

**BEFORE THE  
OIL CONSERVATION DIVISION  
NEW MEXICO DEPARTMENT OF ENERGY, MINERALS  
AND NATURAL RESOURCES**

**IN THE MATTER OF THE HEARING  
CALLED BY THE OIL CONSERVATION  
DIVISION FOR THE PURPOSE OF  
CONSIDERING:**

**RECEIVED**  
AUG 1 1997  
Oil Conservation Division

**CASE NO. 11808  
CASE NO. 11809**

**RE: APPLICATION OF BURLINGTON RESOURCES  
OIL AND GAS COMPANY FOR COMPULSORY  
POOLING AND A NON-STANDARD PRORATION  
AND SPACING UNIT, SECTIONS 8 AND 9, T31N-  
R10W, NMPM, SAN JUAN COUNTY, NEW MEXICO**

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**MEMORANDUM OF LEE WAYNE MOORE AND JOANN MONTGOMERY MOORE,  
TRUSTEES AND TIMOTHY B. JOHNSON, TRUSTEE FOR RALPH A. BARD, JR.  
TRUST CONCERNING THE OBLIGATION OF DISCLOSURE AND THE GROUNDS  
UPON WHICH BURLINGTON SHOULD BE REQUIRED MAKE TECHNICAL  
INFORMATION AVAILABLE**

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At the hearing held in the referenced cases on July 10-11, 1997, Mr. Carroll, Legal Counsel for the New Mexico Oil Conservation Division ("Division"), requested a legal memorandum concerning certain issues which arose in this proceeding. Lee Wayne Moore and JoAnn Montgomery Moore, Trustees ("Moore"), and Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/AD February 12, 1983 et al. ("GLA-66 Owners") submit the following.

**I. VOLUNTARY PARTIAL DISCLOSURE OF INFORMATION CREATES A  
DUTY OF FULL DISCLOSURE**

It is universally recognized that one who assumes to speak when under no duty to do so cannot suppress pertinent facts or state less than the whole truth. MSA

Tubular Products, Inc. v. First Bank & Trust Co., 869 F.2d 1422 (10th Cir. 1989)(citing Deardort v. Rosenbusch, 206 P.2d 996, 998 (1949) ); see also Everett v. Gilliland, 47 N.M. 269, 141 P.2d 326 (1943); Swanson v. Schlumberger Technology Corp., 895 S.W.2d 719, 732 (Tex.Ct.App. 1994, reh. overruled)(duty to disclose arises if the defendant makes a partial disclosure which is not the whole truth); Ragland v. Shattuck National Bank, 36 F.3d 983 (10th Cir. 1994)(“Although a party may keep absolute silence and violate no rule of equity, yet if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to disclose the whole truth.”)(quoting Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350, 1353-54 (Okla. 1988)); Peterson v. Koch Industries, 684 F.2d 667, 671 (10th Cir. 1982)(quoting 4 Summers Oil and Gas § 662 at pp. 148-149 If a lessee is asked if he has tested the land, or knows of the existence of oil and gas structure, he may remain silent, but if he undertakes to answer, he must tell the truth.)

To reveal some information on a subject triggers the duty to reveal all known material facts. Wirth v. Commercial Resources, Inc., 96 N.M. 340, 630 P.2d 292, cert. denied, 96 N.M. 543, 632 P.2d 1181 (Ct. App. 1981); see also R.A. Peck, Inc. v. Liberty Fed. Sav. Bk., 108 N.M. 84 (Ct. App.1988). Indeed, when a party undertakes to speak and conceals or suppresses the truth, such partial disclosure and concealment which induces the other party to part with his property may constitute fraud or deceit. Consolidated Oil & Gas, Inc. v. Ryan, 250 F.Supp 600, 607 (N.D. Ark. 1966).

