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PLEASE REPLY TO SANTA FE

November 7, 1997

Mr. William J. LeMay, Director
New Mexico Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

HAND DELIVERED

Re: NMOCD Case No.s 11808 and11809; Application of Burlington Resources Oil and Gas Company for Compulsory Pooling, Unorthodox Well Location and Non-Standard Spacing and Proration Unit, San Juan County, New Mexico. **De Novo**

Dear Mr. LeMay:

Enclosed for filing is Total's Reply Pursuant to Its Second Motion For Stay of Orders R-10877 and R-10878. Thank you for your assistance in this matter.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

J. Scott Hall

JSH:CMB

cc: W. Thomas Kellahin, Esq. (w/enclos.)
J.E. Gallegos, (w/ enclos)
Lynn Hebert, Esq. (w/enclos.)

BEFORE THE

OIL CONSERVATION DIVISION

NEW MEXICO DEPARTMENT OF ENERGY AND MINERALS

IN THE MATTER OF THE APPLICATION OF
BURLINGTON RESOURCES OIL & GAS COMPANY
FOR COMPULSORY POOLING AND A NON-STANDARD
GAS PRORATION AND SPACING UNIT, SAN JUAN
COUNTY, NEW MEXICO

CASE NO. 11808
CASE NO. 11809
(Consolidated)
DE NOVO

TOTAL'S REPLY PURSUANT TO ITS SECOND MOTION FOR STAY OF ORDERS R-10877 and R-10878

Total Minatome Corporation ("Total"), for its Reply pursuant to the Second Motion For Stay of Orders R-10877 and R-10878, states:

The arguments offered by Burlington Resources Oil and Gas Company ("Burlington") in avoidance of a stay of the two compulsory pooling orders are unpersuasive and unavailing. Moreover, Burlington's position is inconsistent with earlier positions it has asserted in these proceedings. Burlington's arguments should be rejected for the following reasons:

I. **The terms of the compulsory pooling orders do not provide the operator with the option to reject a non-consenting working interest owner's payment of estimated well costs.**

II. **Burlington has failed to make a showing that it will be prejudiced by a temporary stay.**

BURLINGTON'S DISREGARD FOR THE EXPRESS TERMS OF THE DIVISION'S COMPULSORY POOLING ORDERS

Burlington's contention that Total conditioned its tender of its share of estimated well costs is purely evasive and does not address the issue before the Commission: Having taken the

unprecedented step of rejecting a pooled interest owner's tender of its share of estimated well costs, Burlington has created an uncertain situation with respect to the proper means by which a non-consenting party may exercise its right to avoid the imposition of the statutory risk penalty. Given the uncertainty created by Burlington's own conduct and the prejudice accruing to Total, the entry of a stay of the compulsory pooling orders is appropriate under these circumstances.

To our knowledge, no operator has ever rejected a timely tender of estimated well costs pursuant to a compulsory pooling order before; Burlington is the first to have breached this threshold. In essence, Burlington asks the Commission to interject a new provision into the Division's compulsory pooling orders which would be inconsistent with (1) the remaining terms of the order and (2) the decades-long interpretation the agency has given to the administration of the Division's standard compulsory pooling orders. Under Burlington's reading of the compulsory pooling orders, the operator would be provided with the new option of either accepting or rejecting the non-operator's payment of well costs according to the operator's whim. By so doing, the operator could determine on its own who a consenting party is or from whose hide it could extract the 200 percent risk penalty assessment. It is a dangerous interpretation which would inevitably lead to the arbitrary application of the compulsory pooling powers granted by the State to an operator.

The terms of the Division's pooling orders are clear. The option to assume the risk accrues only to the non-consenting working interest owner:

> (4) Within thirty days of the date the schedule of estimated well costs is furnished to him, any non-consenting interest owner shall have the right to pay his share of estimated well costs to the operator. In lieu of paying his share of reasonable well costs out of production, and any such owner

> who pays his share of estimated well costs as provided above shall remain liable for operating costs but shall not be liable for risk charges.

Conversely, the operator is not accorded a reciprocal option. It is only by non-payment that a working interest owner can be subject to the risk penalty assessment:

> (7) The operator is hereby authorized to withhold the following costs and charges of production:
>
> b. As a charge for the risk involved of drilling of the well, 200 percent of the pro rata share of reasonable well costs attributable to each non-consenting working interest owner who has not paid his share of estimated well costs within 30 days from the time a schedule of estimated well costs is furnished to him.

