. Francis Dr.
Santa Fe, NM 87505-4000
Fax No. (505) 476-3200

Larry P. Ausherman

W0278614.DOC