The legal and ethical aspects of negotiations and a party's duty of disclosure and the right to maintain confidentiality in natural resource transactions was addressed head-on in the recent Rocky Mountain Mineral Law Institute article, Moye and McNeil,

Legal and Ethical Aspects of Negotiations--Duties of Disclosure and the Right to Maintain Confidentiality in Natural Resources Transactions, 42 Rocky Mtn. Min. L. Inst. 1 (1996). The authors note that while an outright lie is not welcome in negotiations, negotiators are seemingly less inclined to view selective disclosure as deceitful. Id. p. 1-24. While "telling all" seems counter-intuitive in negotiations, once disclosure begins, a misleading half-truth is often as deceiving as an outright lie. Id. Voluntary disclosure of information thus creates a duty to disclose the whole truth necessary to avoid misleading the other party, even if no duty between the parties previously existed. Id. Similarly, disclosure of some information in response to an inquiry by the other party creates a duty to be certain that the information provided is not misleading. Id. (citing Consolidated Oil & Gas, Inc. v. Ryan, 250 F.Supp 600 (N.D. Ark. 1966)).

In discussing the duties of a potential buyer's disclosure obligations to a potential seller, as would govern Burlington's disclosure obligations to the GLA-66 Owners and Moore as part of its offers to purchase their deep working interest rights, Moye and McNeil state as follows:

The more difficult question is whether a buyer who has independently investigated the value of an asset through the buyer's own resources and without violating any rights of the seller should be required to disclose fully the buyer's results or respond to the seller's inquiries about them. **The cases and authorities appear to require that the buyer, like a seller, must make full disclosure if the buyer undertakes to disclose any of its findings either voluntarily or in response to an inquiry.**

Moye and McNeil, supra 42 Rocky Mtn. Min. L. Inst. 1, 1-24 (emphasis added).

James R. J. Strickler, Senior Staff Landman for Burlington was the Burlington employee tasked with consolidating the working interests and operating rights interests in Sections 8 and 9, T31N, R10W, San Juan County New Mexico for the wells. See

Hearing Transcript attached hereto as Exhibit "A" at p. 27. In various of his correspondence and conversations with the GLA-66 Owners, Moore, and/or their representatives, Mr. Strickler volunteered some information concerning the risk Burlington associated with the wells. Particularly, Mr. Strickler informed certain of the GLA-66 Owners at various times that the wells were "very high-risk, ten-percent chance of success", that he personally would not invest in the well, and that they would be "better off putting their money in the stock market." See Hearing Transcript attached hereto as Exhibit "A" at p. 77.

Burlington's "Deep Penn" Team, along with a cohort team from its joint venture partner, Conoco, has been actively studying the prospect of a Deep Pennsylvanian play in the San Juan Basin for at least two and one-half years. See Hearing Transcript attached hereto as Exhibit "A" at p. 65. Burlington has undertaken an extensive geological and geophysical study of the Deep Pennsylvanian formation employing, among other resources, three-dimensional ("3-D") seismic studies. Indeed, as an end result of this effort, Burlington and Conoco's geologists and geophysicists chose the precise location for the wells based on their "studies". Hearing Transcript attached hereto as Exhibit "A" at p. 91. Burlington and Conoco obviously bring highly skilled personnel to this project.

The 3-D seismic data obtained by Burlington and Conoco has undoubtedly yielded valuable information concerning the drilling targets which in effect decrease the level of technical risk associated with drilling the particular geologic structures Burlington is targeting. As noted in another recent Rocky Mountain Mineral Law Institute article:

If 3D seismic data are properly gathered, properly processed, and properly interpreted, much can be learned about the subsurface. Resulting images, measurements, and calculations are substantially improved over 2D seismic. As with 2D seismic data, geologic structures can be identified. However, with 3D seismic data under appropriate conditions, subsurface structures can be imaged in much greater detail with far greater accuracy. That is, we can image a structure, measure its depth and thickness, and, as never before, calculate its volume directly from the seismic data. Under appropriate conditions, the specific type of rock can be identified and its variability across the structure can be determined and mapped. Porosity and its variations may also be determined throughout the rock. From porosity, permeability may be inferred. Moreover, the contents of the pores (e.g., oil vs. gas vs. water) can be identified. Finally, if seismic data are gathered through time (i.e. 4D seismic data), the drainage pattern of a reservoir can be traced and lenses of by-passed hydrocarbons can be identified, resulting in greater hydrocarbon recovery.