The plain meaning and straight forward operation of this particular provision of the Division's compulsory pooling orders has been understood and relied on by industry for decades. Accordingly, the Division's long-standing interpretation and administration of its pooling orders has become established administrative policy. Were the Division and Commission to accept Burlington's reading of the pooling orders, it would mark a significant departure from a settled policy. This, the Commission mustn't do. INS v. Yang, ____ U.S. ____, 117 S.Ct. 350, 353, 136 L.Ed.2d 288 (1996). ("an irrational departure from [settled] policy could constitute action that must be overturned as "arbitrary, capricious [or] an abuse of discretion".")

Nowhere do the terms of these two compulsory pooling orders provide the operator with the unilateral option to accept or reject a working interest owner's tender of estimated well costs. Indeed, Burlington is unable to point to a single example in any of the hundreds of compulsory pooling orders issued over the years giving rise to such an option. The single contingency which

triggers the authority to impose costs and the risk penalty assessment from production is where the working interest owner does not pay its share of estimated well costs within 30 days. That is not the circumstance here.

In this industry in particular, there is a tremendous need for predictability and certainty in the operation and administration of the Division's compulsory pooling orders. Great damage is done if businesses cannot count on certainty in legal relationships. Charles E. Nearburg, d/b/a Nearburg Exploration Company v. Yates Petroleum Corporation, *Bar Bulletin*, Vol. 36, No. 33, August 14, 1997, ___ N.M. ___ (Ct. App. 1997), citing State, ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 126, 812 P.2d 777, 780 (1991). Burlington's interpretation of the compulsory pooling orders here would destroy such predictability and certainty. Burlington may not ask the Commission to create a new interpretation of the Division's orders because of a situation that was of Burlington's own making.

BURLINGTON WILL NOT BE PREJUDICED BY THE SAY

By Burlington's unilateral abrogation of the terms of Order R-10878 (Marcotte No. 2) and the anticipated abrogation of Order R-10877 (Scott No. 24), Total has demonstrated irreparable harm in-fact: Total is being treated as having gone non-consent and will be forced to bear 300% of its share of costs for Burlington's $4,000,000 wells. Burlington, on the other hand, has offered no countervailing argument or evidence to rebut this point and does nothing to show how it may be prejudiced by an interim stay.[1] Instead, Burlington proffers a vague explanation of how it plans

[1] Indeed, it is unlikely the Scott No. 24 will be drilled before the expiration of Order R-10877 or the resolution of either the 640 acre spacing issue or this de novo proceeding. The drilling rig for Burlington's deep gas prospects is being moved to a location some thirty air miles to the south and then to another location in Rio Arriba County. See attached industry newsletter,

to "carry" the GLA-66 group of interest owners until the 160 vs. 640 acre spacing issue is resolved.[2] Nowhere does Burlington contend that it is prejudiced by carrying the GLA-66 interests or holding their elections in abeyance; The situation is little different with respect to carrying the single-digit interests of Total and holding its elections in abeyance as well. Total should be accorded the same courtesy.

Similarly unavailing is Burlington's argument that it is Total's tactic to "ride-down" the well in order to get the well data for the Marcotte No. 2. Again, it is another diversion. Such an argument presumes, incorrectly, that Total will not be able to make a meritorious case that Burlington may not force pool Total's acreage for, among other reasons, the fact that (1) Total previously committed its acreage under a pre-existing land contract and (2) that Burlington did not act in good faith in seeking Total's joinder. The only reason the availability of well data has become an issue at all is because Burlington forged-ahead with drilling before it had a pooling order. This is a situation of Burlington's making; not Total's. The Commission should not be asked to protect Burlington from the consequences of its own business judgment.

Finally, the Commission should accord no weight to Burlington's surprising argument that if the pooling orders are stayed it may just pick-up its drilling rig and go home. (Page 8, Burlington's November 4, 1997 Response Memorandum). Although Burlington has resorted to

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Exhibit A.

[2]Burlington continues to take confusing and irreconcilable positions on how it will deal with the possible invalidity of 640-acre spacing. Burlington seems to say that the possible reversion to 160-acre spacing would affect only the GLA-66 Group. It won't. Burlington can neither practicably nor legally operate a well where the participation factor is 160 for some working interest owners and 640 for others. "Dual accounting" does not cure this situation.

threats before,[3] it is a hollow threat in this instance, given that Burlington's rig is first being moved to a location in Rio Arriba County before the Scott No. 24 will be drilled anyway. (Exhibit A, attached.) The Commission should not base its decision on such an improper argument.

CONCLUSION

There is no need to issue a separate order clarifying the Division's pooling orders; These orders are clear and follow the form established by the Division and followed in hundreds of cases. Likewise, the Commission should reject Burlington's interpretation of the pooling orders which would interject a new provision giving the operator an option to accept or reject a non-consenting working interest owners payment of estimated well costs. Such an option would contravene the express terms of the orders; There is nothing in the language or operation of the orders that suggests such an interpretation is proper by inference or otherwise.

The prejudice and harm to Total's rights is clearly established. Conversely, given that it was Burlington's conduct that precipitated this problem and, moreover, given Burlington's failure to demonstrate that it would be prejudiced in any meaningful way, the entry of an interim order staying Orders R-10877 and R-10878 is clearly justified under the circumstances.

Counsel for Burlington has not responded to any of our communications regarding this motion or our offer to enter into a confidentiality agreement.

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[3] See Finding Paragraph 16, excerpted Order R-10878, Exhibit B, attached.

MILLER, STRATVERT & TORGERSON, P.A.

By J. Scott Hall

J. Scott Hall
P.O. Box 1986
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Attorneys for Total Minatome Corporation

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on the 7 day of November, 1997, as follows:

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J. Scott Hall

Conoco Set to Drill Deep San Juan Basin Wildcat

CONOCO INC is moving in Parker Drilling's Rig#218 to drill a deep Paleozoics wildcat in the San Juan Basin about 17 miles west-southwest of Gobernador in northwestern New Mexico.

The 1 Stove Canyon, n/2 sw 1-27n-8w, eastern San Juan County, is projected to 13,836 ft in Mississippian sediments and will be drilled in partnership with Burlington Resources Oil & Gas Co (RMRR 10-9 & 10-17-97). It's in an area of gas production from Fruitland, Pictured Cliffs, Chacra, Mesaverde, Graneros and Dakota at depths from 1500 to 8000 ft in the Basin/Blanco field area. The nearest production from Pennsylvanian zones is approximately 48 miles to the northwest, in Barker Dome field, a Paradox gas pool straddling the New Mexico/Colorado border.

About a mile and a half to the east-northeast, Conoco and Burlington have location staked for a 13,500-ft Pennsylvanian test at the 2 Stove Canyon, sw ne 6-27n-7w, Rio Arriba County. No activity has been reported at that site.

The Parker rig is being moved from the site of Burlington's deep San Juan Basin wildcat seven miles northeast of Aztec—the 2 Marcotte in ne se 8-31n-10w, northeastern San Juan County. At last report, Burlington had perforated five-inch liner in preparation for production tests of an undisclosed Paleozoics zone at that 14,032-ft prospect. The 2 Marcotte also is in an area of Cretaceous gas production in the Basin/Blanco field area. It's about 23 miles east-southeast of Barker Dome field.

EXHIBIT
A

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a) Total asserts that its interest in the proposed spacing unit is subject to a Farmout Agreement (hereinafter referred to as the GLA-46 Agreement) dated November 27, 1951, between Brookhaven Oil Company and San Juan Production Company, predecessors in interest to Total and Burlington, respectively. Total further asserts that under the provisions of the GLA-46 Agreement, its operating rights to the subject acreage are already effectively transferred to Burlington without restriction as to well depth (i.e. Total has already agreed to participate) and that a carried interest provision provides that Total's share of drilling costs are to be recovered out of one-half of Total's share of production;

b) On April 22, 1997, Burlington sent a proposal letter and AFE for the Marcotte Well No. 2 to Total seeking its voluntary participation in the drilling of the 14,000 foot Pennsylvanian test;

c) Total responded to Burlington's well proposal and AFE by informing Burlington that it elects to participate in the drilling of the Marcotte Well No. 2 under the terms of the GLA-46 Agreement; and,

d) Burlington responded to Total by stating that it regarded the GLA-46 Agreement as being inapplicable to depths below the Mesaverde formation and that it regarded Total's response as indicating that it was not participating in the drilling of the Marcotte Well No. 2.

(15) Total presented evidence and testimony to support its position that the GLA-46 Agreement should apply to the Marcotte Well No. 2 and that it has voluntarily agreed to participate in the drilling of the well pursuant to its execution of Burlington's well proposal under the terms of the GLA-46 Agreement.

(16) Total further testified that in its opinion, Burlington has not negotiated in "good faith", and that Burlington's landman threatened to create administrative obstacles and difficulties in other properties where Burlington and Total are joint interest owners, including certain offshore properties.

(17) Burlington presented no evidence or testimony with regards to the GLA-46 Agreement, but reiterated its position that this agreement does not apply to "deep gas wells" within the San Juan Basin. Burlington did testify however, that of the six GLA-46 owners, only Total has taken the position that the GLA-46 Agreement covers the "deep gas" while all of the other owners have agreed to either sign a new operating agreement or to farmout their interest for the "deep gas".

EXHIBIT B