Anderson and Pigott, 3D Seismic Technology: Its Uses, Limits, & Legal Ramifications, 42 Rocky Mtn Min. L. Inst. 16, 16-61-62. (1996). As such, given the benefit of its extensive 3D seismic studies in the San Juan Basin, it is likely that Burlington is targeting a highly detailed and well defined geologic structure and has developed information concerning its depth, thickness and expected volume recovery. All of this information is relevant to the level of technical and economic risk associated with the wells.

It is highly probable that Burlington's technical data puts the lie to the 10% risk factor that Mr. Strickler's disclosed to the GLA-66 Owners and Moore. Rather, Burlington, through Mr. Strickler, could have floated this high-risk story in order to negatively influence the decision of the GLA-66 Group and Moore's decision concerning whether or not to participate in the wells and/or sell or farmout their deep gas operating rights to Burlington. Regardless of its motivation, once Burlington, through Mr. Strickler, undertook to speak concerning the risk associated with its

proposed Deep Pennsylvanian test wells, it had to reveal the whole truth about the risk associated with these wells. See e.g. . Wirth v. Commercial Resources, Inc., supra.; R.A. Peck, Inc. v. Liberty Fed. Sav. Bk., supra. In a recent newspaper article attached hereto as Exhibit "B", it was reported:

Recently, BR [Burlington Resources] spudded an exploratory well in the San Juan Basin, the Marcotte No. 2. This exploratory well is the first of several wells that will test the Deep Pennsylvanian formations which the company believes may hold **significant exploration potential**. (emphasis added).

Burlington's public disclosure that the Deep Pennsylvanian formation "may hold significant exploration potential" simply does not tie with Mr. Strickler's admonishments to the GLA-66 owners and Moore. As noted in the Moye and McNeil article, supra 42 Rocky Mtn. Min. L. Inst. 1, 1-26. a misleading half-truth is often as deceiving as an outright lie. Burlington's voluntary disclosure of information creates a duty to disclose the whole truth necessary to avoid misleading the GLA-66 owners and Moore, even if no duty between the parties previously existed. Id. Similarly, disclosure of some information in response to an inquiry by the other party creates a duty to be certain that the information provided is not misleading. Id.

## **II. IT IS A COMMON CUSTOM AND PRACTICE IN THE INDUSTRY TO SHARE CONFIDENTIAL, PROPRIETARY TECHNICAL DATA**

At the hearing of the referenced cases held on July 10-11, 1997, testimony from three experienced industry professionals unambiguously established that it is a standard custom and practice in the industry for an operator seeking participation of his joint owners to share technical information to interest and inform other parties in a prospective well. Of course, Burlington may be seeking non-participation contrary to its

statutory duty to exert good faith to obtain voluntary agreement. NMSA 1978, Section 70-2-18A.

Tom Moore, a long time industry participant with significant knowledge and experience in proposing wells and in responding to other operator's proposals, testified as follows:

Q. Okay. Now, what has been the common practice that you have followed, and what has been your experience in following that practice, in regard to being able to obtain information from the proponent of the well in order for you to make a decision whether or not to participate?

A. Well, normally, we receive structural maps, cross-sections, seismic information, this sort of thing, prior, so we'll know what we're doing. This is the industry norm, whether it be in New Mexico or whether it be in Oklahoma or Texas. And I've been on both sides of this fence, selling units and taking part in them, and wells, so I know what the norm is on both sides of it. If we put together a drilling block and try to sell it, we furnish all the information we have on it.

\* \* \*

Q. Okay. And have you received seismic before from others - -

A. Oh, sure.

Q. Who have drilled wells?

A. That's the industry norm, is -- other wells, sure, when you're going to -- when there's, you know, we see some reason for drilling the well.

Hearing Transcript attached hereto as Exhibit "A" at pp. 255-256; 259.

Likewise, Gail Cotton testified that operators are "usually cooperative with supplying information." See Id at p. 219. Debra Gilchrist, Manager of Land Administration and the New Mexico-West Texas land for Total Minatome Corporation, with over twenty-two years of land administration experience, testified that Total's geologist "requested me to try and obtain for [sic] Mr. Strickler, as is customary with any

exploratory proposed well, to get some seismic geology, anything that we could use.” . . .  
.” . . .without geology, our senior geologist, Brad Watts, could not make a determination to farm out at that time without seeing any geology, which is customary. See Id at p. 291; 303-304.

Burlington argues ad nauseum that its technical data is highly confidential and proprietary and cannot be shared with working interest owners who are potential competitors with Burlington. However, when it suited its purposes, Burlington shared its “confidential and proprietary” technical data with working interest owners, such as Amoco and Cross Timbers, who own acreage surrounding the wells, to allow them to make an intelligent decision on whether or not participate in the wells. See Hearing Transcript attached hereto as Exhibit “A” at pp. 70 and 71.<sup>1</sup> As noted above, the GLA-66 Owners and Moore were flatly denied access to Burlington’s technical information. Unlike it had done with other working interest owners, Burlington **never** suggested any arrangements and/or conditions under which this information could be made available to the GLA-66 Owners and Moore, though they offered to enter into confidentiality agreements.

Burlington’s selective access to its technical data for some parties and absolute denial to others is contrary to established custom and practice in the oil and gas industry and falls short of the statutory requirement that a party undertake reasonable efforts to obtain voluntary joiner of all working interest owners prior to seeking a compulsory pooling order from the Division.

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<sup>1</sup> Ironically Amoco and Cross Timbers are competitors while Moore and the GLA-66 owners are owners who neither drill nor operate any wells in the San Juan Basin.



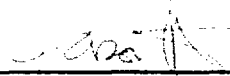
### **III. TO REQUIRE THE GLA-66 OWNERS AND MOORE TO OBTAIN THEIR OWN TECHNICAL INFORMATION IN ORDER TO PROTECT THEIR CORRELATIVE RIGHTS CREATES ECONOMIC WASTE AND CAUSES UNNECESSARY EXPENSE**

Burlington's trite response to the GLA-66 Owners and Moore's request for technical information is for them to go out and acquire their own information. This response is disingenuous for at least two reasons. First, it would have been impossible for the GLA-66 Owners and Moore to obtain the requisite agreements and government approvals and to employ contractors in order to shoot lines, and interpret seismic and other information within the time frame allowed them. Burlington submitted its proposed Joint Operating Agreement and well cost estimate for the wells in April 29, 1997. Its applications for compulsory pooling were filed on June 10th and 11th, 1997. The hearing on these applications was held on July 10-11, 1997. As noted above, Burlington and Conoco, who both have large in-house geophysical, geological, engineering, and land teams, have been studying the Deep Pennsylvanian formation for over **two and one-half years**. To suggest that the GLA-66 Owners and Moore could undertake a similar investigation within a two to three month period is just plain ridiculous.

Second, such a duplicative effort by the GLA-66 Owners and Moore would necessarily result in needless expense and economic waste to these individuals in order for them to protect their correlative rights. Pursuant to NMSA 1978 Section 70-2-11, the New Mexico legislature mandated that **it is its duty** of the Division to prevent waste and to protect correlative rights. Id. (emphasis added.) Further, the legislature, pursuant to NMSA 1978 Section 70-2-17, mandated that Division pooling orders "**shall** be upon such terms and conditions as are **just and reasonable** and will afford to the

owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas, or both." Id. (emphasis added.)

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that I have caused a true and correct copy of the foregoing to be transmitted by facsimile to counsel of record on this 1<sup>ST</sup> day of July, 1997

*AUGUST*  
  
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JASON E. DOUGHTY